

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2022

Public Authority: HM Revenue and Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision

1. The complainant requested from HM Revenue and Customs (HMRC) all email correspondence between its Chief Executive and "HMRC Sols office" that "includes the string "DR" [disguised remuneration] or the phrase "loan charge"" over a period of eight months in 2018 and 2019.
2. The Commissioner's decision is that HMRC was correct to withhold information pursuant to sections 31(1)(d), 40(2) and 42 of FOIA.
3. No other FOIA exemptions were used by HMRC to withhold information.
4. The Commissioner does not require HMRC to take any steps as a result of this decision notice.

Request and response

5. On 23 July 2021 the complainant made the below information request to HMRC under FOIA:

"In an email (dated 31st January 2019 Subject DR and released as part of a separate FOI request), Jim Harra [Chief Executive of HMRC] stated the following:

"HMRC persistently claims that DR schemes never worked. but despite allegedly challenging DR schemes going back 20 years, we have not obtained tribunal/court decisions that back up this claim. In particular, we have not obtained decisions that individuals are taxable of DR loans as income. (In recent months I have repeatedly tried to obtain legal analysis to understand the strength of our claim with very little success."

I would ask that HMRC publish all EMail correspondence originating from Jim Harra, which includes the string "DR" or the phrase "loan charge" sent to any member of HMRC Sols office in the CC list, for the period June 2018 to 31st January 2019. Their responses to such E-mails should also be included, together with any attachments pertaining to the requests or responses" (emphasis added).

6. In the complaint that was submitted to the Commissioner, the complainant has said "I requested information from HMRC regarding specific advice that Jim Harra, Chief Executive of HMRC, had publicly confirmed that he was seeking from his own Solicitors office". However it can be seen from the part of the request the Commissioner has highlighted in bold above that when making the request, the complainant specified the particular email correspondence HMRC was to disclose in response to the request.
7. HMRC asked what the complainant had meant by "sent to any member of HMRC Sols office in the CC list", and the complainant replied the next day:

"I am interested only in Email correspondence initiated from Jim Harra (and any responses therein) and that included any recipient working for HMRCs Solicitors Office and Legal Services (known as Sols within HMRC) and whose name appears in the CC (i.e. recipient or "To:" list) or BCC (i.e. blind recipient or "To:" list) in the emails concerned."
8. On 21 September 2021 HMRC responded to the request, disclosing a copy of four email exchanges and saying that some information was being withheld pursuant to the exemptions at sections 44(1)(a) ('prohibitions on disclosure'), 40(2) ('personal information'), 42 ('legal professional privilege') and 31(1)(d) ('law enforcement') of FOIA.
9. On 23 September 2021, the complainant requested an internal review, focusing their concerns on two exemptions – sections 44(1)(a) and 42.
10. On 6 October 2021 HMRC responded – HMRC apologised for the reference to section 44(1)(a) and said no information within scope of the request was being withheld under section 44(1)(a), but it upheld its

reliance on section 42. HMRC also explained that the legal advice correspondence being withheld under section 42 "relates to an error in legislation regarding a charge to tax on the estate of a deceased person rather than wider disguised remuneration policy."

11. In its internal review response, HMRC made no mention of the other exemptions it had initially cited. However, that is likely to be because on 23 September 2021 the complainant had only disputed sections 44(1)(a) and 42 and in the internal review HMRC was focusing on addressing what had been disputed. (HMRC's submissions to the Commissioner have confirmed that in addition to maintaining its reliance on section 42 HMRC is also still withholding information under section 40(2) (names and contact details of some individuals) and 31(1)(d) (parts of emails sent by/to the Chief Executive on 23 October 2018)).

Brief context about the loan charge

12. HMRC's [website](#) says:

"Disguised remuneration tax avoidance schemes claim to avoid the need to pay Income Tax and National Insurance contributions. They normally involve a loan or other payment from a third-party which is unlikely to ever be repaid. These schemes are used by employers and individuals ... A charge on disguised remuneration loans, known as the loan charge, was introduced to tackle the use of disguised remuneration schemes and came into effect on 5 April 2019."

