

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 November 2016

**Public Authority:** HM Revenue and Customs  
**Address:** 100 Parliament Street  
London  
SWA1 2BQ

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the public authority for copies of internal communications in respect of a provision in the Finance Act 2015 targeted at arrangements which allowed some employees to give up some of their taxable salary in return for tax free expenses. In the government's view, such arrangements were not within the spirit of the relevant rules and were providing a competitive advantage for employers by reducing their tax and national insurance liability.
2. The Commissioner's decision is that:
  - The public authority was not entitled to withhold the withheld information on the basis of the exemption at section 35(1)(a) FOIA.
  - The public authority was entitled to withhold some of the withheld information on the basis of the exemption at section 31(1)(d) FOIA.
  - The public authority was also entitled to withhold the names and contact details of officials below senior civil service grade on the basis of the exemption at section 40(2) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, marked B1, save the information redacted on the basis of the exemptions at sections 31(1)(d) and 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 24 August 2015 the complainant submitted a request to the public authority for the following information:

"SECTION 289A FINANCE ACT 2015

We wish to make a request under the Freedom of Information Act in respect of the above. To be specific, we are requesting all copies you and HM Treasury can provide under the FOIA of the briefing papers, etc provided in respect of this legislation, including notes on clauses and the impact assessment provided by HMRC."

6. On September 16 the public authority provided its response to the request. It informed the complainant that it had published some information relevant to the request. It explained that the published information was therefore exempt on the basis of section 21 FOIA. The remaining information was withheld on the basis of the exemption at section 35(1)(a) FOIA.
7. The public authority considers the following information exempt on the basis of section 21:

The consultation document published on 18 June 2014 available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321201/expenses\\_exemption\\_180614.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321201/expenses_exemption_180614.pdf)

Summary of responses to the consultation published on 10 December 2014 available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384690/1022 -  
\\_Employee Benefits and Expenses exemption for paid or reimbursed expenses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384690/1022_-_Employee_Benefits_and_Expenses_exemption_for_paid_or_reimbursed_expenses.pdf)

A Tax Information and Impact Note (TIN) which sets out what the legislation seeks to achieve, why the Government is undertaking the change and a summary of expected impacts, including any economic impacts. This was also published on 10 December 2014 and is available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385370/OLD\\_complete\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385370/OLD_complete_v3.pdf)

The table of impacts in the TIN which matches the table in the withheld document marked B1.<sup>1</sup>

The legislation as enacted:

<http://www.legislation.gov.uk/ukpga/2015/11/section/11/enacted>

8. On 29 September 2015 the complainant requested an internal review of the public authority's decision. The Commissioner understands that this was restricted to the public authority's application of section 35(1)(a).
9. The public authority wrote to the complainant with details of the outcome of the review on 29 October 2015. It upheld the application of section 35(1)(a).

### **Scope of the case**

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10. The complainant contacted the Commissioner on 9 February 2016 in order to complain about the public authority's decision to rely on the exemption at section 35(1)(a) to withhold some of the information held within the scope of her request. She provided the Commissioner with submissions to support her view that the withheld information was not exempt from disclosure under FOIA and the Commissioner has referred to these submissions at the relevant parts of her analysis below.
11. During the course of the Commissioner's investigation, the public authority additionally relied on the exemptions at section 31(1)(d) and 40(2) in respect of some of the withheld information. The investigation therefore extended to the public authority's application of these exemptions.
12. The public authority also clarified that there were no briefing papers or notes or impact assessments relating specifically to section 289A of the Finance Act 2015. However, it had interpreted the request more widely to include submissions to Ministers on the specific clause.
13. It is pertinent to mention that the withheld information in this case also constitutes part of the withheld information in case FS50617499 which is pursuant to a request from the complainant in this case. However, the request in that case is broader and captures much more information than her request in this case does. Inevitably therefore the

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<sup>1</sup> This is the same document marked A6 in FS50617499 and is the only document within the scope of the request relevant to this case.

Commissioner's conclusions on the application of exemptions are exactly the same as those reached in case FS50617499.

