

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 July 2017

**Public Authority:** Her Majesty's Revenue and Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Decision (including any steps ordered)

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1. The complainant requested information from Her Majesty's Revenue and Customs (HMRC) about referrals from the Department for Work and Pensions (DWP) in relation to off payroll contractors who have failed to provide income tax assurances. HMRC has disclosed some of the requested information but has refused to disclose the remainder of the information stating that it does not hold some of the information and relying on section 44(1) to refuse the remainder. The request and HMRC's final position are set out in Annex A for ease of reference.
2. The Commissioner's decision is that on the balance of probabilities, HMRC does not hold the information requested at point two of the request. In respect of HMRC's reliance on section 44(1)(a) in relation to parts of the request at points one, three and five, the Commissioner does not consider that section 44(1)(a) is engaged. In respect of point four of the request, the Commissioner considers that the information is held but it has not been supplied to the complainant. The Commissioner considers that HMRC's response to point four constitutes a breach of section 1(1)(b) FOIA because it has not disclosed information of the description specified in point four of the complainant's request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 44(1)(a).
  - Provide the complainant with information matching the description specified in point four of the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. The detail of the request and response are included in Annex A.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 14 September 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation is to determine if HMRC handled the request for information in accordance with the FOIA and specifically to consider if HMRC was entitled to rely on section 44(1)(a) to refuse elements of the request, whether, on the balance of probabilities, HMRC did not hold part of the requested information, and in respect of point four, whether HMRC has complied with section 1 FOIA.

## **Reasons for decision**

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### **Section 1 – information held**

8. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
9. In cases such as this, where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
10. 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.
11. In respect of the response at point 2, HMRC has explained that whether a DWP contractor remains in post following a referral to HMRC is a matter for DWP and the contractor. HMRC has set out that there is no business requirement for HMRC to be notified of the number of

contractors remaining in post and accordingly the information is not held.

12. Although the Commissioner had asked HMRC a series of questions relating to searches for information requested at this part of the request, she accepts the position which has been set out by HMRC in its submission and has determined that on the balance of probabilities, the requested information is not held by HMRC. This element of the request may be more appropriately addressed to DWP.
13. The Commissioner has gone on to consider whether HMRC has complied with its duty under section 1 in respect of the request at point 4; in particular she has considered section 1(1)(b).
14. The request at point four was clearly framed in a way that required the response to be set out by four separate financial reporting years. In its initial response HMRC had relied on section 12 to refuse the entire request but at internal review disclosed a total figure for the entire time period but no breakdown by financial reporting year.
15. It is HMRC 's position that any referral to HMRC from DWP would fall within DWP's reporting year which does not align with HMRC's data. In order to provide the information, HMRC would be required to reconcile the year of the referral with the year of the enquiry. The Commissioner notes that in its internal review, HMRC sets out explicitly that it has been able to identify referrals from separate Government Departments within the costs limit and that accordingly section 12 was no longer appropriate. The Commissioner further notes that the total number of referrals spanning the entire period was 46, with 32 having been finalised with no additional tax due and 14 where additional tax is considered to be due. It is clear therefore that there are only 14 cases which are relevant to this element of the request and having identified these, it is difficult to see why HMRC cannot identify the date of the referral from DWP and accordingly provide the information which the complainant has described; i.e. broken down by financial reporting year. In these circumstances, the Commissioner considers that HMRC has complied with Section 1(1)(a) FOIA in that its response implicitly confirms that it holds information of the description specified. However, it has not communicated the requested information to the complainant and is therefore in breach of section 1(1)(b). She has reached this conclusion because she is not persuaded that HMRC would be unable to provide a breakdown by the relevant financial reporting periods for the 14 referrals where additional tax was due. It is noteworthy that HMRC has not refused to comply with this element of the request on the basis that the cost of doing so would exceed the appropriate limit.

16. Turning to points one, three and five of the request, HMRC has relied on FOIA section 44.

#### **Section 44 – prohibitions on disclosure**

17. Section 44 of the FOIA states that :

*“(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 Community obligation, or*

*(c) would constitute or be punishable as a contempt of court.*

*(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”*

18. The relevant legislation in this case is the Commissioners for Revenue and Customs Act 2005 (CRCA).

Section 18(1) CRCA states

*“Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs”.*

Section 18(2)(a)(i) CRCA states:

*“But subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs....”*

Section 23 CRCA states amongst other things:

*“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....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.*