13. A '[policy paper](#)' on HMRC's website says:

"The loan charge works by adding together all outstanding loans and taxing them as income in one year ... The loan charge policy is expected to protect £3.2 billion, which can be used to support our public services ... We want to make sure everybody pays their fair share of tax and contributes towards the vital public services we all use ... People who use these schemes have their salary paid in loans, instead of being paid in the usual way. Normally, when you're given a loan, you have to pay it back, often with interest added. But these loans are paid to people in such a way that means it's unlikely that they'll ever have to be repaid. In other words, the person receiving money from a loan scheme gets to keep it all. And, they don't pay any tax on this money, even though it's clearly income. It's highly unusual to receive your salary in loans and is clearly a method used to avoid paying tax."

Scope of the case

14. The complainant contacted the Commissioner on 7 October 2021 to complain about the way their request for information had been handled.
15. The complainant disagrees with HMRC's refusal to provide information that was requested. In the original complaint, the complainant said that HMRC initially 'mishandled' the request by citing section 44(1)(a); expressed a concern that information is being withheld under the legal professional privilege exemption; and said "HMRC has been inconsistent in its application of the public interest test".
16. The Commissioner first attempted to resolve the complaint informally, and to that end some correspondence was exchanged with the complainant in which the Commissioner set out his preliminary thoughts. However the complainant wanted to pursue the complaint and elaborated on/expanded it.
17. On 10 August 2022 the complainant said "The main crux of my complaint is HMRCs ability to rely on Section 42 and Section 31".
18. On 30 August 2022 the complainant said:

"I am contesting their use of all Sections they threw at my request:

Section 18(1)

Section 19

Section 23

Section 40(2)

Section 44

Section 30

And Section 31".
19. The above list from the complainant does not contain any reference to section 42 (the legal professional privilege exemption), but the Commissioner considers that the complainant is likely to have left it off the list by mistake.
20. The complainant also said to the Commissioner (26 August 2022) that it is not clear which exemptions HMRC is using to withhold information.

21. The Commissioner therefore considers that the scope of the case is to look at all of the FOIA exemptions HMRC cited/relied on, as well as the other legislative provisions (see the complainant's list quoted at paragraph 18 above) that the complainant says HMRC "threw at" the request, and decide whether HMRC has correctly withheld information; and he will consider whether it was clear which exemptions HMRC was relying on. As part of this, first the Commissioner will comment on the interpretation/scope of the request, because that is an important issue in this case.

Reasons for decision

22. The Commissioner has not seen a copy of the withheld information itself and considers that seeing it is unnecessary and is unlikely to make any difference to the present decision. The type of information being withheld, and where, is clear enough from HMRC's labelled disclosure of 21 September 2021.

Interpretation/scope of the request

23. Section 1(1) of FOIA states:

"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 information **of the description specified** in the request, and

(b) if that is the case, to have that information communicated to him" (emphasis added).

24. The Commissioner's [guidance](#) states that public authorities "should respond based on the wording of the request itself".
25. However it also says they "need to take the background and context into account" in some circumstances, such as where a request is clearly linked with other correspondence between the public authority and the requester.
26. It goes on to explain:
- "Sometimes the meaning of a request may appear clear. But the background or context might suggest that you would better meet the requester's needs by providing different or additional information. Where this is the case, your duty is to simply provide what the requester has asked for ... If the request is not sufficiently clear to

enable you to locate or identify the requested information, then your duty to provide advice and assistance [under section 16 of FOIA] will be triggered”.

Complainant's position

27. As noted above (paragraph 6), the complainant believes the request was for certain legal advice.

HMRC's position

28. The text that has been highlighted in bold at paragraph 5 above shows that the request specified email correspondence that was to be disclosed. In its submissions to the Commissioner, HMRC argued that:

“The request specified that it was seeking copies of emails containing either of two key terms, sent by a specified person within a specified period of time. HMRC responded to the request within these parameters”.

29. While HMRC also acknowledged that the Commissioner's guidance says the background to/context of a request may change its meaning, and HMRC noted the quote included by the complainant in the request, HMRC maintained that the request was highly specific and has provided some background details in support of its position that HMRC interpreted the request appropriately.
30. For example HMRC explained that a week before making the request that is the subject of the present complaint, the complainant had made a similar request for copies of any emails that refer to 'loan charge' or 'disguised remuneration' between named individuals covering a period of three months.