## **Reasons for decision**

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### **Background**

14. The public authority explained that the requested information relates to the government's income tax and national insurance contributions policy in respect of paid and reimbursed expenses. The public authority published the consultation "Employee Benefits and Expenses – exemption for paid or reimbursed expenses" on 18 June 2014. The paper as a whole consulted on the introduction of an exemption to enable employers to pay a tax free amount to an employee when they incur an allowable expense, without having to make a return to the public authority. Chapter 4 of the consultation document set out the intention to prevent an employee giving up some of their taxable salary in return for these tax free expenses (salary sacrifice). In the government's view, these arrangements were not within the spirit of the rules and the government was also concerned that such arrangements were providing a competitive advantage for employers by reducing their National Insurance Contributions (NICs) liability.
15. The responses to the consultation were analysed and the government decided to proceed with legislation for the exemption, including a targeted anti-abuse rule to prevent salary sacrifice arrangements. This was explained in the summary of responses published on 10 December 2014. The anti-abuse clause was included in the draft Finance Bill published for consultation on 10 December 2014.
16. As part of the consultation on the draft Finance Bill clauses, views were invited as to whether the legislation worked as intended. A number of stakeholders responded to say that the provision preventing the new exemption being used with salary sacrifice needed to be made clearer. They also highlighted that there were some areas where the legislation could be strengthened to prevent such arrangements.
17. As a result of these responses, the anti-avoidance clause was strengthened. This meant that it was clear that it applied to the arrangements that umbrella companies were using to allow their employees to give up taxable salary in return for tax free expenses. The employees are still able to claim the tax from HMRC but the umbrella companies will no longer be able to benefit from the NICs reduction.
18. An umbrella company employs agency contractors who work under a fixed term contract assignment usually through a recruitment

employment agency. It provides all tax and NICs on behalf of the contractor by billing the recruitment agency directly for work completed by the contractor. The agency in turn directly bills the company for whom the contractor works (the client). In a nutshell umbrella companies employ contractors and enable them to work on a series of assignments whilst having their pay, tax, NICs, including benefits and expenses processed centrally through the umbrella companies. For example, tax free expenses such as travel and accommodation are processed by the umbrella companies who consequently benefit from any employer reductions in NICs.

19. According to the public authority the legislation was not published again for consultation because the government is not obliged to consult on legislation again after it is amended during the Finance Bill consultation process where those amendments are designed to give proper effect to the intention of the legislation. It also explained that due to the General Election, the Finance Bill was given Royal assent on 26 March 2015 through the wash-up process.<sup>2</sup>
20. According to the public authority the Freelancers and Contractors Services Association (FCSA) submitted a complaint to it on 1 August 2015 alleging that it did not follow the Government's tax consultation framework because the anti-avoidance clause that was legislated was not the same as the clause in the draft Finance Bill published on 10 December 2014. The complainant has also submitted to the Commissioner that the public authority mishandled the consultation and consequently that the enabling legislation contained in the Finance Act 2015 is unfair.
21. Following an investigation, the public authority concluded that it had not mishandled the consultation and the tax policy-making framework had been followed in full.

### **Withheld information**

22. The withheld information is contained in a submission to Ministers.

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<sup>2</sup> The wash-up period is the last few days Parliament continues to sit before a General Election. During the wash-up period, the government can attempt to pass unfinished business which has sufficient all-party support.

## **Section 35(1)(a)**

23. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”

24. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. Furthermore, the term ‘relates to’ (ie to the formulation or development of government policy) can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.
25. The public authority explained that the withheld information relates to the formulation and development of government fiscal policy, specifically with regards to income tax and national insurance contributions in respect of paid and reimbursed expenses.
26. Having inspected the withheld information the Commissioner is satisfied it relates to the development of government policy on the basis of the explanation provided by the public authority. She therefore finds that the exemption was correctly engaged.

## **Public interest test**

27. The exemption at section 35(1)(a) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has also considered whether in all the circumstances of this case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosing the withheld information.

