

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 9 June 2011

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

### Summary

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The complainant asked Her Majesty's Revenue and Customs (the "public authority") to provide information about VAT liability of UK-based businesses which undertake betting exchange transactions for third parties. The public authority withheld the information using the exemptions in sections 31(1) (law enforcement), 42(1) (legal professional privilege) and 44(1) (statutory prohibition) of the Freedom of Information Act (the "Act").

During the investigation the public authority introduced the exemption in section 21 in respect of a small amount of the information. The Commissioner concludes that it is not engaged as the public authority did not apprise the complainant that the information concerned was available to him. In respect of the remaining information the Commissioner's decision is that the exemption in section 44 is properly engaged. He has not therefore considered the applicability of the other exemptions.

### 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.

## Background

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2. The Commissioner has previously issued a Decision Notice (reference FS50261662) about this request. This can be found on his website<sup>1</sup>.
3. The requester in this case is acting on behalf of a company which is querying the public authority's imposition of tax duties. The requester accepts that this company is not a 'betting exchange', but believes that some of its activities are similar to those of other betting exchange operators in the UK. He therefore believes that the company should receive similar tax treatment as betting exchange operators for VAT purposes. The company has lodged an Appeal with the VAT & Duties Tribunal and is seeking further information before deciding whether or not to seek a Judicial Review.
4. The public authority provided the complainant with the following information about betting exchanges:

***"extract from V1-7, Chapter 19:  
2.1 Betting Exchanges***

*Betting Exchanges are a relatively new internet - based phenomenon. They facilitate betting between private individuals and also enable bookmakers to deepen their markets and hedge risk. Users of betting exchanges are usually categorised as either 'layers' ie those customers who offer a price/odds on an event happening, or 'backers' ie customers who bet on an event happening at a given price/odds.*

*For example:*

- *A layer selects an event, say, a football match between Rotherham United and Sheffield United, and judges the odds of a Rotherham United win at 3-1. The maximum stake they are prepared to accept at those odds might be £50. If the bet is fully matched then in this example the maximum liability of the layer will be £150 and the maximum win if Rotherham United lose or draw would be £50.*
- *Exchanges will usually show the 3 best prices for a given event. Using the same event described above, it might be that*

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[http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS\\_50261662.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50261662.ashx)

*the best layer price is 4-1 for a Rotherham United win, but with a maximum stake of £10. The next best prices are 3-1, with a maximum stake of £50 and 2-1 with a £100 maximum stake. If a backer wanted to stake £30 on Rotherham United at the best possible price, s/he would place £10 at 4-1 and the remaining £20 available at the next best price of 3-1. The backer could lose his/her stake of £30 and has the chance of winning £100.*

- *The source of revenue for most exchanges is a commission charged on customer winnings. The charge usually varies between 2-5%, with lower fees for larger and more frequent customers. For VAT purposes we currently regard this commission as consideration for an exempt supply of the provisions of facilities for the placing of bets under VATA 1994, Schedule 9, Group 4, Item 1".*

5. The public authority has also published the following guidance within its Notice number 701/26<sup>2</sup>, which exempts betting and lottery agents from paying VAT:

*"If you are a pools agent, concessionaire or collector, your services exempt [sic] from VAT, and you are not therefore required to account for VAT on the commission that you receive. The services of bookmakers who act as agents for other bookmakers, or for the Tote in accepting bets and the services of bookmakers' agents, are also exempt. If these are your only sources of self-employed income you cannot register for VAT".*

6. The following newspaper article also provides some background information about the history of betting exchanges:

<http://www.guardian.co.uk/sport/2009/mar/29/betfair-horse-racing>

## The request

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7. On 26 March 2009 the complainant made the following information request:

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[http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageVAT\\_ShowContent&id=HMCE\\_CL\\_000278&propertyType=document#downloadopt](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000278&propertyType=document#downloadopt)

*"I wish to be provided with any information held by HMRC which specifically relates to the Department's policy regarding the VAT liability of income received by UK based businesses involved in betting exchange transactions undertaken for third parties. Examples of the type of organisations of this nature operating in the UK are Betfair, Betdaq and WBX.*

*The information you provide in response to this request should specifically include the following items set out in a) to c) below but should not be restricted to these items where there are other documents of relevance to our request:*