*(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000."*

19. It is HMRC's position that the requested information relates to a function of HMRC. It cites the assessment and collection of tax as one of the prime examples of a function. HMRC has set out to the Commissioner that section 18(1) of the CRCA gives HMRC a duty of confidentiality which applies to information held in connection with a function. This is to make sure, HMRC asserts, that information held on people and businesses would be protected and disclosed only in controlled and limited circumstances.
20. HMRC has gone on to set out that that in order to reach a decision as to whether it is prohibited from disclosing information under the FOIA, section 23 CRCA sets out two questions:
  - a) Would the requested information be held in connection with a function of HMRC
  - b) Would the information relate to a 'person' who could be identified from the information requested.
21. In its submission, HMRC has set out that the term 'person' includes legal entities such as companies, trusts and charities, as well as living individuals.
22. HMRC has submitted that in this case DWP has provided information to HMRC as an employer and is therefore the 'person' who could be identified from the information.
23. The Commissioner has noted that a previous request to HMRC, from the same complainant, for information relating to DWP off payroll contractors, was the subject of a decision notice held under reference FS50579642.<sup>1</sup> The complainant appealed the Commissioner's decision and the case was due before the appellate authority on 23 June 2016 with HMRC joined as a party. A short time prior to the hearing, HMRC disclosed the requested information and the appeal was withdrawn. Although it was relying on section 44(1)(a) in that case, HMRC did not seek to rely on section 44(1)(a) in respect of the potential identification of DWP.

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560319/fs\\_50579642.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560319/fs_50579642.pdf)

24. The Commissioner put it to HMRC that in the event that its position was that section 44 applied in this case in respect of DWP then it should have applied section 44(2) to the request from the outset. HMRC did not refer to section 44 until the point at which the Commissioner became involved following receipt of the complaint; indeed HMRC had not referred at all to the reasons why certain elements of the requested information had been withheld.
25. In relation to the application of section 44(1)(a) rather than section 44(2), HMRC asserted, in its final submission to the Commissioner, that it is aware that DWP publishes information, via its accounts, about its off-payroll contractors. HMRC has also explained that it is widely publicised that HMRC receive referrals from government departments relating to contractor assurances. HMRC also confirmed that it had previously disclosed information relating to such referrals from DWP. HMRC set out that in these circumstances it did not consider reliance on section 44(2) was appropriate and therefore relied on section 44(1)(a).
26. The Commissioner considers that the request identifies DWP as the department providing the information and that reliance on section 44(1)(a) in itself identifies DWP. Also, in responding to the complainant's request for an internal review, HMRC has disclosed some of the requested information which, given the nature of the request, necessarily discloses information about DWP.
27. Although the Commissioner has addressed the issue of reliance on section 44(1)(a) or 44(2), it is her position, given HMRC's final submission that neither is engaged in this case.
28. HMRC set out that as DWP is an employer of staff and is required to account for income tax and national insurance contributions, it was in this capacity that the requested information was provided to HMRC. It has asserted that as the information provided by DWP related to a function of HMRC, it is covered by the duty of confidentiality imposed by section 18(1) CRCA.
29. Whilst the Commissioner accepts that the information provided by DWP to HMRC does relate to a function of HMRC, she does not accept that it meets both the criteria set out by section 23 CRCA and detailed at [paragraph 18 of this notice.] The information provided by DWP relates to a 'person' but it is the Commissioner's position that the 'person' or in this case, 'persons' to whom it relates are the off payroll contractors, not DWP as asserted by HMRC.
30. It was HMRC's position in the decision notice detailed at paragraph 19 that the information requested at that time related to the off payroll contractors; there is no material difference in this case which could

reasonably be said to alter that position. It is the Commissioner's position that the withheld information does not relate to DWP but was provided by DWP. The second of the two criteria set out by section 23 CRCA is not therefore met.

31. The Commissioner notes that HMRC is relying on section 44(1)(a) in respect of the request at point 1, point 3 and point 5 of the request. However, the Commissioner considers that if it is HMRC's position that it is prohibited from disclosing information about DWP by virtue of the CRCA and therefore section 44 FOIA, it should have applied section 44 to the entire request as the premise of the entire request is that information has been provided to HMRC by DWP.
32. It appears therefore that HMRC is relying on section 44(1)(a), which confirms that DWP provided the information, but is refusing to disclose the requested information as doing so would disclose information relating to a 'person' who could be identified from the information and that 'person' is DWP. There is clearly a paradox in HMRC's argument as it has argued that it cannot disclose information which could identify DWP when it has in fact identified DWP by responding to parts of the request.
33. Furthermore, the Commissioner notes that in respect of points 3 and 5, HMRC has disclosed information for every financial year requested except 2015/16. In these circumstances the Commissioner is concerned that having disclosed information, DWP is clearly identified and that there can be no degrees of identification; in other words, disclosure of the withheld information cannot create a situation where DWP is more identifiable from one piece of information than another.
34. It is the Commissioner's position therefore that HMRC cannot rely on section 44(1)(a) to refuse this request in respect of points 1, 3 and 5.

## **Other matters**

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35. The commissioner is most concerned by the significant delays in handling this case. She notes that having requested an internal review on 10 August 2016, the complainant did not receive a response from HMRC until 9 December 2016.
36. The Commissioner considers that internal reviews should be conducted within 20 working days. She accepts that there will be occasions when more time will be required to complete a review but she does not consider that there are any circumstances where a review should take longer than 40 working days.

