

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2023

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

Decision (including any steps ordered)

1. The complainant has requested from HM Revenue and Customs (HMRC) emails from and to Jim Harra, the Chief Executive of HMRC, containing or referencing certain terms or words over a number of specified months in 2019.
2. HMRC disclosed some emails but withheld information under sections 36(2)(b), 36(2)(c) and 44(1)(a) of FOIA (the exemptions for 'prejudice to effective conduct of public affairs' and 'prohibitions on disclosure').
3. The Commissioner's decision is that HMRC has correctly applied the above exemptions to withhold the redacted information in this case.
4. However he also finds that HMRC breached sections 10(3) and 17(3) of FOIA in respect of the time taken to respond.
5. The Commissioner does not require any further steps as a result of this decision notice.

Background

6. The complainant initially made the following request on 3 October 2021:

"Please provide all emails from and to Jim Harra which contain (in the subject line or in the body of the email) or reference (in the subject line or in the body of the email) one or more of the following keywords

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LCAG (or L.C.A.G. or lcag)

Loan Charge Action Group (or loan charge action group)

Campaigners (or campaigners)

Activists (or activists)

Twitter (or twitter)

Tweet (or tweet)

Please restrict the supply of this information to the year 2019 (01 January 2019 to 31 December 2019 inclusive). This will require a search of one individual mailbox (belonging to Jim Harra), with clear instruction on the keyword search criteria as outlined above.

It should be noted that the searches undertaken for Twitter (or twitter) and Tweet (or tweet) are only where these are on the subject of, or related to, the Loan Charge and/or Disguised Remuneration (or DR), or LCAG (or variations as above), or Loan Charge Action Group (or variations as above) or Campaigners (or campaigners) or Activists (or activists)."

7. HMRC refused the above request, citing section 12(1) of FOIA ('cost of compliance'). HMRC also referenced section 14(1) of FOIA ('vexatious or repeated requests').
8. Within its refusal, HMRC had invited the complainant to narrow the scope of the request. There was an exchange of correspondence, and the complainant submitted a narrowed request on 25 October 2021.

Request and response

9. On 25 October 2021, the complainant wrote to HMRC and requested information in the following terms. The request references emails that HMRC had confirmed holding:

"I would now like to narrow the scope of my request for both the date range and the search terms ... may I therefore request the release of the following emails/email chains –

From 'sent' items', with search term LCAG (01/02/2019 - 28/02/2019)
- 2 instances

From 'sent' items', with search term LCAG (01/03/2019 - 31/03/2019)
- 2 instances

From 'sent' items', with search term LCAG (01/06/2019 - 30/06/2019)
- 1 instance

From 'sent' items', with search term LCAG (01/09/2019 - 30/09/2019)
- 1 instance

From 'received' items', with search term LCAG (01/08/2019 -
31/08/2019) - 64 instances

From 'received' items', with search term LCAG (01/09/2019 -
30/09/2019) - 38 instances

From 'received' items', with search term LCAG (01/10/2019 -
31/10/2019) - 19 instances

From 'received' items', with search term Loan Charge Action Group
(01/08/2019 - 31/08/2019) - 126 instances

From 'received' items', with search term Loan Charge Action Group
(01/09/2019 - 30/09/2019) - 118 instances

From 'received' items', with search term Loan Charge Action Group
(01/10/2019 - 31/10/2019) - 132 instances

... Other than the names of any Senior Civil Service (SCS) grade
personnel, my request does not seek the provision of any third-party
personal data ...".

10. On 9 November 2021, HMRC contacted the complainant to ask for some confirmation regarding the type of information the complainant required, and the complainant replied that same day.
11. On 22 November 2021, HMRC said that it would be extending the deadline for response to 21 December 2021 because (pursuant to section 10(3) of FOIA) it needed more time to consider the public interest test in respect of section 36 of FOIA.
12. On 24 January 2022 HMRC disclosed six 'sent' and 41 'received' emails. Some information was redacted under sections 36, 40 and 44 of FOIA.
13. Following an internal review, HMRC maintained its position. Whilst it said the request had been complex, HMRC acknowledged that there had been an "unacceptable" delay in responding to the request.

