

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 December 2007

Public Authority: Her Majesty's Revenue and Customs (HMRC)
Address: 100 Parliament Street
London
SW1A 2BQ

Summary

The complainant requested a copy of information provided to the public authority by named personal representatives of the estate of an individual who died on 2 May 1991. In particular, the complainant requested a copy of the HMRC Account for the estate, and copies of corrective accounts that had been filed by the personal representatives. The public authority refused to disclose the requested information.

The Commissioner's decision is that the exemption provided in section 40 of the Act applied to prohibit disclosure of the requested information.

The Commissioner has also decided that the public authority did not comply with section 17 of the Act.

The Commissioner's Role

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

2. This request for information was originally made by a limited legal partnership acting for an unnamed third party. However on 6 September 2006 a second firm of solicitors and parliamentary agents informed the Commissioner that it had taken over the handling of this complaint. In this notice all references to the complainant refer to the actions of the limited legal partnership up to September 2006 and the second firm of solicitors from September 2006. This notice has been served on the second firm of solicitors.

3. On 23 May 2005, the complainant made a request to HMRC stating: *“In accordance with [the deceased’s] will, a grant of probate was made to [Messrs X and Y] on 4 December 1991... We should be obliged if you would provide a copy of the information provided to the Inland Revenue in respect of [the deceased’s] estate. In particular, we request a copy of the Inland Revenue Account for {the deceased’s} estate, together with copies of the corrective accounts filed”* (the requested information).
4. In its response dated 26 May 2005 HMRC refused to disclose the requested information to the complainant. Citing section 44 of the Act, HMRC stated that it was prohibited from disclosing the information because of the duty of confidentiality in section 18 of the Commissioners for Revenue and Customs Act 2005 (CRCA) which makes it an offence for its officers to disclose, without lawful authority, information about identifiable customers received in the course of their duties.
5. In a letter dated 1 June 2005 the complainant challenged the basis upon which the public authority had relied on section 44 of the Act and section 18 CRCA. The complainant stated that section 23 CRCA provides that information, the disclosure of which is prohibited by section 18(1) CRCA, is exempt for the purposes of section 44 (1)(a) of the Act only if its disclosure would specify the identity of the person to whom the information is related; or would enable the identity of such person to be deduced.
6. The complainant asserted that in this case the only identifiable person to whom the information could relate is the deceased - but he was not a person for these purposes because there was legal authority that stated that the ordinary and natural meaning of the word *“person”* is a *“living person”*. In making this state the complainant made reference to *R v Newham London Borough Council ex parte Dada EA/2006/0060*.
7. The complainant requested HMRC to review its decision to withhold the requested information.
8. On 8 June 2005 HMRC upheld the original decision to withhold the requested information. In its response to the issues raised by the complainant, HMRC stated that the term person included both natural and legal persons. HMRC further cited paragraph 110 of the explanatory notes to the CRCA to reaffirm its original position that section 44 of the Act applied. The public authority asserted that in this case *“the ‘person’ is the estate of the [deceased]. And by way of further explanation HMRC relies on this section to protect customer information both in relation to living persons and a host of non-living persons eg, charities, pension schemes...”*

The Investigation

9. The complainant was dissatisfied with the result of the internal review and on 27 June 2005 made a complaint to the Commissioner. The complainant's primary argument was based on whether or not the term "person" should include deceased natural persons. The complainant further disagreed with the public authority's suggestion that the estate of a deceased person may be a person for the purposes of section 18 CRCA.
10. On 8 September 2006, the Commissioner wrote to HMRC seeking further comments on its use of the exemption in section 44. HMRC replied on 9 October 2006. Further enquiries were made in relation to the withheld information especially on the issue of whether the estate of a deceased person can be a person for the purposes of section 18 CRCA; and whether the term "person" should include deceased natural persons.
11. HMRC provided a further response to the Commissioner's enquiries on 30 November 2006. HMRC affirmed its position that the requested information was exempt under section 44 of the Act. HMRC also informed the Commissioner that:
 - (i) it also considered that section 31(1)(d) of the Act applied to the requested information because its disclosure would prejudice the assessment or collection of any tax or duty or of any imposition of similar nature and, in its view, the public interest in withholding the information outweighed the public interest in disclosure, and
 - (ii) it believed that section 36 could be applied to the requested information. However, it confirmed it had not yet approached its "qualified person" to obtain formal agreement to apply this exemption.
12. On 3 April 2007 the Commissioner wrote to the complainant and stated that, having reviewed all the submissions received and the relevant statutes, it was his provisional view, subject to further comment from the complainant, that :
 - (i) HMRC had correctly applied section 44, and
 - (ii) though not utilised by HMRC, that the information was also exempt under section 41 due to the duty of confidence owed to the deceased and his personal representatives.
13. The Commissioner referred to the Information Tribunal decision in *Bowbrick v Information Commissioner and Nottingham City Council EA/2005/0006* (Bowbrick Appeal) to support his application of an exemption not previously utilised by the public authority.
14. On 21 June 2007 the complainant responded to the Commissioner's letter. The complainant provided further arguments to support its view that the requested information should be released because section 44 did not apply to the requested information. The complainant also questioned why the

Commissioner had *“to adopt a ground for withholding information not relied upon by HMRC themselves.”*

15. On 17 October 2007 the Commissioner's Senior Complaint Officer conducted an inspection of the documents held by HMRC relating to the deceased's estate. During this inspection the information that had been submitted by the personal representatives was identified and reviewed.