37. The review response in this case has taken four months and the Commissioner finds this unacceptable. She would ask HMRC to ensure that internal reviews are carried out in a timely manner.
38. The Commissioner also notes that engagement with her office on this case has been delayed. Such delays are a cause for concern. When a public authority has responded to a request and undertaken an internal review, the Commissioner considers that the standard of 20 working days should be sufficient to provide the Commissioner with evidence supporting the position set out in the response and/or review. In this case, the Commissioner wrote to HMRC on 20 December 2016 and asked for a response by 24 January 2017; the response was received on 7 February 2017. A further letter dated 14 February 2017 required HMRC to provide a further submission by 28 February 2017. ]This letter set out that given the already significant delays in this case, the Commissioner would not consider any extension request in the event that HMRC could not meet the deadline.]Despite alerting HMRC to the delay issues in this way, the response was received on 14 March 2017.
39. In advance of issuing this decision notice, the Commissioner afforded HMRC the opportunity to issue a response to part four of the request but despite this opportunity, HMRC has shown a blatant disregard for deadlines set by the Commissioner and at the time of issuing this notice, HMRC had still not issued a response to the complainant.
40. It is of concern that a public authority can demonstrate such an overt disregard for deadlines imposed by the Commissioner and it is noteworthy that the only deadline HMRC did meet in this case was the statutory deadline for responding to the request. The Commissioner considers that HMRC has caused significant delays in this case by continually changing its position; this in itself should not be considered an acceptable reason for delays.
41. The Commissioner is always alert to potential patterns when cases are badly handled and will consider whether or not future complaints about HMRC show the emergence of any patterns which may be a cause for further concern.
42. The Commissioner notes that a recent decision notice held under reference FS50650012 has also set out her concerns about HMRC's delays and she asks that HMRC ensures that in future cases it meets the deadlines imposed by the Commissioner unless there are specific mitigating circumstances which may prevent this.

**Right of appeal**

43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 7395836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.

45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

Annex A

On 19 July 2016 the complainant made the following request for information under the FOIA:

*"In relation to the Department for Works and Pensions for the financial periods.*

*1. The number of referrals sent to HMRC from each government department for each of the financial reporting periods 2012/13, 2013/14, 2014/15 & 2015/16 with regards to the failure by their off payroll contractors to provide income tax assurances contrary to HM Treasury Policy, Procurement Policy Note, Tax Arrangements of Public Appointees?*

*2. The number of referrals who remained in post after being referred to HMRC for possible income tax evasion for each government department for each of the aforementioned financial reporting periods?*

*3. The number of referrals who were investigated by HMRC for possible income tax evasion from each government department for each of the aforementioned financial reporting periods?*

*4. The number of referrals who were found by HMRC to have underpaid income tax from each government department for each of the aforementioned financial reporting periods?*

*5. The number of referrals who were found by HMRC to have paid no income tax whatsoever from each government department for each of the aforementioned financial reporting periods?*

*6. The number of referrals who were prosecuted by HMRC for income tax evasion from each government department for each of the aforementioned financial reporting periods?"*

This request was a narrowed request relating to the Department for Work and Pensions (DWP) only, having originally been for information relating to each government department.

On 9 August 2016, HMRC refused to disclose the information requested relying on section 12 FOIA –cost of compliance exceeds the appropriate limit.

The complainant requested an internal review on 10 August 2016 and a response was issued on 9 December 2016.

In its internal review, HMRC set out that it no longer wished to rely on section 12 to refuse the request and that information which fell within the scope of the request had been identified within the cost limit and that this was now being disclosed.

In its review response HMRC set out the following position

Request at point 1 – HMRC relied on section 21 – information in the public domain.

Request at point 2 – HMRC asserts that the information is not held

Request at point 3 - Information disclosed in relation to all financial years requested except financial year 2015/2016

Request at point 4 – Information was not disclosed by financial year as requested.

Request at point 5 – HMRC disclosed information in relation to all financial years requested except 2015/16.

Request at point 6 – disclosed.

HMRC made no reference to any exemptions in relation to the withheld information.

The Commissioner wrote to HMRC on 20 December 2016 requesting a submission regarding the handling of the request.

HMRC responded on 7 February 2017.

Request at point 1 – HMRC no longer wished to rely on section 21 but indicated its reliance on section 44(1)(a) instead.

Request at point 2 – Information not held.

Request at point 3 – HMRC stated its reliance on section 44(1)(a) in respect of the withheld information.

Request at point 4 – HMRC set out that the requested information was not recorded by financial year and therefore could not be disclosed by financial year.

Request at point 5 - HMRC stated its reliance on section 44(1)(a) in respect of the withheld information.

Request at point 6 – already disclosed.

The Commissioner requested a further submission from HMRC on 14 February 2017.

Reference: FS50646300

HMRC responded on 14 March 2017. It maintained its position as detailed in the response dated 7 February 2017 and provided further detail.