Scope of the case

14. The complainant contacted the Commissioner on 11 September 2022 to complain about the way their request for information had been handled.
15. Part of the complaint of 11 September 2022 was that HMRC had refused to provide the opinion of the 'qualified person' in relation to HMRC's application of section 36; and that HMRC had not yet disclosed any meta-data associated with the application of section 36. However such information was not part of the complainant's narrowed request. Any information that the complainant requested after 25 October 2021, and any related concerns, should be handled separately. The Commissioner will not address them here.
16. The Commissioner emphasises that the request being considered in this decision notice is the request set out at paragraph 9 above.
17. The complainant is not challenging the application of section 40.
18. They have raised concerns that HMRC did not respond within the statutory time for compliance.
19. During the Commissioner's investigation, HMRC disclosed the vast majority of meeting minutes previously withheld under section 36(2)(b). A few redactions remain in emails 1, 18 and 30 under section 36(2)(b); HMRC is also applying section 44(1)(a) to some of the text in emails 18 and 33.
20. The Commissioner therefore considers that the scope of the present case is to determine whether HMRC is entitled to withhold the remaining information within scope of the 25 October 2021 request under sections 36(2)(b), 36(2)(c) and 44(1)(a) of FOIA; and whether HMRC breached any procedural sections of FOIA.
21. The complainant has emphasised that they expect all points they have made in their correspondence to be "fully considered" by the Commissioner. The Commissioner assures the complainant that he has carefully considered all of the complainant's comments, and whether they relate to any compliance issues he needs to address in this decision. The Commissioner considers that the scope of the case can be set out as at paragraph 20 above.

Reasons for decision

Section 36(2)(b) and (c)

22. Section 36(2) states that:

“Information ... is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under [FOIA]—

...

(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 otherwise to prejudice, the effective conduct of public affairs”.

23. Thus the judgement about prejudice must be made by the legally authorised qualified person for that public authority; and the qualified person’s opinion must be ‘reasonable’.

24. HMRC’s qualified persons are its Commissioners. They include Jim Harra and Angela MacDonald. HMRC has disclosed documents relating to the qualified person’s opinion under FOIA, and the Commissioner has seen them. Both Jim Harra and Angela MacDonald gave their opinion, for different pieces of information that HMRC considered under section 36.

25. The Commissioner is satisfied that the opinion was sought at the appropriate time and they had access to all relevant information.

26. Section 36 is a qualified exemption so is subject to a public interest test.

27. HMRC explained that it has applied section 36(2)(b) to discussions (two emails) between HMRC’s Chief Executive and other senior officials about loan charge policy and connected matters, and to some minutes from Executive Committee meetings on ‘hot topics’. It explained that it has applied section 36(2)(c) to internal ‘out of hours’ telephone numbers for several government departments.

28. For both 36(2)(b) and (c), HMRC is claiming the lower level of likelihood – that disclosure ‘would be likely to’ cause the relevant inhibition or prejudice. HMRC confirmed this during the Commissioner’s investigation.

Section 36(2)(b)

29. HMRC is relying on section 36(2)(b)(i) and (ii) in relation to both types of information being withheld under this section and outlined above (paragraph 27) .
30. HMRC argued that disclosure of emails 3 and 4, between HMRC's Chief Executive and other senior officials, would likely "lead to a chilling effect" on the provision of advice and discussions – "[HMRC's] Chief Executive has expressed himself completely and candidly and would be less likely to do so in the future should their comments be made public". It noted that whilst the withheld information was nearly three years old, the loan charge policy is subject to continued scrutiny and remains a live issue.
31. Similarly it argued that disclosure of the 'hot topics' meeting minutes would likely have a chilling effect. It considers that it is important that views can be freely exchanged and candid advice given at the meetings in question.
32. For both types of withheld information, when carrying out the public interest test HMRC acknowledged that disclosure would promote transparency and accountability. However it assigned greater weight to the chilling effect arguments, and determined that the exemption should be maintained.
33. Commenting on emails 3 and 4, the complainant argued that "this issue is plainly and clearly in the past". On the withheld 'hot topics' meeting minutes, again the complainant argued that the information is old. In their correspondence with the Commissioner, the complainant has explained their concerns that "HMRC officials are intent on withholding ... disparaging comments and accusations ... related to the Loan Charge Action Group and its members" and that HMRC is applying section 36 "to conceal information which places HMRC in a bad, or even worse, light in its execution of [the loan charge policy]".