The Commissioner's position

31. Given how specific the complainant was in terms of the particular emails requested, and having regard to the points made by HMRC in its submissions to the Commissioner, the Commissioner considers that HMRC was correct to interpret/scope the request in the way that it did.

Section 44(1)(a) and other legislation

32. Regarding the inclusion of sections 18(1), 19 and 23 in the complainant's list quoted above at paragraph 18, those are not FOIA provisions under which HMRC is withholding any information. In its initial response, HMRC did cite sections 18(1), 19 and 23 of the Commissioners of Revenue and Customs Act 2005 (CRCA), so it is possible that the complainant has misread/misunderstood HMRC's

response in that regard. While HMRC did cite sections 18(1), 19 and 23 of CRCA in connection with section 44(1)(a) of FOIA, as noted above (paragraph 10) HMRC accepts that it was wrong to cite section 44(1)(a) in the first instance. In any event, close examination of the four email exchanges disclosed by HMRC reveals no reference to section 44(1)(a) which indicates that no information was actually withheld under section 44(1)(a).

Section 30

33. HMRC did not withhold any information under section 30 of FOIA either – it did withhold information under section 31(1)(d) and quoted section 31(1) which refers to section 30 (“Information which is not exempt information by virtue of section 30 is exempt information if ...”), but did not rely on section 30.

Section 31(1)(d)

34. Section 31(1)(d) provides that information is exempt from disclosure if its disclosure “would, or would be likely to, prejudice ... the assessment or collection of any tax or duty or of any imposition of a similar nature”.
35. A public authority relying on this exemption should be able to explain why disclosure of the information would prejudice, or be likely to prejudice, the function in question; and demonstrate a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.
36. ‘Would’ means ‘more probable than not’; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
37. ‘Would be likely’ means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
38. Section 31 is also a qualified exemption – if the exemption is engaged because the test of prejudice is met, the next stage is to consider whether the public interest in maintaining the exemption, and hence in withholding the information, outweighs the public interest in disclosure.

Complainant’s position

39. The complainant disputed HMRC’s application of section 31(1)(d) in an email of 30 August 2022 to the Commissioner, but gave no particular reasons (saying only that “HMRC has failed to sufficiently demonstrate

that it is entitled to apply any of the reasons cited for refusing to publish the data requested”).

HMRC's position

40. The Commissioner notes that in its initial response to the request, HMRC did not state whether disclosure either 'would' or 'would be likely to' prejudice the function in question. Instead it focused on public interest factors in favour of, and against, disclosure – weighing general accountability and transparency considerations against a strong public interest in HMRC being able to enforce the law. HMRC said “Providing this information **may** put at risk our compliance activities which **could** undermine public confidence in the tax system. This **could** damage the general climate of honesty” (emphasis added), and concluded disclosure was not in the public interest.
41. HMRC has provided further, confidential details on section 31(1)(d) in its submissions to the Commissioner.

The Commissioner's position

42. The Commissioner's [guidance](#) – based on the Tribunal's approach – sets out the steps to be taken in respect of the prejudice test, but HMRC did not demonstrate that it carried out all of those steps. Most obviously, HMRC did not show it had decided on the “likelihood of the occurrence of prejudice”, in that it did not clearly choose whether disclosure “would” or “would be likely to” cause prejudice.
43. The guidance on the level of likelihood states that “If an authority is withholding information under a prejudice-based exemption, it should always make a choice between would or would be likely to and state this in its refusal notice”. However in its response to the complainant, HMRC did not mention the prejudice test but focused on the public interest, and used words like 'may' and 'could' (not 'would'/'would be likely to').
44. HMRC has said to the Commissioner that HMRC was not able to explain in detail its reliance on section 31(1)(d) when responding to the complainant because doing so would have revealed the information that HMRC was trying to withhold.
45. The Commissioner accepts that HMRC makes a valid point in that regard but he still considers that HMRC should have stated the likelihood of the occurrence of prejudice (that is, chosen between 'would' and 'would be likely to') in line with the guidance the Commissioner has quoted above.
46. HMRC's submissions to the Commissioner indicate that “would be likely to” is the level of likelihood that HMRC considers to be applicable.

