

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 November 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested from HM Revenue and Customs (HMRC) information contained in 37 email chains sent and / or received by its General Counsel with specified key words and related to HMRC's Loan Charge policy.
2. HMRC provided some information but withheld the remainder relying on sections 40(2) (Personal information), 42(1) (Legal professional privilege) and 44(1)(a) (Prohibition on disclosure).
3. During the course of the Commissioner's investigation, HMRC provided further information within the scope of the request but withheld the remainder by virtue of section 42.
4. The Commissioner's decision is that HMRC was entitled to rely on section 42 to withhold the remaining requested information.
5. The Commissioner does not require HMRC to take any steps as a result of this decision notice.

#### Request and response

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6. On 13 November 2021, the complainant wrote to HM Revenue and Customs (HMRC) and requested information in the following terms:

*"The FOI request FOI2021/25846 requested a count of the emails sent/received by Alan Evans ( Legal Counsel & DG HMRC) over a period*

*of four months. These emails contained the terms "DR", "LOAN CHARGE" and "LC".*

*The analysis provided information that Mr Evans sent a total of 37 emails with these terms over the period requested. 3 in September 2019 22 in October 2019 12 in December 2019 Please provide a copy of the 37 emails/attachments that Mr Evans sent."*

7. On 20 July 2023 the complainant sent to HMRC a chaser email requesting a response. In there, the complainant referred to HMRC's acknowledgement reply of 8 December 2021 with a case reference FOI2021/29552 and also to his reminder for response which he sent on 23 March 2023.
8. In its response on 20 July 2023, HMRC explained to the complainant that the complainant's request of 7 December 2021 with the assigned number FOI2021/29552 duplicated information that the complainant had already requested a month before (13 November 2021) to which a reference number FOI2021/27578 was assigned and response provided on 8 April 2022.
9. On the same date, 20 July 2023, the complainant acknowledged HMRC's response and made further queries regarding its response of 8 April 2022.
10. In its response of 8 April 2022 HMRC provided the majority of the information within the scope of the request but withheld some extracts. HMRC cited the following exemptions as its basis for doing so:
  - Section 44(1)(a) (Prohibition on disclosure)
  - Section 42 (Legal professional privilege)
  - Section 40(2) (Personal information of a third party)
11. HMRC also excluded some of the information which it deemed to be out of scope of the request.
12. On the date indicated in paragraph 9, the complainant challenged section 42 and requested further information that was not disclosed to him and which he believed existed based on the content of emails he did receive in response to his request. The relevant emails were identified as '10', '17', '19' and '20'.
13. HMRC responded on 8 November 2023. It provided further information in relation to emails '10', '17' and '19' and explained the exemptions on which it relied to withhold some of the information within the emails. These were section 40(2) and section 42. HMRC further explained that the information in email '20' was withheld under section 14 (vexatious request).

14. On 9 November 2023 the complainant wrote to HMRC asking for an internal review of its original response. The complainant particularly challenged the reliance of HMRC on sections 14 and 42.
15. HMRC acknowledged receipt of the request for an internal review on 10 November 2023 and responded on 23 February 2024. It maintained its reliance on sections 14(1) and 42(1) and it also addressed the 'out of scope' information that it excluded from disclosure in response to the request.
16. HMRC explained that the series of request culminating in the subject of the current complaint, began in August 2021. The initial request and the subsequent requests sought copies of email containing key terms relating to the Loan Charge. HMRC further acknowledged that there was serious and legitimate basis to those initial requests in response to which HMRC disclosed a substantial volumes of information.
17. It further explained that to preserve its resources, HMRC focused on the consideration of material relating to the Loan Charge as this was where the complainants interest clearly was, and deemed information which did not as out of scope.
18. HMRC referred to the ICO's Decision Notice<sup>1</sup> where the Commissioner accepted such approach as proportionate and sensible in the particular circumstances of that request.
19. HMRC concluded that, having reviewed the information marked as 'out of scope' against the request made by the complainant, and having applied the reasoning of the cited decision notice, the approach to the information unrelated to the Loan Charge was appropriate.

### **Scope of the case**

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20. The complainant contacted the Commissioner to complain about the way his request had been handled by HMRC. The complainant particularly challenged sections 14(1), 42(1) and HMRC's assessment regarding the 'out of scope' information that was not disclosed to him.
21. In response to the Commissioner's queries during his investigation, HMRC confirmed that due to the passage of time it no longer relied on

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<sup>11</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025144/ic-161762-z1x9.pdf>

section 14(1) in relation to email '20' and that this information was disclosed to the complainant.

22. Upon further communication, the complainant confirmed to the Commissioner that he remained dissatisfied with the application of section 42(1) by HMRC to withhold the remaining information. The complainant did not ask the Commissioner to consider the information classed as 'out of scope'.
23. The Commissioner considers that the scope of his investigation is to determine whether HMRC was correct to rely on section 42(1) to withhold some of the information contained within emails '17' and '19'.