Commissioner's position – emails 3 and 4

34. The Commissioner accepts that the qualified person's opinion is a reasonable one, in accordance with his guidance on reasonableness in the context of this exemption (it is not an irrational or absurd opinion).
35. His guidance on section 36(2)(b) acknowledges chilling effect arguments, and explains that they are likely to be strongest if the issue in question is still live. In this instance the loan charge is still being disputed.

36. He is satisfied that the exemption is engaged and that the public interest lies in maintaining the exemption.
37. The Commissioner highlights another, recent decision notice¹ in which he has agreed with HMRC's application of section 36(2)(b) to correspondence between senior officials about the loan charge policy. The request in that case was submitted around the time of the narrowed request in the present case.
38. He therefore directs the complainant to the comments made in that decision notice about the balance of the public interest, many of which are relevant to the present case.
39. Regarding the complainant's concern that HMRC is withholding "disparaging comments and accusations ... related to the Loan Charge Action Group and its members", the Commissioner confirms that he has seen nothing in the withheld information to support such a concern.

Commissioner's position – 'hot topics' meeting minutes

40. As a result of HMRC's revised disclosure during the Commissioner's investigation, there are now only three remaining redactions under section 36(2)(b) in the meeting minutes – they are in emails 1, 18 and 30.
41. The redacted text in emails 18 and 30 is exactly the same.
42. For all three pieces of text, the Commissioner accepts that the qualified person's opinion is reasonable, the exemption is engaged and the public interest favours maintaining the exemption.
43. It is worth noting that the information itself is not about the loan charge, so it is not the type of information that the complainant is most interested in.
44. The Commissioner, in assessing the balance of the public interest in this case, has given weight to the qualified person's opinion. HMRC is concerned about disclosure resulting in the loss of frankness and candour in future meetings, and the meetings in question are Executive Committee meetings. HMRC's website explains that the Executive Committee is HMRC's "main executive forum and the primary place in which Commissioners make their decisions". The qualified person, a

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4023980/ico-180141-k5q5.pdf>

Commissioner, will have the requisite knowledge of the consequences of disclosure.

45. The Commissioner has also considered the content and sensitivity of the redacted information and HMRC's further, specific comments about it following the revised disclosure (the Commissioner will not repeat all of those comments here, as that would risk revealing some of the withheld information).
46. As his guidance² explains, the content and sensitivity of the information are important considerations.
47. Regarding the redacted text in emails 18 and 30, HMRC highlighted a previous decision notice³ in which the Commissioner upheld HMRC's application of section 36(2)(b)(ii) to the same type of information that is being withheld here. The Commissioner considers that the reasoning in that decision notice applies to the present case too.

Section 36(2)(c)

48. HMRC considers that the 'out of hours' telephone numbers for government departments, if disclosed, would likely be misused and need to be changed.
49. For the public interest test, HMRC said:

“Whilst HMRC accepts the public interest in government departments being as open and transparent as possible, we do not consider any wider public interest to be met by the disclosure of this information. Rather we find the public interest to favour government departments being able to operate effectively”.
50. In their internal review request the complainant queried HMRC's evidence that the withheld telephone numbers would likely be misused if disclosed, and noted that elsewhere other telephone numbers had been disclosed. The complainant was referencing two mobile numbers.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020412/ic-110605-h4p4.pdf>

51. The Commissioner is satisfied that the qualified person's opinion is a reasonable one and there is a real chance that the withheld numbers would be misused if disclosed. The exemption is therefore engaged.
52. The Commissioner considers that the weight of the public interest lies in maintaining the exemption. He can see no compelling public interest argument for the disclosure of the 'out of hours' numbers.
53. In response to the complainant's point about two disclosed mobile numbers, the Commissioner notes that they were not 'out of hours' numbers. HMRC explained the numbers were disclosed in error. The Commissioner does not share the complainant's view that this disclosure undermines the qualified person's opinion regarding the out of hours numbers.

