

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2015

Public Authority: Her Majesty's Revenue and Customs (HMRC)

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence between a named individual and HMRC. He has also asked for a copy of a particular internal review conducted by HMRC in 2012. HMRC has neither confirmed nor denied whether the requested information is held citing section 44(2) FOIA.
2. The Commissioner's decision is that HMRC is entitled to rely on the exemption at section 44(2).
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 19 November 2014, the complainant wrote to HMRC and requested information in the following terms:

"Under the Freedom of Information Act 2000, I seek the following information about HM Revenue & Customs and their investigation into the tax affairs of [named company and Assessment reference number]"

1. All correspondence, including emails, letters and telephone records, between [named individual] and HM Revenue and Customs.

2. A full copy of the internal 'review' conducted by HM Revenue and Customs in 2012 into Assessment [specific reference number].

5. HMRC responded on 22 December 2014. It neither confirmed nor denied whether the requested information was held. It cited FOIA section 44(2).
6. On 21 January 2015 the complainant requested an internal review of HMRC's decision and on 19 February 2015 HMRC responded. It upheld its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2015 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the investigation is to determine whether HMRC is entitled to rely on section 44(2) to neither confirm nor deny whether it holds the requested information.

Reasons for decision

9. Section 1(1)(a) FOIA requires a public authority to inform any person making a request whether it holds information of the description specified in the request. This is commonly referred to as 'the duty to confirm or deny'.
10. Section 44 of FOIA states that :

"(1) 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.

(2) 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)."
11. HMRC has asserted that in this case it is excluded from complying with the duty to confirm or deny whether it holds the information requested because to do otherwise is prohibited under the Commissioners for Revenue and Customs Act 2005 (CRCA).
12. Section 18(1) CRCA states:

"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".

13. Section 18(2)(a)(i) states:

"But subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs...."

14. Section 23 states amongst other things:

"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...."

15. The complainant has set out that a "raft of information" about the case in question is already in the public domain and that this therefore nullifies any grounds on which section 44 can reasonably be applied.

16. In its initial response to the complainant, HMRC has set out that in accordance with the FOIA, it neither confirmed nor denied that it held the requested information and set out its reliance on section 44(2) FOIA.

17. HMRC explained that section 44 FOIA applies when the requested information, if held, would be prohibited from disclosure under any enactment. It went on to explain that the relevant enactment in this case is the CRCA. The relevant section of the CRCA is 23(1).

18. HMRC has further explained that in order to determine whether information is captured by section 23(1) there are two relevant questions:

- "would the requested information be held in connection with a function of HMRC and
- would the information relate to a 'person' who could be identified from the information requested"

19. In this case HMRC advised that the answer to both these questions was yes and therefore the exemption at section 44 FOIA is engaged. Therefore HMRC's statutory duty of confidentiality (at section 18(1) CRCA) removes the possibility of any disclosure on a discretionary basis.

20. In its response, HMRC has explained to the complainant that paragraph 1 of Schedule 1 to the Interpretation Act 1978 provides that the term 'person' includes a body of persons corporate or unincorporated.
21. HMRC explained that where even just confirming whether the information is held would, of itself, tell you something about this 'person', then section 44(2) removes the obligation at section 1(1)(a) FOIA; the duty to confirm or deny. It also set out that this was its consistent position when dealing with requests under FOIA for customer specific information and provided a link to its website where a statement to this effect is set out.
22. In his request for an internal review, the complainant set out his concern that the reply handles both aspects of the request simultaneously and that section 44(2) has been used as a blanket, non-specific reason for refusal. Accordingly, the complainant asked that both parts of his request were made subject of an internal review by HMRC.
23. In its internal review, HMRC has set out that its initial response applied to both parts of the complainant's request because the preface to those requests explicitly stated that he was asking about the tax affairs of a named company and identified a specific assessment reference number. It went on to set out that complying with the duty to confirm or deny whether it holds information pursuant to the request would necessarily mean disclosing information about an identifiable 'person' i.e. that HMRC had, or had not, conducted an investigation into the tax affairs of a named company. HMRC stated that in these circumstances the exemption at section 44(2) to neither confirm nor deny whether the information is held, applied equally to both parts of the request.
24. HMRC further set out to the complainant that section 18(1) of the CRCA provides that HMRC officials may not disclose information which is held by HMRC in connection with a function of HMRC. The requested information, if held, would be held in connection with HMRC's function to assess and collect tax.
25. HMRC further set out that in considering requests for information made under the FOIA, it must bear in mind that the FOIA is applicant and purpose blind and therefore any response cannot take into account what information the requester may already have. HMRC has also set out that its position under FOIA is not affected by any information already in the public domain.
26. In its response to the complainant at internal review, HMRC has explained why it cannot disclose the requested information on a discretionary basis. HMRC can disclose customer information on a discretionary basis if one of the conditions in section 18(2) or 18(3) of

CRCA applies. However, these conditions do not affect the interaction between section 18(1) and 23(1) of CRCA. Therefore such a disclosure would not be made under the FOIA. An amendment to the Borders, Citizenship and Immigration Act 2009 made this position explicit.

27. It is the Commissioner's view that the request clearly relates to information which, if held, would relate to a function of HMRC, namely the assessment and collection of tax.
28. The Commissioner accepts that disclosure under the FOIA is not a function of HMRC as set out in section 5 CRCA. It is therefore not a function envisaged by section 18(2)(a)(i). The Commissioner further accepts that the exceptions at sections 18(2) and (3) should be disregarded (for the purposes of responding to a request under the FOIA) in any event by virtue of the amendment contained in section 19(4) of the Borders Citizenship and Immigration Act 2009. What this therefore means is that access to customer specific information is excluded from the FOIA. In this case the customer is the company named in the request.
29. It is the Commissioner's position that the refusal notice issued by HMRC, and its subsequent internal review response, adequately explained the position as set out in section 23(1) and 18(1) CRCA.
30. Based on all of the evidence before him, the Commissioner's position is that HMRC was entitled to rely on the exemption at section 44(2) FOIA to refuse to confirm or deny whether it held the requested information.

Right of appeal

31. 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: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
- 33.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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