Analysis

Procedural matters

16. Section 17(1) provides that where the authority is relying on an exemption relevant to the applicant's request, it must issue a refusal notice within 20 working days, specifying the exemption concerned and how it applied to the requested information. In its refusal notice of 26 May 2005 HMRC did not utilise the exemption at section 31(1) (d) of the Act, which it later applied in its comments to the Commissioner. In failing to apply this exemption in its refusal notice, the Commissioner finds that HMRC breached section 17 (1) of the Act.

Exemptions

17. The parties have each provided arguments on the application of section 44 to the requested information.
18. HMRC contends that section 44 exempts the disclosure of the information because:
 - (i) pursuant to section 18(1) of CRCA, it holds information about the deceased's estate for the purposes of its function to tax the estate under the Inheritance Tax Act 1984(IHTA). In addition, the requested information is also covered by the duty of confidentiality set out in section 18(1) CRCA as modified by section 23 CRCA
 - (ii) the definition of “persons” for tax purposes applies to both “natural” and “legal persons” and its meaning is not restricted by the death of an individual because a taxpayer's affairs do not cease on death, and any information held or supplied does not cease to be information about a person
 - (iii) the personal representatives of the deceased are the persons who assume the liability for accounting for tax on an estate and thereby become the tax payer. The personal representatives can be identified from the information, and the requested information relates to them in relation to their role as personal representatives. In addition, the redaction of their names will not prevent their identity being deduced and so the remaining information must still be covered by the exemption as it relates to the personal representatives, a

- (iv) the personal representatives have not provided their consent to the release of the requested information.
19. According to the complainant *“the issue to be determined in this complaint is whether the requested information is “Revenue and Customs information relating to a person, the disclosure of which would specify the identity of the person to whom the information relates or would enable the identity of such person to be deduced...the requested information is not Revenue and Customs information relating to a person” and hence there is no question of its disclosure specifying the identity of a person to whom the information relates or enabling the identity of such person to be deduced.”*
20. The Commissioner considered that before he proceeded to evaluate the application of section 44 to the requested information, he must initially deal with the data protection issues that are present in both arguments; namely, does the requested information contain the personal data of the personal representatives of the deceased's estate and if so, is this third party data exempt from disclosure in accordance with sections 40(3) and (4) of the Act.
21. The Commissioner is mindful that HMRC has not sought to rely on section 40 of the Act; and he acknowledges the objections of the complainant to the propriety of his application of an exemption that has not been employed by the public authority. However he considers that in the circumstances of this case he is obliged to consider the application of section 40 because of his responsibility for the protection of the rights of data subjects under the Data Protection Act 1998 (DPA 1998) and the promotion of access to official information under the Act.
22. In the Bowbrick Appeal the Information Tribunal considered that, in some exceptional cases, the Commissioner is entitled to consider exemptions that have not been used by the public authority. The Tribunal commented that if *“the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if the information is revealed, it may be a breach of the data protection rights of data subjects. Otherwise it would put the Commissioner in a very strange position where the Commissioner is responsible for both freedom of information compliance and data protection compliance. Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects. Therefore it would be a very curious situation if the Commissioner had to forget about his data protection enforcement role when he had his freedom of information hat on.”*
23. In *England v London Borough of Bexley and the Information Commissioner EA/2006/0060*, a differently constituted panel of the Information Tribunal acknowledged the importance of section 40 as an interface between the DPA 1998 and the Act by stating that *“in relation to section 40 it would be inconsistent with the Tribunal's own obligations...for it to, on a technicality, require a disclosure that would have an impact upon individuals' private lives which would otherwise be protected by the provisions of the Data Protection Act 1998*

24. Therefore in the circumstances of this case the Commissioner considers there is a positive duty to consider the application of section 40 even when the public authority has not sought to use it.
25. Consequently, the Commissioner initially considered two issues in this case. The first, whether the information is exempt from disclosure under section 40 of the Act. The second, which only arises if the first question is answered in the negative, is whether the requested information is exempt from disclosure under sections 44, 41 and 31(1) (d) of the Act. A full text of the relevant sections of the statutes referred to is contained in the legal annex.