## *Complainant's submissions*

28. The complainant's submissions are summarised below.
29. Prior to the introduction of the new legislation, the approximately 400,000 individuals employed by umbrella firms received their tax relief for travel and subsistence expenses at source. The new legislation now prevents this and requires the contractors to reclaim many months later via self-assessment tax returns. In many instances this means that contractors and their families are denied over £3,000 income for several months so there is a public interest in understanding the reasons behind the legislation.

30. The future longevity of umbrella companies that support the contractors is now in question because not receiving properly incurred tax relief at source will mean that contractors are less likely to choose an umbrella company service. There are more than 250 such umbrella companies in existence and the annual PAYE and NICs from their collective employment is £2.1 - £2.8bn. Should umbrellas become obsolete, £2.8bn Treasury annual income would be at risk.
31. There is a clear public interest in ensuring that government adhere to its tax consultation framework. This especially so with tax legislation because given the need to tackle evasion and avoidance, such legislation can be draconian. This however increases the public interest in ensuring that poorly targeted and unfair/disproportionate measures are avoided.

*Public authority's submissions*

32. The public authority's submissions are summarised below.
33. It recognised that there is a general public interest in being able to assess the quality of advice given to Ministers. It acknowledged that openness in government will generally allow more informed debate and thereby increase trust in the quality of decision-making. It further acknowledged that disclosure of the withheld information could increase public awareness and understanding of the analysis and decision-making processes of the tax measures Ministers adopt.
34. The public authority however argued that the public interest in transparency and accountability have been addressed to a significant degree by the consultation process itself. It also submitted that the Budget and Autumn Statements already provide a considerable degree of transparency in relation to the reasons for introducing the legislation.
35. In favour of non-disclosure, the public authority argued that disclosure "would, or would be likely to, curtail the space in which officials operate in as part of the thinking space to develop, test, and converse on policy options in order to advance ideas and prepare them for a decision."
36. It argued that the complainant's submission that there was a public interest in disclosure on basis of her allegation that the government had mishandled the consultation process should not carry any weight because the consultation framework was followed and had not been mishandled. It explained that chapter 4 of the 18 June 2014 consultation document set out the intention to prevent an employee giving up some of their taxable salary in return for tax free expenses. In the government's view, these arrangements were not within the spirit of the rules and the government was also concerned that such arrangements were providing a competitive advantage for employers

reducing their NICs liability. The government's intention in drafting chapter 4 was to capture a range of different types of organisations which use these arrangements including umbrella companies. The government did not consider it necessary to list each different type of arrangement in the consultation document because it believed it was evident that it was trying to capture all arrangements including those used by umbrella companies as well as other types of arrangements used by other employers. It provided the Commissioner with evidence in confidence to support the submission that it was always the government's intention for the legislation to cover different types of salary sacrifice arrangements including those used by umbrella companies.

37. However, it became clear during the consultation process that the legislation had not been drafted to capture the specific arrangements used by umbrella companies though that had been the government's intention. The legislation was therefore strengthened to make clear that the principle of not allowing tax relief when salary is swapped for expenses applies to all employers equally. It reiterated that the government is not obliged to consult on legislation again after it is amended during the Finance Bill consultation process where those amendments are designed to give proper effect to the intention of the legislation. It noted that the FCSA had responded to the consultation and had not raised concerns about the applicability or otherwise of the legislation to umbrella companies.
38. The public authority drew the Commissioner's attention to the fact at the time of the request the legislation had not come into force<sup>3</sup> though Royal Assent was given on 26 March 2015. Although not explicitly stated by the public authority, presumably, this fact was mentioned in order to argue that the timing of the request should not carry significant weight in relation to the public interest in disclosure given that the legislation was not yet in force at the time of the request.
39. It explained that the policy is barely 5 months (ie from the date it came into force) and that it is only once it has been able to analyse the data from 2016/17 Self-Assessment returns (not due until January 2017) that it would be able to measure whether the policy has been successful or needs for further development. For example, if it emerged that new avoidance schemes had been devised. It therefore argued that the policy development process in this respect remains "live".

