

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to Research & Development (R&D) tax relief claims. HM Revenue and Customs (HMRC) refused to comply with the request by virtue of section 31(1)(d) (the assessment or collection of any tax or duty) and section 44(1)(a) (prohibitions on disclosure) of FOIA.
2. The Commissioner's decision is that HMRC was entitled to rely on section 31(1)(d) and section 44(1)(a) to refuse to disclose the requested information.
3. The Commissioner does not require HMRC to take any further steps.

Request and response

4. On 28 November 2022, the complainant wrote to HMRC and requested information in the following terms:
"Please state, for each of the 20/21, 21/22 and 22/23 financial years:
a) For how many claims under R&D tax relief schemes did HMRC ask for more information from the applicant making the claim?"

- b) For how many claims under the scheme for each year has HMRC:
- i) issued a penalty to a company for a breach of scheme rules
 - ii) required a repayment of tax credits issued for a breach of scheme rules
 - iii) launched civil fraud proceedings for a breach of scheme rules
 - iv) launched criminal fraud proceedings for a breach of scheme rules”
5. HMRC responded on 21 December 2022. It refused to comply with the request, citing section 31(1)(d) of FOIA as its basis for doing so.
6. Following an internal review HMRC wrote to the complainant on 20 February 2023. It maintained its reliance on section 31(1)(d) to refuse to comply with parts a), b)i), b)ii) and b)iii) of the request. However, it amended its position regarding part b)iv) of the request, for which it now cited section 44(1)(a) as its basis for refusal.

Reasons for decision

Section 31 – law enforcement

7. Section 31 of FOIA provides an exemption from the duty to disclose information if to do so would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
8. Section 31(1)(d) states:
- “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 any tax or duty or of any imposition of a similar nature.”
9. The Commissioner’s guidance¹ on section 31(1)(d) of FOIA states that the phrase “tax, duty or...imposition of a similar nature” is a very broad term. This exemption may protect information if its disclosure would or would be likely to prejudice the collection of tax from a particular person, or be of use to those evading tax. It may also apply if disclosing the information would, or would be likely to, promote tax avoidance.

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

10. HMRC advised that it was relying on section 31(1)(d) to withhold the information at parts a), b)i), b)ii) and b)iii) of the request on the basis that its disclosure would be likely to prejudice the assessment and payment of R&D tax relief claims. That is that there is more than a hypothetical or remote possibility of the envisaged prejudice occurring.
11. HMRC explained that companies can claim R&D tax relief for qualifying activities which will either reduce their tax bill and/or result in a payable tax credit. However, the possibility of a payable tax credit raises the risk of abuse or fraud which HMRC must protect against.
12. HMRC advised that in recent years it has experienced increased criminal attacks on the R&D tax relief scheme using knowledge linked to perceived weaknesses in the level of coverage policing the scheme. It further stated that, from experience, releasing any data risks prejudicing future tax collection.
13. HMRC stated that if the requested information was disclosed it could be paired with related information which is already available in the public domain, regarding the total number of claims received by HMRC along with the measures which it is taking to oversee compliance with the scheme. Together these pieces of information would provide those who are, or would be, involved in fraud with an effective estimate of how successful HMRC is at locating fraudulent activities and instigating appropriate compliance action. Enabling those intent on committing fraud in such a way would undermine the deterrent effect of HMRC's compliance work and may in turn lead to more unlawful claims.
14. The Commissioner notes that the requested figures alone may not reveal much, however, HMRC has demonstrated that when read with the related information which is readily available in the public domain, prejudice to its function of correctly assessing or collecting tax in relation to the R&D tax relief scheme would be likely to occur. He is satisfied that the envisaged prejudice is real, actual and of substance, and that there is a causal link between disclosure of the requested information and the harm claimed.
15. He also notes that comparing this data with equivalent data for other tax schemes could enable a person considering avoiding or evading tax to estimate the risk of detection associated with the scheme. That in turn might lead such people to target those schemes where they perceive that the risk of detection is lower.
16. Therefore, the Commissioner finds that section 31(1)(d) of FOIA is engaged as disclosure of the requested information would be likely to result in prejudice to the assessment or collection of any tax or duty or of any imposition of a similar nature.

Public interest test

17. The exemption at section 31(1)(d) is subject to the public interest test set out at section 2(2)(b) of FOIA. Therefore, the Commissioner has also considered whether, in all circumstances of this case, the public interest in maintaining the exemption at section 31(1)(d) outweighs the public interest in disclosure of the withheld information.

Public interest arguments in favour of disclosure

18. HMRC acknowledged that there is a general public interest in promoting transparency, accountability, and wider understanding surrounding public authorities, and that FOIA is a means of satisfying this public interest.
19. It recognised "the need to demonstrate robust yet proportionate and effective actions which will stand the test of public scrutiny." It also recognised that there is a strong public interest in "ensuring that it is as transparent as possible about its activities, and that publishing the requested information would, on the face of it, reassure the public that its compliance activities are fair and robust and applied equitably."
20. The complainant argues that it is not clear that disclosure of the requested information would meaningfully assist a motivated fraudster. Given the widely reported levels of fraud associated with the R&D tax relief scheme, along with HMRC's increased efforts in overseeing and ensuring compliance, the complainant considers that it can be reasonably assumed that those intent on submitting fraudulent claims are already in possession of the information they require in order to do so.
21. The complainant further argued that disclosure would permit for proper accountability of HMRC over the extent to which previous due diligence of the scheme was insufficient. They also argued that accountability through public scrutiny of HMRC's handling of public funds could offer important lessons on the consequences of insufficient due diligence in the dispersal of public funds which could be carried over into other areas of HMRC's work, as well as across other government departments.

