

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2019

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested information in relation to the number of contractors discovered to have been using disguised remuneration schemes whilst engaged by the public authority. The public authority considers that it does not hold the requested information.
2. The Commissioner finds that, on the balance of probabilities, the public authority does not hold the requested information.
3. No steps are required.

Request and response

4. On 28 November 2018 the complainant submitted a request for information to the public authority in the following terms:

"On the 19th November 2018, Ruth Stanier, Director General of HMRC replied to Lord Forsyth on some questions about disguised remuneration.

Ruth Stanier stated that it would be possible for an engager to utilise contractors using disguised remuneration/loan schemes without the knowledge of the engager.

This request relates to that response.

1. Did HMRC as engager of contractors ever find a contractor that they had engaged using such a scheme, whilst working for HMRC?
2. How many contractors have been discovered to be using such schemes whilst delivering services to HMRC?
3. How many contractors have been discovered by HMRC to be using such schemes whilst working for HMRC, but after they had stopped providing services to HMRC?
4. In which years were the contractors engaged by HMRC whilst also utilising these schemes?
5. How many contractors that HMRC found to be using schemes whilst delivering services to HMRC are now being investigated?
6. How many contractors that HMRC found to be using schemes whilst delivering services to HMRC are now subject to the 2019 Loan Charge for work carried out on behalf of HMRC?

None of these questions relates to an individual, nor could answering them identify an individual."

5. The public authority issued the following response on 18 December 2018:

"HMRC is an engager of professional services and contingent labour. As a contracting authority, the majority of HMRC's contracts are via an agency and use the Crown Commercial Service's framework contracts, or service contracts with contracted suppliers. HMRC carries out diligently the checks required by both specific central government guidance and the law.

Under our main contingent labour contracts, details of the individual contractor arrangements are maintained by the labour supplier rather than by HMRC. As the contractor details are maintained by the labour supplier it is possible that contractors could engage in tax avoidance without the participation, or knowledge, of their engager. Contractors identified in the course of our compliance work as using a tax avoidance scheme would be investigated.

Therefore, HMRC does not hold the necessary information required to comprehensively respond to your request. Based on our review of the records which HMRC does hold, and in line with HMRC's procurement policies, the answer to your questions is nil."

6. The complainant requested an internal review of that decision on 28 January 2019 in the following terms:

"Having done some further research in the social media there are a number of individuals who contradict the statement in your earlier response letter, that HMRC did NOT engage contractors that are subject to the loan charge.

In light of this I would expect that HMRC review their response carefully."

7. On 12 February 2019 the public authority wrote to the complainant with details of the outcome of the review. Upholding the original response, the following response was issued:

"I have determined that to comply with your request comprehensively would initially require a complete record of all historic departmental engagements.

I can confirm that such a historic record is not held by HMRC. I have reviewed the records which are held and can advise that from these, the answer to your questions is nil.

In response to your email, it may help if I explain that as an engager of professional services and contingent labour, HMRC's contracts are via an agency and use the Crown Commercial Service's framework contracts, or service contracts with contracted suppliers.

As the contractor details are maintained by the labour supplier it is possible that contractors could engage in tax avoidance without the participation, or knowledge, of their engager. Any contractors identified in the course of our compliance work as using a tax avoidance scheme would be investigated.

For the reasons provided above I uphold the previous decision that the information required to respond to your request is not held by HMRC.”

Scope of the case

8. The complainant contacted the Commissioner on 13 February 2019 to complain about the public authority's handling of his request. He specifically disagrees with the view that the public authority does not hold any information within the scope of his request.

Reasons for decision

Section 1 FOIA - Information held/not held

9. The Commissioner has considered whether the public authority was entitled to conclude that it does not hold any additional information within the scope of the complainant's request.
10. In scenarios where there is some dispute between an applicant and a public authority with respect to whether any information is held by the authority, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
11. The Commissioner will reach a decision based on the adequacy of the public authority's search for the information or in some cases, based on any reasons explaining why the information is not held.

Public authority's submissions

12. The public authority's submissions are summarised below.
13. By way of background, Disguised Remuneration (DR) schemes include arrangements whereby 'loans' are provided in place of ordinary remuneration, usually via an offshore trust, with no expectation that they will ever be repaid. The individual is typically paid enough salary to use-up their tax-free personal allowance and protect future entitlement to the State Pension and other benefits. However, the majority of their pay is provided by a loan which is never intended to be repaid. This is therefore no different to normal income and should be taxed. The government believes this arrangement is unfair on the vast majority of people who pay their tax and it deprives the Exchequer of the money

needed to pay for vital public services. Every pound of tax avoided through these schemes is a pound more than other taxpayers are required to pay, or a pound lost to the UK's hospitals, schools, police, armed forces and other vital public services.

