

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2023

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

Decision (including any steps ordered)

1. The complainant submitted a request to HM Revenue & Customs (HMRC) seeking information about a number of Anti Avoidance Board meetings. HMRC disclosed some of the information falling within the scope of the request but sought to withhold the remaining information on the basis of sections 36(2)(b)(i), (ii) and 36(2)(c) (effective conduct of public affairs), 40(2) (personal data) and 44(1) (prohibition on disclosure) of FOIA. The complainant sought to challenge the application of the section 36 exemptions.
2. The Commissioner's decision is that HMRC is correct to rely on sections 36(2)(b)(i), (ii) and 36(2)(c) and that in all the circumstances of the case the public interest favours maintaining these exemptions.
3. No steps are required.

Request and response

4. Following a series of previous FOI requests, the complainant submitted the following request to HMRC on 27 January 2022 seeking information about particular Anti Avoidance Board (AAB) meetings:

'Thank you for your response in providing the headings for the issues.

It has now made it easier to identify the issues that I need.

Please provide copies of the following issues

18/2/2020 2.1-2.6 Proposed new DR settlement terms following the loan charge review

7/10/2019 8. Disclosure of AAB papers in litigation cases

7/10/2019 4.1 Disclosure of AAB papers in litigation cases

1/5/2019 6. Isle of Man Contractor Treaty Abuse

5/12/2018 6. DOTAS Enforcement Update - Discussion on the DOTAS report provided by C-A Promoters and Rulebreakers team

5/12/2018 2. DR Project update

2/5/2018 .5. DR settlement terms involving s223 and Voluntary Restitution

Please also supply the headings for the issues for the period Jan 2021 to Dec 2021'

5. HMRC responded on 14 March 2022. It explained that the information regarding the first and last issue listed in the request was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and 36(2)(c) (effective conduct of public affairs) of FOIA. Furthermore, it explained that the information regarding the issue '1/5/2019 6. Isle of Man Contractor Treaty Abuse' was exempt from disclosure on the basis of section 44(1) (prohibitions on disclosure). However, HMRC disclosed information sought by the other issues albeit that some information was redacted on the basis of sections 36(2)(b)(i) and (ii) and 36(2)(c), 40(2) (personal data) and 44(1).
6. The complainant contacted HMRC on 18 March 2022 and asked it to conduct an internal review into its application of section 36 of FOIA. She also submitted a meta-request for the information generated by HMRC when processing her request of 27 January.
7. HMRC informed her of the outcome of the internal review on 4 May 2022. The review upheld the application of section 36 of FOIA. In the same reply it also provided her with a response to her meta request.

Scope of the case

8. The complainant contacted the Commissioner on 18 May 2022 to complain about the way her request of 27 January 2022 had been handled. She sought to challenge HMRC's decision to withhold information falling within the scope of this request on the basis of sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA. She did not challenge HMRC's application of sections 40(2) and 44(1).

Reasons for decision

Section 36 – effective conduct of public affairs

9. Sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA state that:
- '(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
- (b) would, or would be likely to, inhibit-
- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.'
10. In determining whether sections 36(2)(b)(i), (ii) and (c) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.

11. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
12. Before considering whether these exemptions are engaged, the Commissioner has set out some useful background to this request which was provided to him by HMRC as this background is relevant to the Commissioner's determination as to whether the qualified person's opinion is a reasonable one.
13. HMRC explained that its Code of governance for resolving tax disputes sets out the department's internal governance arrangements for decisions on how tax disputes should be resolved. Governance processes are in place to ensure that HMRC deals with all cases fairly and in an even-handed manner. These arrangements are one aspect of HMRC's wider governance framework.
14. HMRC explained that deciding the department's approach on a disputed point that arises in multiple cases – and applying it consistently – is an important part of the even-handed and fair administration of the tax system. Resolving such disputes is decided by cross-HMRC panels, to ensure the necessary consistency. One such panel is the AAB.
15. HMRC explained that the role of the AAB is to ensure that HMRC responds effectively and consistently to avoidance issues, in line with wider HMRC strategies and taking account of ministerial priorities. AAB provides governance for decisions on how HMRC will handle tax avoidance issues.
16. Policy owners are responsible for assessing the level of risk posed to their parts of the tax system by a newly identified avoidance risk, and for developing and agreeing a strategy for handling that risk in collaboration with relevant stakeholders. The policy owner must inform the AAB Secretariat of all new handling strategies agreed so that they can sight AAB on emerging avoidance risks.

