

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2023

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

Decision

1. The complainant requested information from HM Revenue and Customs ("HMRC") relating to legal advice sought by HMRC.
2. The Commissioner's decision is that HMRC is entitled to rely on section 42(1) (legal professional privilege) of FOIA to withhold the requested information.
3. No steps are required.

Request and response

4. The complainant made the following information request to HMRC on 9 December 2021:

"Under the Freedom of Information Act (FOI) I request copies of the minutes to all meetings held and all legal advice in preparing the following 4 letter(s) sent by HMRC to Michelle Donelan MP.

Firstly the letters from Angela MacDonald dated 4 January 2023 and 3 May and also the letters sent by Jim Harra dated 10 March and 1 June."
5. HMRC responded on 6 July 2023. It stated that it held some of the information but refused to provide it citing section 42 (legal professional privilege) as the basis for doing so. HMRC stated that the remainder of the information was not held, specifically, minutes in relation to meetings held in preparing for the letters sent by HMRC to Michelle Donelan MP.

6. Following an internal review HMRC confirmed to the complainant on 10 August 2023 that it upheld its decision to refuse the request.

Scope of the case

7. The complainant contacted the Commissioner on 21 August 2023 to complain about the way HMRC handled his request for information.
8. The Commissioner considers the scope of his investigation is to determine whether or not HMRC are correct in their application of section 42(1) of FOIA to the held information within scope. The complainant has not raised issue with HMRC's response that it did not hold some of the requested information. Accordingly the Commissioner has not investigated that aspect of the response.

Reasons for decision

Section 42(1): legal professional privilege

9. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP).
10. There are two types of LPP – litigation privilege and advice privilege. HMRC has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client (HMRC) and a legal adviser, made for the dominant purpose of seeking and giving legal advice.
11. The Commissioner has reviewed the withheld information and he is satisfied that it comprises of communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP. Accordingly the Commissioner finds that the exemption is engaged in respect of the withheld information.
12. Section 42 is a class based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

Public interest in disclosure

13. In regard to the public interest in disclosing the withheld information, the complainant has argued that there is a public interest in

understanding how HMRC have come to the decision about how to classify a mastectomy bra for the purposes of Customs classification legislation.

14. They go on to say that in their opinion HMRC has adopted an incorrect classification and is wrongly charging 6% duty on mastectomy bras which has the potential to affect a large number of people.
15. Whilst this is primarily a tax issue, the Commissioner recognises that it could also have the potential to be quite an emotive topic given the type of person who would be likely to require a mastectomy bra (e.g. women following cancer treatment.)
16. HMRC has acknowledged that the general public interest in transparency counts in favour of disclosure. It also acknowledges that there will be public interest in Customs duties applicable to the classification of mastectomy bras.

Public interest in maintaining the exemption

17. HMRC argued that whilst it recognises the public interest in disclosure, this particular issue relates to a legal interpretation on how to apply Customs classification legislation. It involves a specific company and a limited number of individuals who consider HMRC is not applying Customs legislation correctly. As such, the information relates to the requester's own specific interests rather than those of the general public.
18. HMRC further argued that there is a strong public interest in a person seeking access to legal advice being able to communicate freely with their legal advisers in confidence, and in being able to receive advice from those legal advisers in confidence.
19. It went on to say that 'an important factor which underlies the general rationale for legal professional privilege and its particular application in the case of governmental decisions, is that the rule against disclosure should be known to operate with reasonable certainty in advance, since if its application was uncertain and too readily displaced, it would undermine the very public interest in encouraging full and frank exchanges which the rule is supposed to promote.'

Balance of the public interest

20. The public interest here means the public good, it is not necessarily what is of interest to the public; or the private interests of the requester (unless those private interests reflect what is in best interests of the public, for example in holding public authorities to account).
21. The Commissioner recognises that, in this case, the complainant's interest in the information aligns with broader public interests. These are the general public interest in transparency, the public interest in good decision making, and ensuring that HMRC is applying Customs legislation correctly.
22. The public interest here, then, is in ensuring that HMRC is able to obtain and use legal advice without its position being prejudiced by the disclosure of information. Whilst the Commissioner recognises that there is a general public interest in understanding how HMRC came to the conclusion to classify mastectomy bras in the way it did, he considers that disclosure would, in this case, undermine HMRC's ability to have full and frank exchanges with its legal advisers.
23. The general public interest inherent in section 42 will generally be strong owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
24. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
25. However, in this case, having regard to the content of the withheld information, it is the Commissioner's opinion that disclosure would do little to explain how HMRC reached its decision. It would simply confirm that HMRC sought legal advice prior to formulating a response to correspondence.
26. Although the Commissioner accepts that disclosure may provide some insight into how HMRC reached the decision it did, he also notes that some or all of the advice could be relevant when corresponding on the same issue in the future.
27. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However he does not consider that they

are strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case.

28. Having considered the relevant factors the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to HMRC's ability to obtain legal advice.
29. The Commissioner concludes that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, HMRC is entitled to rely section 42(1) in order to withhold the information in question.

Right of appeal

30. 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 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

Sarah O’Cathain
Senior Case Officer
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Wycliffe House
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