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<sup>3</sup> The public authority has informed the Commissioner that the legislation came into force on 6 April 2016.



40. A small part of the public authority's submissions has not been included in this notice because it reveals some of the withheld information. The submission is available in a confidential annex.
41. The public authority therefore concluded in view of the above that the public interest in maintaining the exemption is stronger than the public interest in disclosing the withheld information.

*Balance of the public interest*

42. As the public authority has rightly noted, there is always a general public interest in disclosing information in the interests of transparency and accountability. Specifically, the Commissioner considers that the reasons for introducing the legislation are transparently clear from the consultation documents. The government was keen to plug a loophole which allowed an employee to sacrifice part of their salary for tax free expenses. It was also concerned that salary sacrifice arrangements were providing a competitive advantage for some employers by reducing their NICs liability.
43. Nevertheless, given the likely impact on contractors and umbrella companies, there is also a public interest in disclosing information which reveals details of the options and factors considered by Ministers and officials leading up to the consultation on the policy and its subsequent enactment.
44. The Commissioner considers that there is a public interest in disclosing the withheld information on the grounds that the consultation had not been explicitly clear that the legislation would extend to the salary sacrifice arrangements used by umbrella companies given the impact it would have on a large number of people. However, in the circumstances, she has not attached significant weight to this public interest. The wording of the legislation was clearly amended to bring it in line with the government's intention to capture a range of different types of organisations who use salary sacrifice arrangements to reduce their NICs liability. Therefore, she does not consider that there was a lack of transparency regarding the government's intentions such that there is a public interest in disclosing the withheld information for that reason.
45. More often than not, the enactment of a policy signals the end of the policy formulation or development process in the Commissioner's view. She considers that in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. She does not accept that there is inevitably a continuous process or seamless web of policy review and development.

46. Therefore, the Commissioner does not accept the suggestion that the policy development process was ongoing at the time the complainant submitted her request in August 2015. Royal Assent had been granted and there is nothing to suggest that the legislation was going to be subject to significant discussions with a view to amendments before it came into force. In the Commissioner's view, at that stage, the development process for the policy in relation to the exemption for paid or reimbursed expenses had ended. The fact that compliance with the policy itself remains under review does not automatically mean that the policy development process is still ongoing.
47. Consequently, the Commissioner does not consider that there was a public interest in maintaining a safe space for discussions in relation to the development of the policy at the time of the request. The request was submitted more than a year after the withheld information was produced, and five months after the enactment of the enabling legislation. The Commissioner has generally acknowledged that officials should be afforded the private thinking space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Therefore, she considers that the need for safe space will be strongest when the relevant issue is still live. However, once the government has made a decision, the argument for a safe space for deliberation will no longer be required and consequently carry little weight.
48. Having carefully weighed the public interest arguments in the circumstances of this case, the Commissioner has concluded that on balance the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.

**Section 31(1)(d)**

49. The public authority considers a small amount of the withheld information additionally exempt on the basis of the exemption contained at section 31(1)(d).
50. Section 31(1)(d) states:
51. "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 tax or duty or of any imposition of a similar nature."
52. The public authority considers that the disclosure of the information withheld on the basis of this exemption would be likely to prejudice the assessment or collection of tax. It explained that the information exposes actions which, if taken by the promoters of tax avoidance

schemes, could frustrate and jeopardise its ability to successfully prove that their schemes are caught by the new anti-avoidance provisions, thereby putting the proper assessment of their tax at risk. It drew the Commissioner's attention to the fact that the Information Tribunal has dismissed the view that the exemption is designed only to help prevent actual wrongdoing or breaches of the law, and that, since exploiting a perfectly legal tax loophole would not involve illegality, the exemption could not apply. According to the Tribunal the exemption could be engaged if disclosure of requested information would, or may well, result in less tax being lawfully due than would otherwise have been the case.<sup>4</sup>