17. HMRC further explained that underpinning the governance of this process is a series of gateways which set how issues are brought to the AAB and the actions it takes as a result.
18. In terms of the background to this request, HMRC explained that in January 2022 the complainant made a request, seeking the 'heading' of all issues considered by the AAB from 2007 to 2020. In response, HMRC provided the headings of 1,110 issues relating to 152 meetings. A further request, that which is the subject to this complaint, was received the following day, seeking the documents associated to seven of these issue headings.
19. In response to the request, HMRC explained that the requested documents could be split into two categories, those which had been provided to the AAB for information only, and those which had been provided to the AAB under the gateway process for decision. HMRC explained that it disclosed the first category of documents and withheld the latter by virtue of sections 36(2)(b)(i), (ii) and (c) FOIA. In addition to this, HMRC explained that it withheld a small section of an attachment providing detail of AAB discussions.
20. Turning to the process of seeking this opinion, HMRC sought the opinion of the Penny Ciniewicz, Director General Customer Compliance and Commissioner of HMRC on 22 February 2022 with regard to whether sections 36(2)(b)(i), (ii) and (c) of FOIA were engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(c) stating that 'qualified person' means 'in relation to information held by any other government department, means the commissioners or other person in charge of that department'. The Commissioner is therefore satisfied that Ms Ciniewicz was an appropriate qualified person.
21. The qualified person was provided with a rationale as to why the exemptions could apply and copies of the withheld information. The qualified person provided their opinion that the exemptions were engaged on 1 March 2022. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
22. Turning to the substance of the opinion, the qualified person noted that AAB leads HMRC's strategic approach to tax avoidance and provides governance for decisions on how HMRC will handle tax avoidance issues. The qualified person argued this process requires those referring issues to AAB to be open and frank about all aspects of the issue at hand, the department's ability to effectively tackle the tax avoidance, as well as the potential pitfalls to their proposal.

23. The qualified person further argued that disclosure of such material would likely result in future submissions to AAB being far more guarded. She argued that there is a real risk that future submissions could fail to highlight relevant risks and issues associated with proposals, thus undermining the effectiveness of the AAB process. Furthermore, she argued that disclosure of information which fed into the decision making process would likely result in reduced engagement in this process. As result, this would be likely to impair the quality of the decision making process and inhibit the ability to make an impartial and appropriate decision.
24. As part of her submissions to the Commissioner, the complainant challenged the engagement of these exemptions. She argued that submissions to the AAB are formal and any free and frank views will have been tempered by the knowledge that this is a formal committee. Furthermore, she noted that the committee members themselves are aware that their meetings are recorded and subject to requests from litigation hearings and FOI requests. She also noted that the data requested is old, going back as far as 2018 and therefore could not be realistically seen to prejudice the effective conduct of public affairs.
25. Despite the complainant's points, the Commissioner is satisfied that the qualified person's opinion was a reasonable opinion to come to. In reaching this conclusion the Commissioner accepts that it is rational to argue that disclosure of submissions, particular ones which are open and frank, to the AAB about complex tax avoidance matters could be lead to an infringement or impact on the way future submissions are presented if such submissions were disclosed. Such an argument also applies to records of discussions made at the AAB. In turn the Commissioner accepts that it is logical and reasonable to argue that the effectiveness of the decision making process involving the AAB could be impacted if either category of information was disclosed. Sections 36(2)(b)(i), (ii) and (c) are therefore engaged.

Public interest test

26. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

27. HMRC acknowledged the public interest in transparency and accountability in government and in promoting public understanding of the decisions taken by government.