14. In 2016 the government announced that it would introduce a charge on the balance of any DR loans still outstanding at 5 April 2019 in order to ensure that appropriate time was provided to clear up these arrangements. The charge was legislated in the Finance (No.2) Act 2017 and is part of a package that was estimated to yield £3.2 billion over five years. While the government recognises the impact the charge on outstanding DR loan balances will have on some individuals, the government believes that it is right to end this form of tax avoidance for good.
15. In November 2018, responding to a letter from the House of Lords Economic Affairs Committee on this issue, Ruth Stanier, Director General of HMRC's Customer Strategy and Tax Design provided that:

'HMRC has never participated in disguised remuneration tax avoidance schemes, for example by remunerating contractors through loans or payments to trusts. It is possible for contractors to use disguised remuneration without the participation or knowledge of their engager. Any HMRC contractor identified in the course of our compliance work as using a disguised remuneration scheme would be investigated in the same way as any other contractor.'
16. The public authority explained that the statement above was made on the basis that the public authority engages contractors through approved suppliers, which are subject to tax compliance checks. As the public authority has no involvement in the payment arrangements between its suppliers and individual contractors the authority have not and could not have participated in such avoidance schemes. However, the public authority acknowledges that as they are not privy to these details, it is possible that a contractor may utilise an avoidance scheme without the knowledge of their engager.
17. With respect to the complainant's request, the public authority noted that the first question - Did HMRC as engager of contractors ever find a contractor that they had engaged using such a scheme, whilst working for HMRC? - is specific to the public authority as an engager of professional services and contingent labour rather than as a tax authority. Therefore, as an engager of professional services and contingent labour, the public authority does not hold the payment arrangements for individual contractors and has no legal basis to conduct tax assurance checks for the use of tax avoidance schemes by

individual contractors. The information within the scope of the first question is not held, such information would never have been recorded.

18. The public authority further explained that the majority of its contracts are for contingent labour via an agency and use the Crown Commercial Service's framework contracts. These contractors form a flexible workforce sourced through an employment agency who are directly managed by the public authority but paid through an agency. There is always at least one agency between the public authority and the individual contractor although in practice this contract can be further sub-contracted meaning there are multiple agencies between the authority and the contractor themselves. The remainder of contractors are brought in via fully contracted out professional service provision. In these circumstances, the arrangement is between the public authority and the supplier. The contractors then have their own arrangements with and are directly managed by the supplier.
19. All contracts with agencies supplying contractors to the public authority include standard tax compliance clauses. This is for both fully contracted out provision and contingent labour. There is also clear guidance around tax compliance and what checks will be completed on anybody supplying labour to HMRC on GOV.UK. All contractors working in the public sector are engaged in line with the requirements of legislation in place at the time as well as cross-government guidance. The most notable of these requirements are the off-payroll working rules, commonly known as IR35. These rules ensure that those who work through a personal service company (PSC) who would have been employees if they were directly engaged, pay broadly the same employment taxes as if they were employed.
20. A public authority as an engager is not authorised to instruct or initiate any tax status investigations following the engagement of a contractor. The public authority covers as much due diligence as possible to ensure that it gains assurance from agencies/suppliers that they are complying with all necessary tax laws and legislation and that these obligations flow down into the individual agreements with their personnel and subcontractors for which they provide assurance. In addition, any engagement of a contractor by the public authority will result in mandatory tax compliance checks with the Agency supplying the contractor itself and its directors rather than individual contractors.
21. The public authority as an engager does not hold the payment arrangements for individual contractors and has no legal basis to conduct tax assurance checks, for the use of tax avoidance schemes by individual contractors.

22. The public authority set out its position with respect to the rest of the request (ie questions 2 – 6).
23. As a tax authority, the public authority holds a data set of circa 50,000 known users of DR schemes.
24. However, there is no legal basis under which the public authority would notify a person's engager in the instance that a contractor is subject to a personal tax enquiry. Therefore, the investigation side of HMRC would not and could not notify HMRC the engager that a particular contractor was being investigated for tax avoidance. The investigation is a matter between the individual contractor and HMRC's tax compliance/investigation team.
25. On this basis, the public authority as an engager would not be made aware if a contractor was a known user of a DR scheme. Therefore, information within the scope of the complainant's second question - How many contractors have been discovered to be using such schemes whilst delivering services to HMRC? - is not held.
26. Alternatively, the public authority as a tax authority could seek to obtain the record of HMRC contractors from HMRC the engager in order to cross-reference the data and determine if there are any positive matches. However, a comprehensive record of HMRC contractors is not held. In accordance with departmental retention policy and in preparation to ensure compliance with the 2017 reforms to the off-payroll working rules, the public authority only holds a complete central record of departmental engagements from 2016 to present. This record was created in response to an Internal Audit report which stipulated that the department should have a central record of all contractors on site for monitoring purposes and to assist with the proposed changes to the Intermediaries Legislation. The record created was not retrospective and did not include any contractors previously engaged. The public authority has interpreted the complainant's request to cover the period from the formation of the department in 2005 until present.
27. Information within this database is specific to compliance with the off-payroll working rules, recording the name of the contractor, the relevant agency, where appropriate the name of their personal service company and finally their IR35 determination. Identifying information such as a date of birth or national insurance number are not recorded as there is no business need to do so. The information recorded within this database is not sufficient to be able to easily identify an individual and cannot be directly cross-referenced with other datasets without substantial, additional analysis, taking place.