47. Based on the confidential details HMRC provided to the Commissioner about the information withheld under section 31(1)(d) and HMRC's arguments for withholding it, the Commissioner is satisfied that HMRC was correct to apply section 31(1)(d). He considers that disclosure of the information would be likely to prejudice the function in question (the assessment/collection of tax), and that the public interest favours maintaining the exemption. The Commissioner is not able to set out his reasoning in any greater detail here with reference to HMRC's arguments and the relevant considerations, because doing so would reveal information HMRC provided to the Commissioner in confidence.

Section 40(2)

48. Section 40(2) of FOIA, with section 40(3A), provides that information is exempt information if it is the personal data of any other individual(s) and disclosure would contravene any of the data protection principles.
49. Personal data is information that relates to an identified or identifiable individual ('data subject').
50. In this instance, the withheld information comprises names and contact details, which are personal data because they both relate to and identify individuals.
51. Article 5(1)(a) of the UK General Data Protection Regulation (UK GDPR) states that personal data shall be "processed lawfully ... in relation to the data subject".
52. To determine whether disclosure of personal data in response to an information request under FOIA is lawful, a public authority should consider whether there is a lawful basis for processing in Article 6(1) of the UK GDPR.
53. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under FOIA is Article 6(1)(f), 'legitimate interests'. In considering the application of Article 6(1)(f), it is necessary to consider the following three-part test:
- i) Legitimate interest test: whether a legitimate interest is being pursued in the request for information;
 - ii) Necessity test: whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) Balancing test: whether the legitimate interest overrides the interests, fundamental rights and freedoms of the data subject(s).

Complainant's position

54. The complainant said to HMRC (23 September 2021) that HMRC could "redact any personal details for any people involved" and that the complainant has "no interest in determining who any of the recipients or senders might be".
55. Therefore it is clear that the complainant is not seeking personal data.

HMRC's position

56. In its initial response, HMRC explained the operation of section 40(2) with Article 5 of the UK GDPR, and indicated that it felt disclosure of the personal data within scope of the request (clearly names and contact details, looking at the emails HMRC disclosed as an annex to the response) would be contrary to the individuals' expectation of privacy.
57. In its submissions to the Commissioner, HMRC explained why it felt that disclosure of the withheld information – the personal data of junior officials and certain personal data of senior officials – would be unfair, against the reasonable expectations of those individuals and would have no public interest value anyway.

The Commissioner's position

58. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
59. In this case, the complainant has clearly stated they have no interest in the disclosure of any personal data; and the Commissioner can see no legitimate interest of HMRC or any third party in disclosing the names and contact details of the people involved/mentioned in the correspondence. As a result, there is no need to consider the second and third parts of the above test.
60. There is no lawful basis for disclosure of the personal data that HMRC has withheld. It would contravene Article 5(1)(a) of the UK GDPR, the principle that personal data shall be "processed lawfully ... in relation to the data subject", so HMRC was correct to rely on section 40(2) of FOIA.

Section 42

61. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege and this claim to legal professional privilege could be maintained in legal proceedings.
62. The legal professional privilege exemption is subject to a public interest test.

63. The concept of legal professional privilege protects the confidentiality of communications between a lawyer and client.
64. The Commissioner is satisfied that the information is confidential legal advice. In the correspondence that was disclosed by HMRC in response to the request, the information withheld under the legal professional privilege exemption is marked by a reference to section 42(1) in an email dated 7 September 2018 that was sent to Jim Harra by an Interim General Counsel and Solicitor, and appears below a sentence that reads "The current legislation contains an error that results in a charge to tax on the estate of a deceased person when that is not the intention behind the legislation". Such correspondence will engage section 42 as it was sent by a legal adviser to a client and provides legal advice. HMRC has emphasised to the complainant that the legal advice "relates to an error in legislation regarding a charge to tax on the estate of a deceased person".
65. The Commissioner is aware of no evidence suggesting that this privilege has been waived – indeed HMRC told the complainant that the advice has not been made public therefore privilege has not been waived.
66. Section 42(1) being engaged, next the Commissioner must consider the public interest test. This involves balancing the arguments in favour of disclosure with the arguments in favour of maintaining the exemption.

