

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2017

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 from HMRC in relation to a particular liquidator. It is HMRC's position that the information is not held.
2. The Commissioner's decision is that on the balance of probabilities the requested information is held. The Commissioner now requires HMRC to issue a fresh response to the request which complies with its obligation under section 1(1)(b) FOIA but which does not rely on section 40(2) FOIA.
3. 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

4. On 8 September 2016, the complainant wrote to HMRC and requested information in the following terms:

"Under the Freedom of Information Act, could you let me know how many cases have HMRC passed to that particular Liquidator in the past six years, or is that confidential (I am not asking for names just numbers)"

5. The request was made within the body of a detailed letter from the complainant to HMRC in respect of a particular case. The letter refers only to 'the liquidator'.

6. HMRC responded on 4 October 2016; it refused the request relying on section 40(2) FOIA – personal information.
7. The complainant requested an internal review on 27 October 2016. HMRC sent the outcome of its internal review on 21 December 2016. It upheld its original position.
8. Following the Commissioner's intervention, HMRC wrote to the complainant on 21 June 2017 advising that it had erroneously relied on section 40(2) in order to refuse the request and that it was now relying on section 44(1) FOIA - prohibitions on disclosure.
9. During the course of the Commissioner's investigation, it became apparent that there was a misunderstanding between the complainant and HMRC in respect of the interpretation of the request as it related to 'the liquidator'. HMRC advised that it had understood the request to be about an individual rather than a company whilst the complainant was in fact referring to a company. The Commissioner will address the issue of interpretation in the 'other matters' section of this decision notice.
10. Although HMRC interpreted the request as asking for information about an individual, it should be noted that the request was made against the backdrop of a specific case and that the Insolvency Practitioner was employed by the company the complainant was asking about.
11. On 5 September 2017, HMRC wrote to the complainant setting out that it now understood that it had not interpreted his request as he had intended. In light of the correct interpretation of the request, HMRC set out to the complainant that it did not hold the requested information because it does not hold historic information on which company any particular insolvency practitioner (IP) was employed by at the time of their appointment.

Scope of the case

12. The complainant had originally contacted the Commissioner on 5 January 2017 to complain about the way his request for information had been handled. At that stage he was specifically concerned that section 40(2) had been applied when he had only requested a figure. Following HMRC's correspondence advising that it did not hold the number of cases passed to the specific liquidator company, the complainant set out that he does not accept that HMRC does not hold the information and that HMRC would have a list of liquidators who they use in certain types of cases. The complainant went on to ask if it might be in order to ask

the company if it objects to providing the information requested to HMRC.

13. The Commissioner notes here that the FOIA applies to public authorities (PA) only and that there is no obligation on a PA to seek to obtain information from a third party unless that third party holds information on behalf of the PA; that is not the case here. In this case therefore the Commissioner does not consider it appropriate for HMRC to ask the particular company to provide the requested information.
14. The Commissioner also notes that HMRC changed its position twice during the course of her investigation; once from reliance on section 40(2) to section 44(1) and then from reliance on section 44(1) to section 1(1)(a) FOIA.
15. Ultimately with HMRC having set out that it does not hold the requested information, the scope of the investigation was restricted to whether, on the balance of probabilities, HMRC holds information about the number of cases passed to a specific liquidator company in the past six years.

Reasons for decision

16. Section 1 of the FOIA states that:

“(1) 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 the information of the description specified in the request, and

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

17. In cases where there is some dispute about whether a public authority does or does not hold the requested information, the Commissioner, in accordance with a number of first tier tribunal decisions, applies the civil standard of the balance of probabilities.
18. HMRC has explained that it holds a central register which records all cases where HMRC takes a positive decision to appoint an IP in an insolvency case. It has set out that such appointments relate to an individual rather than to a company. The register was checked for information falling within the scope of the request.

19. The register is held in a spreadsheet and is maintained by a central team. HMRC has explained that it changed its governance arrangements for IP appointments in 2015 by creating a central team to cover this particular area. HMRC has further explained that prior to 2015, IP appointments were neither monitored nor recorded centrally.
20. In its submission, HMRC has set out that given its initial interpretation of the request, the spreadsheet was searched for a named individual and this search returned results within the scope of the request at that time, albeit only from 2015 onwards.
21. When the same spreadsheet was searched for the company name, it did not return any results, notwithstanding the fact that the company the individual currently works for is recorded on that spreadsheet. HMRC has asserted that the central register records information in relation to an individual IP. Accordingly, when an individual IP changes company, all information on the previous company is automatically overwritten. In other words, although the name of the company employing the IP appears on the spreadsheet, all entries will show the employer as the current employer despite the fact that the IP may have previously worked for a different company.
22. HMRC has explained that in October 2015 the company in question changed its name but that the HMRC spreadsheet, as updated, records the company under its new name and that is what is recorded on the spreadsheet since its inception in January 2015. This is therefore before the name of the company was changed but in line with the date that the spreadsheet was introduced.
23. The Commissioner understands that this is because when the name of the new company was added to the spreadsheet all previous information relating to the company employing the IP was also overwritten to reflect the name change. In these circumstances it is clearly not possible to interrogate the spreadsheet with regard to historical information in relation to an IP's employer. HMRC has also explained that the spreadsheet is not so large as to require solely electronic searches and accordingly it was also manually reviewed; no information within the scope of the request was located.
24. In response to the Commissioner's question as to whether the requested information would be held manually or electronically elsewhere, HMRC has set out that there may be instances of case files being held which would record the fact that the company in question had been appointed in insolvency cases by HMRC. It has set out that this information would be held in manual records. HMRC has gone on to set out the process by which these records would need to be located.