*a) Internal memoranda or draft notices within HMRC relating to the treatment of commissions collected by betting exchange organisations where the organisation provides the facility for the placement of bets between two parties but does not bear the risk of the bet and merely acts as an agent, collecting a commission of a specified percentage of the monies bet or winnings achieved or any other fixed fee based charge based on the value or number of bets placed.*

*b) Correspondence entered into by HMRC with specific organisations (suitably edited to protect the identity of the businesses involved) or any related internal correspondence within HMRC or with other Government Departments, regarding the VAT liability of income falling into the category of supplies detailed in a) above received by such organisations.*

*c) Details of the basis of any agreements or concessions entered into by HMRC and any rulings given to betting exchange or similar organisations in b) above relating to betting exchange transactions concerning their liability to VAT, including any internal decisions and the basis for such decisions determined by HMRC Policy division."*

8. The public authority provided some information, withheld some under sections 31(1) (law enforcement) and 42(1) (legal professional privilege), and would neither confirm nor deny holding the remainder by virtue of section 44(2) (statutory bar). As mentioned in 'Background' above, the Commissioner issued a Decision Notice as a result of this request.
9. In compliance with the Commissioner's decision, the public authority released some information withheld under section 31 and confirmed that it held the remaining information; however, it now withheld the remaining information under sections 31(1), 42(1) and 44(1). It wrote

to the complainant with a formal refusal citing these exemptions on 26 October 2010.

10. On 29 October 2010 the complainant asked for an internal review.
11. On 8 December 2010 the public authority sent its response. It upheld its position.

## The investigation

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### Scope of the case

12. On 31 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the withholding of the information. He drew particular attention to his willingness to be provided with 'anonymised' information, to avoid revealing the identity of any party which is the subject of the withheld information.
13. For clarification, the Commissioner is only considering the information covered by parts (b) and (c) of the request which has been withheld by virtue of sections 44 and 31.
14. During the investigation the public authority also introduced the exemption at section 21; the Commissioner has considered this below.

### Chronology

15. On 9 February 2011 the Commissioner commenced his enquiries. He invited the public authority to submit further arguments in support of its position and also asked to be provided with a full copy of the withheld information.
16. On 9 March 2011 the public authority advised that it had no further submissions to make. It also advised that the Commissioner was able to view the information *in situ* but that it would not provide a copy.
17. Following further correspondence, on 7 April 2011 the Commissioner issued an Information Notice requiring the public authority to provide him with the withheld information. This was provided on 27 April 2011.

## Findings of fact

18. The Commissioners for Revenue and Customs Act 2005 ("the CRCA") provides a statutory prohibition from disclosure under section 18. The full text of the CRCA is available online<sup>3</sup>; the most relevant extracts for the purpose of this investigation are as follows:

*"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."*

*"19 Wrongful disclosure*

- (1) A person commits an offence if he contravenes section 18(1) ... by disclosing revenue and customs information relating to a person whose identity—*  
*(a) is specified in the disclosure, or*  
*(b) can be deduced from it."*

*"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 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".*

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<sup>3</sup> [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050011_en_1)

## Analysis

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### Exemptions

#### Section 21 – information accessible to applicant by other means

19. Section 21(1) states that information is exempt from disclosure if it is reasonably accessible to the applicant by other means. The purpose behind the exemption is that if there is alternative route by which a requester can obtain information there is no need for the Act to provide the means of access. This removes the burden of responding to requests under the Act from public authorities.
20. Section 21(3) qualifies section 21(1). It explains:

*“For the purposes of section 21(1), information which is held by a public authority...is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority’s publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”*
21. The public authority has listed this exemption alongside some of the withheld information - as provided to the Commissioner for his investigation. However, it has not cited this exemption to the complainant nor has it advised the Commissioner of its reasons for including it.
22. Having considered the information it is apparent to the Commissioner that it is likely to be ‘*reasonably accessible*’ to the complainant; however, the public authority has failed to apprise the complainant of this fact.
23. In order to apply section 21, a public authority must direct the applicant to the information. As it has failed to advise the complainant of the existence of this information, and has not made any attempt to direct him to it, the Commissioner does not accept that this exemption is properly engaged.