Public interest arguments in favour of maintaining the exemption

22. HMRC set out that the public interest in relation to FOIA requests "means the public good, rather than what is of interest to the public or the private interests of the requester." It stated that, by its very nature, R&D activity attracts those willing to take a risk and stretch boundaries. HMRC considers that disclosing further details of its compliance strategy carries the risk of facilitating or encouraging those so inclined to take

greater risks, for personal gain beyond that intended by the spirit and letter of the legislation.

23. HMRC put forward various examples of the R&D tax relief scheme having been discussed and examined in the public forum. Some examples of which include questions answered by HMRC chief executive Jim Harra at the Treasury Select Committee, the National Audit Office audits of its accounts and subsequent recommendations, and a report on R&D tax relief published by the Lords Committee in January 2023². The report discusses the matter extensively, from the increase in error and fraud within R&D tax relief in recent years, to details of compliance actions and operation undertaken by HMRC, to the specialist R&D compliance team more than doubling in size in response to the growing levels of error and fraud, and changes to the way in which R&D relief claims are made in order to improve HMRC's ability to detect and counter potential abuse of the scheme.
24. HMRC considers the level of information in the public domain on R&D tax relief compliance satisfies the requirement for transparency and accountability, along with the various reports mentioned above which adequately facilitate public debate on the matter.
25. HMRC believes there is no additional interest in disclosing information which further confirms that it needs to do more to tackle error and fraud in R&D tax relief schemes, and subsequently puts its compliance activities at risk, when the subject has already been openly discussed and confirmed through a variety of platforms.

Balance of the public interest

26. The Commissioner has considered both HMRC's and the complainant's arguments. He is in no way dismissive of the public interest and concerns surrounding this matter, nor the impact which fraudulent claims of R&D tax relief have had so far on the public purse. However, the Commissioner finds that the ample information already widely available to the public adequately meets the transparency and accountability expectations placed upon HMRC. The requirement to protect the public purse from any further abuse than it has already been subject to outweighs the public interest in disclosure of the requested information.

² <https://committees.parliament.uk/committee/230/finance-bill-subcommittee/news/185805/lords-committee-publishes-report-on-research-and-development-tax-relief-and-expenditure-credit/>

27. The Commissioner concludes that in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information, and HMRC was therefore entitled to rely on section 31(1)(d) of FOIA to refuse to disclose the information at parts a), b)i), b)ii) and b)iii) of the request.

Section 44 – Prohibitions on disclosure

28. Section 44 of FOIA states:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any retained EU obligation, or
- (c) would constitute or be punishable as a contempt of court.”

29. HMRC considers in this case, that the information sought by part b)iv) of the request is prohibited from disclosure by virtue of the Commissioners for Revenue and Customs Act 2005 (CRCA)³ and therefore would be exempt from disclosure by virtue of section 44(1)(a) of FOIA.

30. Section 18(1) of CRCA states that HMRC officials may not disclose information which is held by HMRC in connection with one of its functions.

31. The Commissioner is satisfied that the requested information in this case is generated and held by HMRC in connection with its compliance function. Therefore, the information falls under section 18 of the CRCA and is prohibited from disclosure.

32. HMRC explained that, for the purposes of FOIA, section 18(1) only acts as a statutory prohibition where section 23(1) of the CRCA is also satisfied. Section 23(1) states:

“Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (prohibitions on disclosure) if its disclosure-

- (a) would specify the identity of the person to whom the information relates, or
- (b) would enable the identity of such a person to be deduced.”

³ <https://www.legislation.gov.uk/ukpga/2005/11/contents>

33. For the purposes of the CRCA, the term "person" includes both natural and legal persons, so, for example, entities such as companies, trusts and charities.
34. HMRC accepts that disclosure of the specific number of criminal fraud proceedings, as sought by part b)iv) of the request, would not fulfil the conditions of section 23(1)(a) of the CRCA because the number alone would not explicitly identify to whom the information relates. However, HMRC maintains that such a disclosure would fulfil the conditions of section 23(1)(b) as disclosure of the information could enable the identity of such a person to be deduced. It has reached this position based on the small number of criminal proceedings each year related to the R&D tax relief scheme.
35. In reaching its conclusion HMRC carefully weighed up the likelihood of identification. In doing so it referred to the ICO's Anonymisation Code of Practice⁴, which provides that when assessing whether a person could be identified from anonymised data, account needs to be taken of the means reasonably likely to be used to re-identify or the 'motivated intruder' test. The key is what is reasonably likely relative to the circumstances, not what is conceivably likely in absolute terms.
36. HMRC explained that the subject of fraud and compliance surrounding the R&D tax relief scheme has come under recent intense public scrutiny. Its position is, therefore, that it is reasonable to assume that this would provide motivation to anyone wishing to learn the identities of those persons who are, or have been, subject to criminal proceedings as a result of breaching the R&D tax relief scheme rules.
37. HMRC accepted that the complainant themselves may be unlikely to identify any person from the requested information, however, it is probable that other individuals – for example, family, friends, those involved in any legal capacity, staff members of associated entities, etc. – would be able to relate the withheld information to those individuals concerned.
38. Usually when considering identification, the Commissioner takes into account whether an individual could learn anything new about the data subject as a result of disclosure of the requested information. Even though disclosure in this case may only confirm what any individual capable of identifying the data subjects already knows, section 23(1) of

⁴ <https://ico.org.uk/media/1061/anonymisation-code.pdf>

the CRCA is clear – if the identity of the individual to whom the information relates can be deduced, it is exempt.

39. Since the Commissioner is satisfied that an individual could be identified from the requested information, section 23(1)(b) of the CRCA is engaged and, by extension, the information is exempt from disclosure in accordance with section 44(1)(a) of FOIA.

Right of appeal

40. 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

41. 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.
42. 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

Roger Cawthorne
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