Section 44(1)(a)

54. Section 44(1)(a) provides that information is exempt from disclosure if its disclosure (otherwise than under FOIA) is prohibited by or under any enactment.
55. It is an absolute exemption, so is not subject to a public interest test.
56. HMRC cited the Commissioners for Revenue and Customs Act (2005) (CRCA), and stated that a "duty of confidentiality prohibits HMRC officials ... from disclosing information held by HMRC in connection with its functions".
57. Section 18(1) of CRCA provides that HMRC officials may not disclose information held by HMRC in connection with a function of HMRC.
58. Section 5 of CRCA provides that HMRC's functions include "the collection and management of revenue".
59. The Commissioner has seen the withheld information and is satisfied that it is held by HMRC in connection with the above function of HMRC – thus it falls under section 18(1) of CRCA and its disclosure is prohibited.
60. Section 23(1) of CRCA provides that information relating to a person, the disclosure of which is prohibited by section 18(1) of CRCA, is exempt from disclosure under FOIA (by virtue of section 44(1)(a) of FOIA) if its disclosure would specify the identity of the person to whom the information relates or would enable the person's identity to be deduced.
61. For the purposes of CRCA, 'person' includes natural and legal persons.
62. Having seen the withheld information, the Commissioner is satisfied that it either specifies identities or would enable identities to be deduced.

63. The Commissioner has considered the complainant's comments about section 44(1)(a) in their internal review request. His understanding is that the complainant is concerned that HMRC has withheld comments about published articles. However in its submissions, HMRC has highlighted a previous decision notice⁴ issued by the Commissioner, which explains that the effect of CRCA is that no-one is entitled to information HMRC holds relating to a person, even if it is already in the public domain (paragraph 23).
64. The Commissioner also understands that the complainant believes that HMRC has withheld information because it relates to the loan charge whilst disclosing other, similar information that does not relate to the loan charge. However, having seen the withheld information himself, the Commissioner can confirm that is not the case here.
65. The complainant has also argued that the disclosed information reveals some identities of persons. However, in the Commissioner's view, that does not mean that section 44(1)(a) cannot apply to the text HMRC has redacted under that exemption.
66. As the Commissioner is satisfied that a person could be identified from the withheld information, section 23(1) of CRCA is engaged and the information is exempt from disclosure under section 44(1)(a) of FOIA.

Procedural matters

67. As noted above, HMRC responded to the narrowed request of 25 October 2021 on 24 January 2022. This was 51 working days after receiving the confirmation that the complainant had provided on 9 November 2021 (there were three bank holidays between 9 November 2021 and 24 January 2022).
68. In its internal review HMRC explained that consultations were necessary, and that it was handling a large number of similar requests at the time.
69. HMRC apologised to the complainant, and accepted that the delay was unacceptable.
70. However in its submissions to the Commissioner, HMRC cited section 10(3) of FOIA. This provision allows a public authority to delay disclosing

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020484/ic-125944-l6r0.pdf>

information beyond 20 working days if it needs additional time to consider the balance of the public interest.

71. Similarly, section 17(3) of FOIA allows a public authority to delay issuing a refusal notice beyond 20 working days if it needs additional time to consider the balance of the public interest.
72. There is no statutory limit on the amount of time a public authority can take in order to consider the balance of the public interest. FOIA refers to a delay that is "reasonable in the circumstances", but the Commissioner considers that this should usually only be an additional 20 working days. A delay beyond 40 working days from the date of the request will only be "reasonable" in exceptional circumstances.
73. HMRC has emphasised the level of consultation the request involved.
74. The Commissioner has considered the correspondence that HMRC highlighted as evidence that the time taken to respond was reasonable.
75. However he is not satisfied that the request involved exceptional circumstances making the delay beyond 40 working days reasonable.
76. The Commissioner therefore finds that HMRC took an unreasonable amount of time to complete its public interest deliberations, so breached sections 10(3) and 17(3) of FOIA.

Other matters

77. The Commissioner notes that an internal review was requested on 11 March 2022, but HMRC did not provide one until 13 June 2022. Whilst internal reviews are not a statutory requirement, they are a matter of good practice, and the Commissioner's guidance⁵ explains that where public authorities have internal review procedures they should ensure that internal reviews take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

⁵ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-freedom-of-information/refusing-a-request/#20>

Right of appeal

78. 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

79. 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.
80. 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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