#### Section 44 – prohibition on disclosure

24. The public authority has cited this exemption to cover all of the withheld information.



25. 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...”.*

26. In its refusal notice the public authority stated:

*“Section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law. Section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) provides that 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. The information you are seeking is held in connection with our function to assess the VAT liability of identifiable taxpayers. Section 23(1) of the CRCA further provides that information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information for the purposes of section 44(1)(a) of the FOIA if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity to be deduced. Person includes both natural and legal persons such as companies (see para 110 of the explanatory notes to the CRCA).*

*In your request, you have focussed on UK based businesses involved in betting exchange transactions undertaken for third parties and you have given named examples of such businesses. Even if the information held were redacted to remove the names of the companies, because of other information in the public domain, the identity of such companies could be deduced and so the exemption applies.*

*Section 44 is an absolute exemption and therefore does not require a consideration of the public interest”.*

27. Section 23(1) of the CRCA provides that information relating to a person, the disclosure of which is prohibited by section 18(1) of the CRCA, is exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity to be deduced.

28. As section 23(1) of the CRCA works by reference to section 18(1) of the CRCA, it is necessary to consider how the prohibition in that section



works. Section 18(1) of the CRCA provides that the public authority's officials may not disclose information which is held in connection with one of its functions. The public authority has explained, as shown above, that if it were to confirm whether or not it holds the requested information it would be breaching section 18(1) of the CRCA. The Commissioner accepts that the requested information is information that is held for the purpose of assessing and collecting tax or duty.

29. The Commissioner is of the view that it is important to focus on the wording of the parts of the request to which this exemption has been applied. The information sought can be broadly placed into the following four categories.

- Correspondence entered into by the public authority with specific organisations.
- Related internal correspondence within the public authority or with other Government Departments.
- Details of the basis of any related agreements or concessions entered into by the public authority.
- Any rulings given relating to betting exchange transactions concerning their liability to VAT, including any internal decisions and the basis for such decisions determined by the public authority's Policy division.

30. In his earlier decision, at paragraph 60, the Commissioner stated:

*"Whilst the Commissioner might agree that disclosure of any actual information that may exist could be prohibited under the CRCA (certainly where identity could be deduced), he does not agree that to either confirm or deny holding such information in this case would be in breach of the CRCA".*

31. According to paragraph 110 of the CRCA explanatory notes<sup>4</sup>:

*"... The term "person" includes both natural and legal persons, and, for example, the tax affairs of a limited company are also protected by the provisions of the subsection".*

32. To ensure compliance with the CRCA, the Commissioner therefore needs first to ascertain whether or not the withheld information can identify 'a person'; and secondly, to ascertain whether or not the information can be 'anonymised' to protect any such identity.

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2005/11/notes/division/1/13/2/20>

33. Having viewed the withheld information the Commissioner is satisfied that full disclosure would reveal 'a person' and would therefore be prohibited by the CRCA. However, the complainant has requested 'anonymised' information so the Commissioner must now consider whether or not adequate redaction could prevent identification of any party concerned. The public authority's position is that:

*"Even if the information held were redacted to remove the names of the companies, because of other information in the public domain, the identity of such companies could be deduced and so the exemption applies";.*

and

*"... redaction of the material to remove reference to identifiable persons would render it of limited value; what would be left would refer to VAT legislation which is already in the public domain".*

34. The Commissioner suggested to the public authority ways in which the information might be redacted. In its response it provided the Commissioner with further arguments, and a link to some publicly available information, which have convinced the Commissioner that redaction would not prevent identification of the party concerned. This is because the betting exchange industry is small and the litigation covered within the withheld information concerns a narrow point of law.
35. In light of this, it is the Commissioner's view that the information cannot be sufficiently redacted to prevent identification of any party involved. He therefore concludes that the exemption at section 44 is engaged and that it relates to the information in its entirety. He will not therefore consider the application of the other exemptions.

## The Decision

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36. 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 correctly withheld the requested information under section 44(1) of the Act

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

- it incorrectly cited section 21 of the Act.

### **Steps required**

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38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- it should provide the complainant with copies of, or direct him to, the information which it has withheld under section 21

### **Failure to comply**

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39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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40. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

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 sent.

**Dated the 9<sup>th</sup> day of June 2011**

**Signed .....**

**Jon Manners  
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SK9 5AF**