28. To comply with the complainant's third question - How many contractors have been discovered by HMRC to be using such schemes whilst working for HMRC, but after they had stopped providing services to HMRC? - would require the public authority as a tax authority to determine if any of the 50,000 known DR scheme users had ever been engaged by the public authority as a contractor.
29. This level of detail is not held within the data set of known DR users as there is no requirement for an individual to notify the tax authority of their individual engagements. Where a salary has been received this will have been received from their 'employer' (the intermediary or loan scheme provider) and will be reflected as such in HMRC records.
30. Therefore, information within the scope of the complainant's third question is not held. As questions four, five and six are qualified by the preceding questions, information in response to these questions is also not held.
31. In conclusion, whilst records of contractors dating back to 2005 are not held by the public authority, the public authority considers it has demonstrated that even if this information was held, it would still not be sufficient to comply with the terms of the request.

Complainant's submissions

32. The complainant's submissions are reproduced below.

"The response from HMRC is inadequate and is clearly an attempt to withhold information.

I asked the question "How many" and the response from HMRC is that there are none. A more honest answer would have been "We do not know and therefore cannot provide that information". Instead they have purposefully attempted to mislead.

HMRC are pursuing people going back to 1999 for how they were engaged with their clients. This is not just about the period 2016 to 2019.

HMRC are likely correct that they themselves did not operate such a scheme (although we do not know), but they do know that some of the people that they engaged through their designated agency, did. People responding to enquiries in respect of the Loan Charge and related Accelerated Payment Notices to HMRC will have declared that the agency used was the Crown Commercial Service and that the end client was HMRC. This information will have been captured in HMRC databases, but again HMRC claim no such information is available and therefore the answer must be nil.

The response....provided indicates that HMRC do not perform any checks on their contract staff prior to engagement. Such basic details such as DOB and NI would provide the basis for such checks. [The statement that] HMRC do not retain such basic details... indicates that HMRC does not vet its contingent workforce. This seems unlikely in the extreme and would be a serious cause for concern if it was true.

Since raising this request it has now been determined and a known fact that some contractors engaged at HMRC are now being caught with the Loan Charge legislation for their time whilst engaged at HMRC.”

The Commissioner's considerations

33. The Commissioner has first considered whether the public authority holds any information within the scope of questions 1 and 2 of the request.
34. The Commissioner is persuaded by the public authority's explanation that in its capacity as an engager of professional services and contingent labour the information requested in question 1 is not held and would never have been recorded.
35. The Commissioner is equally persuaded by the public authority's explanation that the public authority as an engager would not have been made aware if a contractor was a known user of a DR scheme. The public authority is clear that any investigation by the public authority as a tax authority pursuant to DR schemes is a matter between the individual contractor and the public authority's tax compliance/investigation team.
36. In light of the above, the Commissioner has concluded that on the balance of probabilities the public authority does not hold any information within the scope of questions 1 and 2 of the complainant's request.

Question 3

37. In question 3, the complainant asked; “How many contractors have been discovered by HMRC to be using such schemes whilst working for HMRC, but after they had stopped providing services to HMRC?”
38. The Commissioner accepts that the request is for historic records of such findings rather than a retrospective analysis of contractor records against the information currently held on known DR schemes.
39. In the Commissioner's view, given the way that the request is worded, this necessarily requires a consideration of whether information in scope

is held by the public authority as a tax authority and not as an engager of professional services and contingent labour.