28. As noted above at paragraph 24, the complainant questioned the extent to which disclosure of the information would be genuinely prejudicial. Furthermore, she argued that there was a significant public interest in the disclosure of the information as the issue of the loan charge was very current and receiving media interest, besides affecting approximately fifty thousand people. The complainant also suggested that this issue had resulted in the suicides of at least eight people.

Public interest arguments in favour of maintaining the exemptions

29. HMRC emphasised that the process through which the AAB makes decisions is reliant upon a perceived safe space in which free and frank views and advice can be exchanged, both in the form of submission documents and meeting discussion. It noted that submissions to the AAB are required to be concise and balanced, being open about the potential weaknesses of the case put forward. HMRC argued that an infringement of this safe space could make submissions more guarded which reduces the quality of the decision-making process and inhibits the ability to make impartial and appropriate decisions, thus undermining the effectiveness of the AAB process.
30. Furthermore, in relation to the withheld information concerning discussions at the AAB, HMRC emphasised that the AAB process is dependent upon the confidence of board members and policy owners to be candid with each other. This confidence derives from the expectation that any frank comments made will be treated in confidence. Where officials must take into consideration the potential disclosure of these discussions, and the ensuing risks, this would be likely to inhibit the free and frank exchange of views and consequently have a detrimental effect on the quality and scope of future discussions.
31. HMRC argued that there was a strong public interest in the implementation of policy to tackle tax avoidance which delivers vital funding for public services. It explained that the AAB is integral to the successful delivery of such policy as it is internally facing, providing invaluable and candid views of those involved to ensure the even-handed and fair administration of the tax system.
32. HMRC argued that it was in the public interest for the department to be able to have a full and open debate away from external scrutiny and to be able to think through all the implications of particular options. Furthermore, HMRC argued that it needed to also be able to undertake a rigorous and candid assessment of the risks and how to mitigate these. It emphasised that the disclosure would not be limited to this matter but could have implications for how officials engage with the AAB process in the future.

Balance of the public interest

33. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
34. The Commissioner agrees that there is public interest in HMRC being open and transparent about how it make decisions in relation to tax policy. In the particular circumstances of this case the Commissioner recognises that implementation of the loan charge in 2019 has been one that has attracted both press and political attention, not least because the Commissioner is aware that this policy affects a large number of people and has caused financial hardship for some.¹ In this context, the Commissioner accepts that this adds weight to the disclosure of the withheld information given that it concerns an arguably controversial area of tax policy. Furthermore, disclosure of the information would provide the public with a direct insight into matters considered by the AAB in May 2018 and February 2020 in respect of the loan charge.
35. However, the Commissioner agrees with HMRC that in order for the AAB process to work effectively, there has to be safe space in which submissions for decision can be made to the AAB and that the AAB is able to undertake candid discussions of matters brought before it. The Commissioner is satisfied that disclosure of the withheld information, both the papers submitted to the AAB and a record of part of its discussions, would significantly encroach on this space. In reaching this conclusion the Commissioner notes that the information in question is detailed and provides a candid assessment of the matters under consideration. In turn the Commissioner therefore accepts that the impact of the disclosure of this information would create a real risk of future submission to the AAB, and future discussions of it, being infringed. The Commissioner does not consider the age of the information to undermine the likelihood of such risks occurring, firstly because of the detailed and open nature of the information contained within it, and secondly, because as the complainant notes herself, the

¹ <https://www.theguardian.com/politics/2021/nov/27/suicides-linked-to-hmrc-cash-demands-in-loan-charge-tax-bills>

issue in question is still one that is attracting considerable external attention.

36. The Commissioner considers an impact on the effectiveness of the AAB to be firmly against the public interest, not only because it undermines the effectiveness of HMRC's internal mechanisms for considering matters relating to tax disputes but more broadly risks undermining its ability to fairly administer the tax system. The Commissioner also accepts HMRC's point that disclosure of the requested information, whilst focused on matters concerning the loan charge, also risks impacting on other matters brought to, and discussed at, the AAB. In the Commissioner's opinion this adds additional weight to the public interest in maintaining the exemptions.
37. In view of the above, in particular given the wide ranging prejudicial effects disclosure of the withheld information would have, the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions.

Right of appeal

38. 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

39. 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.
40. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF