

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 21 October 2009

**Public Authority:** HMRC  
**Address:** 100, Parliament Square  
London  
SW1A 2BQ

### Summary

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The complainant's request was handled by the Freedom of Information department and a response was sent withholding the information citing section 44 of the Freedom of Information 2000 Act ("the Act"). The public authority later clarified that it was relying specifically on section 44(2) to neither confirm nor deny if the requested information was held. The public authority argued that section 23 of the Commissioners for Revenue and Customs Act 2005 gave it an absolute exemption from the duty to confirm or deny. The Commissioner finds that the statutory bar was correctly applied and agrees with the public authority's reliance on section 44(2). The Commissioner recorded some procedural breaches of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 21 October 2008 the complainant requested a copy of the enquiry files in respect of two specific companies. Enclosed with the request was a letter from a director of the companies authorising the release of the information to the applicant.
3. On 17 November 2008 the complainant sent a letter to HMRC chasing a response. During the following five weeks numerous emails were exchanged

between the complainant and HMRC indicating the complainant's frustration at the handling of the request.

4. On 23 December 2008 HMRC issued a refusal notice citing section 44.
5. On 5 January 2009 the complainant requested an internal review.
6. On 27 February 2009 HMRC provided the outcome of the internal review. HMRC explained that it was relying on section 44(2) to refuse to confirm or deny whether the information was held. HMRC answered the points raised by the complainant in the request for review.

## **The Investigation**

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### **Scope of the case**

7. On 4 March 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant mentioned that authority had been provided by the directors of the companies to which the information related, for the information to be released.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

9. On 14 May 2009 HMRC wrote to the Commissioner in response to an initial letter of notification that a complaint had been received. HMRC gave an explanation of its application of the exemption found in section 44.
10. On 26 June 2009 the Commissioner contacted HMRC to request an explanation of statements it had made regarding section 44(2).
11. The Commissioner corresponded with HMRC between 7 July 2009 and 14 August 2009 to try to resolve this complaint informally. Unfortunately this proved unsuccessful and the Commissioner has therefore proceeded to a decision notice.

## Analysis

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### Exemptions

#### Section 44 – prohibition on disclosure

##### HMRC's position

12. HMRC has argued that in this case it is not required to comply with the duty to confirm or deny whether the requested information is held under section 1(1)(a) of the Act by virtue of section 44(2).

13. Section 44(2) states that:

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)”.

The section removes the obligation to comply with section 1(1)(a) of the Act if the information that would be disclosed as a result of confirming or denying would itself be subject to one of the exemptions in 44(1)(a) to (c). In this case the relevant section is 44(1)(a).

14. HMRC has claimed that the confirmation or denial that would have to be given in this case would result in the disclosure of information that would be subject to the statutory prohibition in section 23(1) of the Commissioners for Revenue and Customs Act 2005 ('CRCA').

15. Section 23(1) of the CRCA further provides that information relating to a person, the disclosure of which is prohibited by 18(1), is exempt information for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity to be deduced. HMRC has highlighted the fact that paragraph 110 of the explanatory notes of the CRCA states that 'person' includes both natural and legal persons such as companies. In this case, given that the request named the two companies involved the information would clearly identify them and therefore the exemption applies.

16. As Section 23(1) works by reference to section 18(1) it is necessary to consider how the prohibition in that section works. Section 18(1) of the CRCA provides that HMRC officials may not disclose information which is held by HMRC in connection with one of its functions. HMRC has explained that if it was to comply with section 1(1)(a) it would reveal whether or not it had conducted enquiries into the two named companies. This is information that would be held for the purpose of assessing and collecting tax or duty.

17. HMRC has acknowledged that section 18(2) sets aside the duty of confidentiality established by section 18(1) in some circumstances. (In essence, a number of gateways to disclosure are created by section 18(2)). However, in HMRC's view

section 18(2) does not affect the interaction of sections 18(1) and 23 of the CRCA because section 23 makes no mention of sections 18(2) and (3). Consequently, in HMRC's view, the only questions to be considered for section 44(1)(a) to be engaged are 'Is the information held by HMRC for one of its functions?' and 'Does it relate to an identifiable person?'. If the answer is yes to both of these questions the information is subject to 44(1)(a). As HMRC has relied upon section 44(2) it must also consider whether the information that would be revealed if it complied section 1(1)(a) would itself fall within 44(1)(a). In other words would knowing whether or not the two named companies had been investigated constitute a disclosure of information held for one of HMRC's functions and can those companies be identified from that information.

18. HMRC has suggested that the clear intention of Parliament was to remove information from the right of access under the Act as shown by the following statement made by the then Paymaster General, Dawn Primaralo on the introduction of section 23 of the CRCA, which followed concerns expressed during the passage of the bill through Parliament that information HMRC held about taxpayers might be disclosed under the Act:

*'Taxpayer confidentiality remains of paramount importance in the new department. As I have said, for that reason, the Bill ensures that information connected with a taxpayer is not discloseable under the Freedom of Information Act. That was always the intention, but the new clause puts that beyond doubt – that information will not be discloseable under the Act. However, much of the information that Her Majesty's Revenue and Customs will hold is not taxpayer confidential – for example, information about the department's internal processes. The new clause identifies that such information will be subject to the Freedom of Information Act. Therefore, if a person requests information that it is not taxpayer confidential, that request will be considered under the Act.'*

In HMRC's view, if Parliament had intended for section 23 of the CRCA to take account of section 18(2) and section 18(3) exceptions it would have expressly said so.

### **The Complainant's position**

19. In correspondence with the Commissioner the complainant highlighted a number of reasons why in his opinion HMRC has incorrectly refused to provide the information requested.
20. The complainant believed that the specific consent of a serving officer of the companies which was provided with the initial request was sufficient to engage the exception contained at section 18(2)(h) of the CRCA which would prevent HMRC from relying on sections 44(1)(a) and 44(2) of the Act.

### **The Commissioner's position**

21. In his consideration of both HMRC's and the complainant's submissions, the Commissioner has considered the following questions:

- Would confirming whether or not the requested information is held involve the disclosure of information which would be held 'in connection with a function of Revenue and Customs' and thus is section 18(1) of the CRCA met?
- If HMRC was to confirm or deny would the information identify the person to whom the information relates?
- Does section 18(2) of the CRCA affect the interaction of sections 18(1) and 23 of the CRCA?
- If so, do any of the gateways contained in section 18(2) of the CRCA apply in this case?

**Would confirming whether or not the requested information is held involve the disclosure of information which would be held 'in connection with a function of Revenue and Customs' and thus is section 18(1) of the CRCA engaged?**

22. In the Commissioner's opinion confirming whether or not the two named companies have been subject of an enquiry would result in the disclosure of information held by HMRC in connection with a function of the HMRC, namely assessing and collecting tax or duty. Thus that information falls within the scope of section 18(1) of the CRCA.

**If HMRC was to confirm or deny would the information identify the person to whom the information relates?**

23. The Commissioner is satisfied that it would be possible to identify the person to whom the information relates because the two companies involved are named in the request. Therefore it is not possible to comply with section 1(1)(a) without revealing information about those persons.

**Does section 18(2) of the CRCA affect the interaction of sections 18(1) and 23 of the CRCA?**

24. The Commissioner must consider the way in which the public authority handled the request at the time it was made. At the time of the request the Commissioner disagreed with HMRC's position that section 18(2) of CRCA does not affect the interaction of sections 18(1) and 23 of the CRCA. Rather the Commissioner believed that it was not possible to determine whether or not section 18(1) was engaged without reference to section 18(2). After the date of the request changes were made to the relevant legislation. Further comments regarding those changes are included in the other matters section below. However, those changes cannot be taken in account here because, as mentioned previously, the Commissioner is obliged to consider the way in which the request was handled by HMRC at the time of the request was made.
25. Therefore, the Commissioner has considered whether any of the exceptions contained within section 18(2) of the CRCA applied so that section 18(1) could

not have. If this was found to be the case the information would not have been subject to section 44(1)(a) or consequently 44(2).

**Do any of the gateways contained 18(2) of the CRCA apply in this case?**

26. In the circumstances of this case the only exception that the Commissioner considers may be relevant is that contained at section 18(2)(h). This sub-section provides that:

*'18(2) But subsection (1) does not apply to a disclosure—*

*(h) which is made with the consent of each person to whom the information relates.'*

27. At the time the request was made the complainant provided HMRC with a letter that he claimed constituted consent from a Director of the two named companies to the disclosure of the requested information. HMRC did not consider the consent to be relevant given its position that section 18(2) was not relevant to the interaction between section 18(1) and section 23. However, given the Commissioner's view about the relevance of section 18(2) he has considered whether it would have been reasonable for HMRC to have interpreted the consent supplied by the complainant as consent to it confirming under the Act whether information of the nature requested was held about the two companies.
28. When deciding whether the consent constituted valid consent the Commissioner will consider whether it would have been reasonable for HMRC to have viewed that consent as being properly informed. In other words, was the person who provided the consent aware that a disclosure under the Act is to the public at large. Information released under the Act must be suitable for disclosure to any person who may ask for it.
29. The Commissioner has viewed a copy of the consent and notes that it references the Data Protection Act and specifically authorises HMRC to release the information to the complainant who was acting on behalf of the companies. Given the contents, the Commissioner considers that it would be unreasonable to have expected HMRC to interpret the consent as being to a disclosure under the Act. Therefore section 18(2)(h) did not apply. As none of the exceptions in section 18(2) applied the Commissioner is satisfied that HMRC would have been prohibited by section 18(1) of the CRCA from disclosing the information that would have been released as a result of complying with section 1(1)(a). In view of this and the fact that the identity of the companies to whom the information related was known, section 23 of the CRCA applied. As a result HMRC was correct to refuse to confirm or deny relying upon section 44(2) because the confirmation or denial that would have to be given to comply with 1(1)(a) would have fallen within section 44(1)(a).

**Procedural Breaches**

30. The full text of the sections referred to can be found in the Legal Annex at the end of this notice.

## Section 17 (1)

31. Section 17(1) states that a public authority must give the applicant a notice which states that fact, specifies the exemption in question, and states (if that would not otherwise be apparent) why the exemption applies.

In failing to specify that it was relying upon section 44(2) until the internal review HMRC breached section 17(1).

## The Decision

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32. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

It appropriately refused to comply with section 1(1)(a) on the basis that section 44(2) applied.

33. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

HMRC breached section 17(1) because it failed to specify that it was seeking to rely upon section 44(2) until the internal review.

## Steps Required

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34. The Commissioner requires no steps to be taken.

## Other matters

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35. Although they do not form part of this Decision Notice the Commissioner also wishes to highlight that since the request was made the Borders, Citizenship and Immigration Act 2009 received Royal Assent on 21 July 2009. The Act clarified that, in relation to section 18(1) of the CRCA, where the requirements of that section are met then it is taken to be engaged regardless of whether one of the exceptions in section 18(2) or (3) applies. Therefore if a further request for the same information as was requested here was made now section 18(1) of the CRCA and section 23 would apply even if informed consent was provided to HMRC.



## Right of Appeal

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36. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 21st day of October 2009**

**Signed .....**

**Jo Pedder  
Senior Policy Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

## Legal Annex

### **S.1 General right of access**

**Section 1(1)** provides that -

*'Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.'*

### **S.10 Time for Compliance**

**Section 10(1)** provides that –

*'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

**Section 17(1)** provides that -

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies.'*

### **S.44 Prohibitions on disclosure**

**Section 44(1)** provides that –

*'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-*

*(a) is prohibited by or under any enactment,*

*(b) is incompatible with any Community obligation, or*

(c) *would constitute or be punishable as a contempt of court.'*

**Section 44(2)** provides that –

*'The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).'*

Commissioner for Revenue and Customs Act 2005

**Section 18** provides that -

**“18. Confidentiality**

- (1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
- (2) But subsection (1) does not apply to a disclosure –
  - (h) which is made with the consent of each person to whom the information relates.

**Section 23** provides that -

**“23. Freedom of Information** (1) Revenue and Customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure –

- (a) would specify the identity of the person to whom the information relates, or
  - (b) would enable the identity of such a person to be deduced.
- (2) Except as specified in subsection (1), information the disclosure which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.