40. In the absence of a date range, the Commissioner shares the view that the request covers relevant historic records from the public authority's formation in 2005 until 28 November 2018 when the complainant made his request.
41. The public authority is clear that in accordance with departmental retention policy and in preparation to ensure compliance with the 2017 reforms to the off-payroll working rules, the authority only holds a complete central record of departmental engagements from 2016 to present.¹ Notably, information within this database is specific to compliance with the off-payroll working rules, recording the name of the contractor, the relevant agency, where appropriate the name of their personal service company and finally their IR35 determination. Identifying information such as a date of birth or national insurance number are not recorded as there is no business need to do so. Furthermore, the mandatory tax compliance checks are conducted on the Agency supplying the contractor itself and its directors rather than individual contractors.
42. The Commissioner considers that the public authority does not hold a comprehensive set of records relevant to question 3 of the request. The relevant database which could be interrogated only goes as far back as 2016. On that basis alone, the Commissioner finds that on the balance of probabilities, the public authority does not hold a comprehensive set of records within the specific scope of question 3. The Commissioner additionally finds that the public authority does not hold any information within the scope of questions 4, 5 and 6 as they are qualified by question 3.
43. Nevertheless, the Commissioner asked the public authority whether it holds records from 2016 to November 2018 of instances where contractors were discovered by the authority to have been using a DR scheme while engaged by HMRC. The public authority reiterated that it does not hold any central record of information within the specific scope of question 3.

¹ The public authority however subsequently suggested that what it actually holds is a partial, not a complete, record of departmental engagements from 2016 to present. See paragraph 47 below.

44. The Commissioner therefore asked the public authority to describe the steps it would have to take in order to identify contractors who utilised DR schemes whilst engaged by the public authority from 2016 to November 2018. The public authority explained that at the time of the request it held information in a number of different places which could have been extracted and cross-referenced against the data set of circa 50,000 known users of DR schemes. It however reiterated that it only holds a complete record of contractor departmental engagements from 2016 to present created in response to an Internal Audit report.²
45. It explained that in order to create this record, a small working group of six staff was established. The group initially set out to ascertain the information which was held by nearly 150 hiring managers and 50 Finance Business Partners. As mentioned, this piece of work focussed on those contractors engaged by the department at that time, it was not retrospective and did not include any contractors previously engaged.
46. Contractor figures change on a monthly basis as contractors join and leave, obtaining this information is not as simple as requesting end of year records. Collating the data took the working group about 6 months of multiple workshops, emails and telephone calls. Data was obtained from a number of different sources, including supplier management information and accounts payable.
47. The team identified nearly 1,200 contractors working on hundreds of programmes of activity across 13 separate directorates. Once completed, this record could still not be described as a comprehensive list of all contractors engaged by the department at that time. This is on the basis that information could only be collated on those contractors engaged through a contingent labour contract and did not include those contracted via a professional service contract.
48. To attempt to collate a similar record of engagements prior to 2016 would require the public authority to repeat this exercise with a similar working group. It estimates that to complete this work, even for a single year would by far surpass the appropriate limit. As the record of previous engagements to be cross referenced with compliance data cannot be collated within the appropriate limit, analysis necessary to comply with this interpretation of the request cannot be completed.
49. The public authority however revealed that in order to inform the letter from the authority to the House of Lords Economic Affairs Committee

² Note however the comment at paragraph 47 below.

which instigated this request, "analysis of the post-2016 contractor records was completed."

50. This work identified five contractors who had a history of using disguised remuneration DR schemes and had previously been engaged by the public authority. In all cases, the periods of scheme usage did not run concurrently with the period for which they were engaged by the authority, therefore this information did not meet the criteria of the complainant's request.
51. The Commissioner is satisfied that the public authority does not hold the information requested within the specific scope of question 3. Even if she is wrong on this point, the Commissioner considers that it would far exceed the appropriate limit of 24 hours to identify the number of contractors engaged by the public authority from its formation in 2005 to November 2018 who utilised DR schemes whilst engaged by the authority. For the reasons given by the public authority, it would be almost impossible for the authority to collate a complete record of contractor departmental engagements since 2005 up to the date of the request and certainly not within the appropriate limit just in order to commence the next substantial piece of work cross-referencing the record with compliance data to determine whether any of the contractors had utilised DR schemes whilst engaged by the authority.
52. By virtue of section 12 FOIA, a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit³. The "appropriate limit" is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004⁴ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that the public authority may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
53. Further to its obligation to provide advice and assistance under section 16 FOIA⁵, the public authority advised the complainant that should he decide to narrow his request to just those contractors who have been

³ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

⁴ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

⁵ <http://www.legislation.gov.uk/ukpga/2000/36/section/16>

engaged by the public authority since 2016, a preliminary analysis of this data may be able to be completed within the FOIA cost limit. However, such analysis would require a caveat that the information recorded within this dataset is not sufficient to be able to easily identify an individual and cannot be directly cross-referenced with other datasets without substantial additional analysis taking place.

Right of appeal

54. 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@justice.gov.uk

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

55. 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.
56. 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.....

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