

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2024

Public Authority: HM Revenue & Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information held in relation to HM Revenue & Customs' (HMRC) management of the R&D tax credit programme. HMRC refused to provide the information under section 31(1)(d) (prejudice to tax collection) of FOIA as it determined that releasing the information would prejudice the assessment and payment of tax credits.
2. The Commissioner's decision is that section 31(1)(d) is engaged and the public interest test favours maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 20 July 2023, the complainant wrote to HMRC and requested information in the following terms:

"Please could you provide a copy of any lessons learned reports, or other internal department performance summary reports, in relation to HMRC's management of the R&D [Research and Development] tax credit programme produced from 1st January 2022 to date."
5. HMRC responded on 20 September 2023 and provided a heavily redacted copy of a report entitled 'R&D: Lessons Learned from the Recent Criminal Attacks'. Where information was redacted, it was withheld under section 31(1)(d) of FOIA as it determined that releasing the information would prejudice the assessment and payment of tax credits.

6. The complainant requested an internal review on 21 September 2023. HMRC provided its internal review outcome on 13 October 2023 in which slightly more information was disclosed. It upheld its initial response in regard to the remaining information which was withheld under section 31(1)(d) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 18 October 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether section 31(1)(d) of FOIA was applied correctly to the remaining withheld information. The Commissioner will also consider any procedural issues.

Reasons for decision

Section 31(1)(d) – the assessment or collection of any tax or duty or any imposition of a similar nature.

9. Section 31 of FOIA creates an exemption from the duty to disclose if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
10. Section 31(1)(d) states:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature.”
11. The Commissioner’s guidance on section 31(1)(d)¹ states that the phrase “tax, duty or... imposition of a similar nature” is a very broad term. This exemption may protect information if its disclosure would or would be likely to prejudice the collection of tax from a particular person, or be of use to those evading tax. It may also apply if disclosing the information would or would be likely to promote tax avoidance.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/sections-31-1-a-f-criminal-and-civil-law/>

12. HMRC provided the Commissioner with a copy of the withheld information (ie the unredacted report) and detailed submissions regarding its application of the exemption claimed. The Commissioner notes that some of HMRC's arguments are identical to those put forward in a previous case relating to a request for information regarding R&D tax credits. The Commissioner wishes to emphasise that, although he is informed by previous decisions, he has made his decision in this case on its own merits. He is satisfied that HMRC's arguments relate to the withheld information in this case.
13. HMRC explained that companies can claim R&D tax relief for qualifying activities which will either reduce their tax bill or result in payable tax credit. Its position is that having a payable credit system means that HMRC must protect against any risk of abuse or fraud and disclosing the withheld information would provide those 'intent on breaking the rules with a blueprint to launch criminal attacks on our systems across multiple regimes'.
14. HMRC further explained that the report was written by one business area and highlighted issues faced at that time, from the viewpoint of colleagues. It clarified that it was never intended to be used externally or provide a holistic HMRC view of a particular matter.
15. It stated that from experience, releasing any data risked prejudicing future tax collection because its data could then be used to assess the risk of getting caught, and then estimate more effectively how successful HMRC is in locating such activity and tackling the resultant non-compliance. HMRC believed that this may undermine the deterrent effect of its compliance work and may in turn lead to more unlawful activity.
16. HMRC further set out that, by its very nature, R&D activity attracts those willing to take a risk and stretch boundaries. HMRC considered that disclosing details of its compliance strategy carries the risk of facilitating or encouraging those so inclined to take greater risks for personal gain beyond that intended by the spirit and letter of the legislation.
17. The Commissioner is somewhat sceptical of HMRC's argument that the disclosure of "any" information would have a harmful effect. He notes that HMRC did in fact disclose a redacted version of the report into the public domain, and further information after the internal review.
18. However, having examined the withheld information in detail the Commissioner accepts HMRC's position that it would be useful to those looking to abuse the scheme. He is satisfied that it would give significant insight into HMRC's policing of R&D tax relief, which would be of considerable assistance to those seeking to break the rules. The

Commissioner accepts that this would be likely to make it more difficult for HMRC to fulfil its functions in terms of assessing and collecting tax effectively.

19. The Commissioner therefore concludes that disclosure of the requested information would be likely to result in prejudice relevant to section 31(1)(d) of FOIA and therefore that this exemption is engaged.