Section 40

26. Section 40(2) of the Act provides an exemption for information which is the personal data of a third party where disclosure would contravene any of the data protection principles contained in the DPA 1998.
27. The Commissioner acknowledges that the DPA 1998 specifically defines personal data to mean data relating to a living person. The Act also has no special provision about information relating to the deceased. However, he recognises that there are cases in which the information about the deceased person forms part of the information about a living person and, as a result, the living person may be identified from the information and that information can also be said to relate to that living person. In those cases, the Commissioner considers that such information is the personal data of living individuals.
28. Therefore, in applying section 40 of the Act, the Commissioner needs to initially establish whether the requested information (which is primarily information about the deceased's estate) is the personal data of the personal representatives. If so, he will then need to consider whether disclosure of this information would constitute a breach of one or more of the data protection principles.
29. The Commissioner has noted that, under section 200 of the IHTA, the personal representatives assume personal liability for tax on the deceased's estate. This in effect means that, in the event that the personal representatives fail to pay the tax due on the estate, HMRC is statutorily empowered to take legal action to recover the tax due and impose statutory sanctions against the personal representatives.
30. As the information being processed by HMRC is to establish the tax liability of the personal representatives of the deceased, the Commissioner is satisfied that the requested information relates to the personal representatives. The Commissioner then considered whether the personal representatives are identifiable from the information.
31. It has been suggested by the complainant that the names of the personal representatives could be redacted although the complainant is already aware of their identities. The Commissioner considers that even if the names were to be redacted, members of the public could still identify the personal representatives either through the family of the deceased or through the Probate Registry.

Therefore, the Commissioner considers that the requested information does constitute the personal data of the personal representatives.

32. The Commissioner must therefore consider whether any of the data protection principles would be contravened by disclosing the requested information. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA 1998 is met.
33. To determine whether it would be fair to disclose the requested information, the Commissioner has considered: the means by which the information was obtained; the likely expectations of the data subjects; and the effect that disclosure would have upon the data subjects.
34. The Commissioner also considered the advice from HMRC that:
 - (i) it holds requested information in connection with its function to tax the estate under IHTA, pursuant to section 18(1) of CRCA,
 - (ii) the requested information is covered by the duty of confidentiality in section 18(1) CRCA, as modified by section 23 CRCA, and
 - (iii) the personal representatives have not provided their consent to the disclosure of the requested information.
35. The Commissioner considers that it is apparent from the nature of the requested information, and the relationship between the personal representatives and HMRC (established by section 200 of the IHTA) that the information has been provided under an expectation of confidence and that it is confidential in nature.
36. After a careful evaluation of the requested information the Commissioner considers that its disclosure would be unfair to the personal representatives of the estate. The Commissioner has taken into consideration that:
 - (i) the personal data is held for the purpose of determining the tax liability of the personal representatives, and
 - (ii) as a result, is data of a highly personal nature, which has been provided to HMRC in the expectation that it would not be released into the public domain.
37. Consequently, the Commissioner finds that the information is exempt information under section 40 of the Act.
38. The exemption in section 40 (3) is absolute and the public interest does not therefore fall to be considered.

Other exemptions

39. As the Commissioner is of the view that the exemptions in sections 40 applies, he has not gone on to consider the other exemptions claimed by HMRC namely 31(1) (d), 41 and 44 of the Act.
40. Although HMRC raised the potential to rely on section 36 (prejudice to effective conduct of public affairs) in later correspondence, the Commissioner does not consider that HMRC formally sought to rely on section 36 because it did not seek to obtain the reasonable opinion of its qualified person in this particular case and provided no further evidence in support of this initial comment. Consequently the Commissioner did not investigate this further.

The Decision

41. The Commissioner's decision is that the information is exempt from disclosure under section 40 of the Act.
42. The Commissioner has also decided that the public authority did not comply with section 17 of the Act in that it failed to notify the complainant of its reliance on section 31 in accordance with the Act.

Steps Required

43. The Commissioner requires no steps to taken in relation to the breach of section 17 as sufficient comment has been made in this decision notice.

Right of Appeal

44. 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

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 19th day of December 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

LEGAL ANNEX

Freedom of Information Act 2005

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.”

Section 31(1) (d) provides that –

“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 the assessment or collection of any tax or duty or of any imposition of a similar nature,

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

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.”

Commissioners for Revenue and Customs Act 2005

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—

- (a) which—
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,
 - (b) which is made in accordance with section 20 or 21,
 - (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (e) which is made in pursuance of an order of a court,
 - (f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,
 - (g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or
 - (h) which is made with the consent of each person to whom the information relates.
- (3) Subsection (1) is subject to any other enactment permitting disclosure.

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](#) (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 of 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.
- (3) In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19.

Inheritance Tax Act 1984

Transfer on death.

Section 200. - (1) The persons liable for the tax on the value transferred by a chargeable transfer made (under section 4 above) on the death of any person are -

- (a) so far as the tax is attributable to the value of property which either -
 - (i) was not immediately before the death comprised in a settlement, or
 - (ii) was so comprised and consists of land in the United Kingdom which devolves upon or vests in the deceased's personal representatives,

Reference: FS50081722



Information Commissioner's Office

the deceased's personal representatives.