53. The Commissioner accepts that disclosing the relevant withheld information highlighted in document B1 would be useful to those utilising or intending to utilise salary sacrifice arrangements to reduce their tax and NICs liability. She has therefore concluded that the exemption was correctly engaged because disclosing the relevant withheld information could result in less tax being lawfully due than would otherwise be the case. She shares the Tribunal's view that the exemption could be engaged regardless of any actual breach of the law. For example, in this case where the public authority would like to prevent the exploitation of any loopholes in legislation targeted at tax avoidance.
54. The age of the information and the timing of the request are therefore not particularly significant in the circumstances. The Commissioner considers that the relevant withheld information could still be useful to promoters of tax avoidance schemes irrespective of the fact that the Finance Act 2015 had been enacted at the time of the request. Those seeking to circumvent the legislation by exploiting any potential loopholes could still find the information useful.

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<sup>4</sup> Paul Doherty v Information Commissioner and Her Majesty's Revenue and Customs (EA/2011/0202) at paragraph 6  
[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i660/2012-01-25\\_Decision\\_EA20110202.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i660/2012-01-25_Decision_EA20110202.pdf)

### **Public interest test**

55. The exemption at section 31(1)(d) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has also considered whether in all the circumstances of this case, the public interest in maintaining the exemption at section 31(1)(d) outweighs the public interest in disclosing the withheld information.
56. The public authority noted that there will always be a public interest in being transparent about the way government policy is developed. It however argued that there is a significant public interest in not disclosing information which could clearly help those intent on avoiding tax.

### *Balance of the public interest*

57. The Commissioner considers that in all the circumstances of the case the significant public interest in not revealing information which highlights tax avoidance risks to Ministers clearly outweighs the public interest in disclosing the information. She is in no way dismissive of the public interest in disclosing this information in the interests of transparency and accountability. However, in the circumstances, the Commissioner is not hesitant to conclude that there is a significant public interest in withholding the information.
58. She has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the relevant withheld information.

### **Section 40(2)**

59. The public authority has additionally withheld the names and contact details of officials below senior civil service grade on the basis of the exemption contained at section 40(2).
60. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (ie the personal data of an individual other than the applicant) and the conditions in section 40(3) FOIA have been met.
61. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:
62. ".....data which relate to a living individual who can be identified from those data or from those data and other information which is likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the

intentions of the data controller or any person in respect of the individual.”

63. The Commissioner is satisfied that the names and contact details of the relevant officials constitute their personal data within the meaning in section 1 of the DPA because it is information from which they could be identified.
64. As mentioned, in order to engage section 40(2), the conditions set out in section 40(3) must be met. The first condition in section 40(3) is that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
65. The first data protection principle states:
- “Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-
- At least one of the conditions in schedule 2 [DPA] is met...”
66. In considering whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- Does the information relate to the individual’s public life (ie their work as a public official or employee) or their private life (ie their home, family, social life)?
  - What reasonable expectations does the individual have about what will happen to their personal data and the consequences of disclosing personal data, ie what damage or distress would the data subjects suffer?
  - Furthermore, notwithstanding the data subjects’ reasonable expectations or any damage caused to them, it may still be fair to disclose their personal data if it can be argued that there is an overriding legitimate interest to the public in doing so.
67. In the Commissioner’s view, it is reasonable to expect that a public authority will disclose more information relating to senior employees than more junior ones unless a junior employee is directly accountable for a decision. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions.
68. The relevant withheld information is obviously held in the context of the individuals’ professional duties. However, in view of the fact that these are junior officials who were not directly accountable for the policy

decision in question, the Commissioner considers that they would reasonably expect their names and contact details not to be revealed in the context of the complainant's information request.

69. The Commissioner does not consider that there is an overriding legitimate interest to the public in revealing their identities given that they cannot be held directly accountable for the policy decision. Disclosure is not necessary in the circumstances and would constitute an unwarranted infringement of their privacy.
70. The Commissioner has therefore concluded that revealing the names and contact details of officials below senior civil service grade would be unfair and consequently contravene the first data protection principle. The public authority is therefore entitled to withhold this information on the basis of the exemption at section 40(2).

## Right of appeal

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71. 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 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.
73. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**