Public interest test – complainant's position

67. The complainant's arguments regarding the public interest seem to be based on the complainant's apparent belief that the legal advice being withheld is about whether disguised remuneration loans were taxable in the view of HMRC's legal advisers.
68. The complainant mentioned accountability and transparency, and said that many of the 'factors in favour of disclosure' listed in the Commissioner's [guidance](#) (paragraph 55) are relevant in this instance – for example the complainant highlighted the amount of money involved (a figure of £3.2 billion has been mentioned), and the number of people affected by the loan charge.
69. The complainant also believed that HMRC was withholding information under section 42 because it related to the estate of a particular deceased individual. This was a misunderstanding on the part of the complainant. The misunderstanding has been highlighted to the complainant by the Commissioner and the complainant acknowledged it.
70. It is worth noting that the complainant told HMRC "there was no intent to unearth any material relating to ... any debate about potential "errors" in the LC [loan charge] legislation ... "

71. The complainant argued that the advice being withheld is not recent and does not relate to ongoing issues – rather it relates to a period when legislation/policy now in force (the complainant meant the 'loan charge') was being formulated.

Public interest test – HMRC's position

72. HMRC said that maintaining the exemption will ensure the department is able to communicate with its legal adviser frankly and openly; the matter in question is recent and ongoing; and it highlighted the general public interest that is inherent in the exemption. HMRC also argued that the public interest factors put forward by the complainant "are irrelevant to this specific advice", because the withheld advice is not on the subject of wider disguised remuneration policy.

Public interest test – the Commissioner's position

73. The Commissioner upholds HMRC's position regarding section 42 and he directs the complainant to the [guidance](#) on his website about section 42 and the public interest test (paragraphs 51 – 55) for detailed comments on the balancing exercise.
74. There is a strong inherent public interest in maintaining the exemption due to the importance of the principle behind legal professional privilege (safeguarding candidness in all communications between client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice). The fact that the advice being withheld in this instance does not relate to the subject of interest to the complainant makes the case for maintaining the exemption even stronger. The public interest arguments that the complainant has advanced are of little/no relevance if the legal advice being withheld is about the issue of an unintended consequence of the legislation around the estates of deceased people, and not whether disguised remuneration loans were taxable.

Was it clear which exemptions HMRC applied?

75. The Commissioner considers that HMRC was clear as to the exemptions it was relying on to withhold information, notwithstanding its error in citing section 44(1)(a) initially. The annex it provided on 21 September 2021 was labelled to show which exemptions were being applied and where; the exemptions were stated in the main text of the refusal; and while HMRC only mentioned sections 44(1)(a) and 42 in its internal review, it should be noted that the complainant had only disputed those two sections.

Other matters

Time for compliance/refusal of request

76. If the complainant had complained to the Commissioner about the time HMRC took to address the request, the Commissioner would have found that HMRC did not issue its response in accordance with sections 10(1) and 17(1) of FOIA because it did not, within 20 working days of receiving the request, confirm whether the information was held and disclose it (in respect of the disclosable information) and issue a refusal notice stating that the information is exempt and why (in respect of the exempt information).
77. Section 1(1) of FOIA states that:
- “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 information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”
78. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
79. Section 17(1) of FOIA states that:
- “A public authority which, in relation to any request for information, is to any extent relying on a claim that ... information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”
80. In this instance HMRC received the request on 23 July 2021, and sought clarification of the request on 11 August 2021. Clarification was provided on 12 August 2021, and HMRC provided its substantive response on 21 September 2021. As the Commissioner’s [guidance](#) explains (paragraphs 40 – 45), the period of 20 working days begins the day after the public authority receives the clarification it needs in order to respond to the

request. Therefore HMRC should have responded by 10 September 2021 (30 August 2021 was a bank holiday).

Right of appeal

81. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

82. 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.
83. 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

Daniel Kennedy
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