25. HMRC has further set out that although there are business purposes for holding information about the appointment of IPs, there is no business purpose to hold information in relation to the company the IP works for. HMRC has confirmed that there is no statutory requirement to retain the requested information.
26. The Commissioner accepts HMRC's position in relation to the spreadsheet it holds insofar as it records information in relation to an IP's current employer. Given that a change of employer, or change of employer's name as in this case, will mean that any previous employer information is overwritten, the Commissioner accepts that the requested information is not held on the spreadsheet. She also accepts that as the spreadsheet only details information from January 2015, it does not meet the request requirements in terms of the time frame set out in the request.
27. However, it is clear from the submission to the Commissioner that information falling within the scope of the request may be held in hard copy manual records. Although the process of locating the information has been set out in the response, the Commissioner considers that in the particular circumstances of this case, where HMRC has had ample opportunity to consider the request and respond appropriately, it is only for her to now determine whether, on the balance of probabilities, the requested information is, or is not held by HMRC.
28. Based on the submission to the Commissioner it is her position that she cannot find on the balance of probabilities, that HMRC does not hold information of the description specified in the request as it is clear from the submission that HMRC may hold manual records within the scope of the request.

Other matters

29. There are several issues of concern to the Commissioner in the handling of this case and as a responsible regulator she has a duty to set these out in order to ensure that public authorities, in this case, HMRC, can learn lessons.
30. The difference in the interpretation of the request is of some concern. It is clear that HMRC has interpreted it to mean the individual IP rather than the company the IP works for and in different circumstances this would perhaps be understandable given how HMRC records information in relation to insolvency arrangements. However, it is for a public authority to ensure that where there is any question of ambiguity then it seeks clarification from the requester. It is clear from the request that the complainant has set out that he is *"not asking for names just*

numbers". It is the Commissioner's position that were he asking about an individual IP, the complainant would not have included this sentence or would not have used the plural, "names". The Commissioner considers that the wording of the request for cases passed to "*that particular liquidator*" followed by the complainant's assertion that he is not asking for names should have alerted HMRC to the fact that he was asking for information about a company; were he asking about an individual IP it is difficult to see what he could have meant by the caveat "*I am not asking for names just numbers*" whereas in asking about a company it makes sense to include the caveat about names to be clear about his position.

30. Whilst the Commissioner acknowledges that HMRC may not have considered there to be any ambiguity in relation to this request, she would recommend that in future HMRC does not only consider a request in terms of what information it holds or how it is held as more often than not the complainant will not have the luxury of that knowledge before making a request. In this case, the Commissioner considers that the complainant's interpretation of the request is at best the more obvious interpretation and at worst, ambiguous.
31. Whilst it is not unusual for a public authority to change its position during an investigation, it is of concern that HMRC had stated that it relied on section 40(2) in error and consequently it is perhaps more concerning that this erroneous position was upheld at internal review. The purpose of an internal review is to allow someone more senior to consider whether the handling of a request has been correct. HMRC has not offered any explanation as to why it erroneously relied on section 40(2).
32. Also of concern in this case is HMRC's engagement with the Commissioner's office. In order to try to resolve this case, the Commissioner has had to ask HMRC for several submissions and these have not been received within the time frame set out by the Commissioner; this has necessarily involved the Commissioner issuing reminders to HMRC and has contributed to delays in the case. Deadlines set by the Commissioner are not unreasonable and are made in the knowledge that having adopted a particular stance in relation to a case, that stance should have been thoroughly considered and therefore providing a submission or further information need not be a particularly onerous task.
33. The Commissioner asks that in future case handling, HMRC complies with the Commissioner's time scales for response.
34. The Commissioner notes that following HMRC's reliance on section 44(1), it wrote to the complainant setting out its new position and

advised the complainant that he should seek an internal review of HMRC's decision if he was dissatisfied.

35. The Commissioner is concerned that HMRC should have considered this an appropriate course of action given the particular circumstances of the case and given that the handling of the request was subject to an investigation by the Commissioner. In the event that HMRC is unsure as to a particular course of action, the Commissioner advises that it should check with staff on the ICO helpline or with the investigating officer.
36. The Commissioner considers that this case has been particularly poorly handled by HMRC but it is not for her to speculate as to the reasons for the poor handling of this particular request which appears to be relatively straightforward.

Right of appeal

37. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.

39. 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

Terna Waya
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