Public interest arguments in favour of disclosure

20. HMRC acknowledged the general public interest in ensuring that public authorities are as transparent as possible about their activities, promoting accountability and public understanding of actions being taken. It also recognised that publishing the requested information in this case may reassure the public that its compliance activities are robust and applied fairly.
21. The complainant argued that the taxpayer has lost significant sums from fraudulent activity regarding the R&D tax credit system. They referred to HMRC figures indicating that the level for the 2020/21 tax year alone was £1bn in fraud and error, with a non-compliance rate in the SME (small and medium enterprise) scheme of 24.4%.²
22. The complainant set out that this was a “serious policy failure” on the part of HMRC. As such they maintained that it is important that as much information about what happened and what lessons have been learned are put into the public domain to hold the government properly accountable.
23. They further argued that the risk of not sharing this information is that other public bodies will continue to make the same mistakes in similar programmes which would not serve the public interest.
24. The complainant accepted that specifics of policy changes that could assist fraudsters should be withheld. However, they consider this is likely to be a very small amount of information in a report providing a general overview. In addition the complainant suggested that HMRC’s decision to disclose some information following an internal review showed that further information could be disclosed into the public domain.

² <https://www.gov.uk/government/publications/compliance-approach-to-research-and-development-tax-reliefs/hmracs-approach-to-research-and-development-tax-reliefs>

Public interest arguments for maintaining the exemption

25. HMRC set out that the public interest in relation to FOIA “means the public good, rather than what is of interest to the public or the private interests of the requester.”
26. It put forward various examples of the R&D tax relief scheme having been discussed and examined in the public forum. Some examples include questions answered by HMRC chief executive Jim Harra at the Treasury Select Committee, the National Audit Office audits of its accounts and subsequent recommendations, and a report on R&D tax relief published by the House of Lords Economic Affairs Finance Bill Sub-Committee in January 2023.³ This report discusses the matter extensively, from the increase in error and fraud within R&D tax relief in recent years, to details of compliance actions and operation undertaken by HMRC, to the specialist R&D compliance team more than doubling in size in response to the growing levels of error and fraud, and changes to the way in which R&D relief claims are made in order to improve HMRC’s ability to detect and counter potential abuse of the scheme.
27. HMRC considered that the level of information in the public domain on R&D tax relief compliance satisfies the requirement for transparency and accountability, along with the various reports mentioned above which adequately facilitate public debate on the matter.
28. HMRC also identified a strong public interest in being able to enforce the law effectively so that the tax burden is shared equally. It set out that “tax evasion and avoidance unfairly shift the tax burden onto honest taxpayers”. It was not in the public interest to disclose information that would be likely to undermine current and future tax compliance, since this would also undermine public confidence in the tax system.

Balance of the public interest

29. The Commissioner has considered both HMRC’s and the complainant’s arguments, and has examined the withheld information. He acknowledges the legitimate public interest and concerns surrounding tax compliance generally, and specifically relating to R&D tax relief. He is also mindful of the impact which fraudulent claims of R&D tax relief have had so far on the public purse. The Commissioner acknowledges that disclosure of the withheld information would further inform the public on HMRC’s activities.

³ <https://committees.parliament.uk/committee/230/finance-bill-subcommittee/news/185805/lords-committee-publishes-report-on-research-and-development-tax-relief-and-expenditure-credit/>

30. However, the Commissioner is satisfied that there is extensive information in the public domain which in his view is sufficient to assist public understanding and inform debate and scrutiny.
31. In accepting that the exemption is engaged the Commissioner has accepted that disclosure of the withheld information is more likely than not to cause prejudice or harm to the function of tax collection. He finds that considerable weight should be attached to the public interest in protecting this key function. In the Commissioner's opinion this substantially outweighs the public interest in disclosure of the withheld information, particularly given the information already disclosed. The requirement to protect the public from any further financial impact than it has already been subject to outweighs the public interest in disclosure of the requested information.
32. The Commissioner concludes that in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information, and HMRC was therefore entitled to rely on section 31(1)(d) of FOIA to refuse to disclose the information.

Procedural matters

33. Section 1(1)(a) of FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority, it must be disclosed to the complainant unless a valid refusal notice has been issued.
34. Section 10 of FOIA requires a public authority to comply with section 1 within 20 working days of receiving a request.
35. HMRC breached sections 1(1)(a) and 1(1)(b) in conjunction with section 10(1) of FOIA by failing to confirm that the information was held and providing information beyond the 20 working day statutory timeframe.
36. HMRC did disclose some further information following the internal review. However, this was also outside the 20 working day timeframe.

Right of appeal

37. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
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