## Reasons for decision

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### Section 42(1) - legal professional privilege

24. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and the claim to privilege could be maintained in legal proceedings. It protects confidential communications between a lawyer and client.
25. There are two types of LPP – litigation privilege and advice privilege. The Commissioner's guidance<sup>2</sup> on section 42(1) explains that where no litigation is in progress or contemplated, such privilege covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.
26. HMRC confirmed that in this case it relied on advice privilege. Specifically, HMRC applied section 42(1) to sections of two emails, namely emails '17' and '19'.
27. HMRC explained that in relation to the withheld information in email '17', the communication concerns a request copied to HMRC's General Counsel (legal adviser) from other senior officials (client) concerned with the Loan Charge policy. HMRC added that the dominant purpose of the communication was to seek legal advice on how previous legal assessments could be applied in different scenarios. It further added that the nature of this communication becomes apparent when read in

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/>

the context of an email already disclosed to the complainant, which says:

"...I'd welcome early sight of the legal reasoning and assessment so far" and "Are you being looped into this exchange, and urgent request for legal advice?"

28. In relation to the withheld information in email '19' HMRC explained that this concerns communication between the FOI team (client) and its General Counsel (legal adviser) about FOIA exemptions in response to a request, which had been informed by legal advice.
29. The Commissioner is not aware of any evidence suggesting that privilege has been waived in respect of any of the withheld information. HMRC confirmed to the Commissioner that none of the withheld information has been disclosed in open court and neither has privilege been waived through disclosure by other means. Therefore, on this basis, HMRC argued that the withheld information maintains its confidentiality.
30. The complainant challenged the application of section 42. In his communication to HMRC of 20 July 2023 he said:

"The emails in question are between HMRC's internal solicitors department and other HMRC managers,. The use of section for 42 , Legal Professional Privilege is unreasonable . Legal professional privilege typically protects confidential communications between a lawyer and their client for the purpose of seeking or providing legal advice. This is not the case within these communications as they are all internal".
31. Later, in his communication to the Commissioner on 29 August 2024, the complainant further specified that in relation to the (information disclosed in) email '17' the person sending an email is not a part of the HMRC legal team and has simply posed a number of bullets / questions to share with a large number of other senior civil servants.
32. In relation to email '19' the complainant said that the communication (i.e. that disclosed to him) "appears to be a request for support in responding to another FOI request (not related to mine) from the head of HMRC's FOI team".
33. The Commissioner has considered HMRC's explanation and the complainant's arguments, and has viewed the withheld information. The Commissioner respectfully disagrees with the complainant's argument that the withheld information in question cannot attract legal professional privilege because it comprises internal communications.

34. The Commissioner's guidance<sup>3</sup> describes who the legal adviser and who is the client. With reference to the Court of Appeal decision in the *Three Rivers District Council & Ors v The Governor Company of the Bank of England* (No.5) [2003] EWCA Civ 474<sup>4</sup> it confirms that a team of employees can constitute a client, depending on the circumstances of the case. The Commissioner also accepts that HMRC's internal legal team may be considered legal advisers for the purposes of determining whether privilege attracts.
35. The Commissioner is further satisfied that the information withheld under section 42 constitutes confidential communication between a legal adviser and their client made for the dominant purpose of seeking or giving legal advice. As stated by HMRC at paragraph 23 above, the information disclosed to the complainant clearly references that legal advice has been sought, and describes the advice received. The Commissioner appreciates that, unlike the complainant, he has had the opportunity to examine the withheld information, but having done so he is able to conclude that it falls within the scope of the exemption.
36. The Commissioner accepts that the withheld information attracts legal professional privilege, and in particular advice privilege. Accordingly the Commissioner finds that the exemption is engaged in respect of the withheld information. Section 42 is a class based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect in order for it to be engaged. It is however qualified by the public interest test.

### **Public interest test**

#### The complainant's arguments

37. The complainant referred to the need for transparency from HMRC when discussing issues regarding the Loan Charge which, according to the complainant, would be of significant importance to the 67,000 people affected by this policy.

#### HMRC's arguments.

38. HMRC acknowledged the legitimate public interest in ensuring that public authorities are transparent in their actions. It recognised that in

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<sup>3</sup> Ibid.

<sup>4</sup> <https://www.bailii.org/ew/cases/EWCA/Civ/2003/474.html>

this particular case disclosure could assist the public in understanding further the background of any decision made by the government in relation to the Loan Charge policy and how it responds to information requests concerning it. HMRC recognised the importance of the issues relevant to this request for information.

39. However, HMRC also argued that there is a very strong public interest in preserving the principle of legal professional privilege, allowing the department “*to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain*”. It cited an Upper Tribunal decision, *Cabinet Office v Information Commissioner* [2014] UKUT 461 (AAC),<sup>5</sup> in support of this argument.
40. HMRC further argued that the disclosure could have a negative impact on the frankness of legal advice provided and even upon the extent that legal advice may or may not be sought.

#### The Commissioner’s findings

41. The Commissioner acknowledges the legitimate public interest in disclosure to promote transparency in public authorities’ actions and decision making.
42. In this case the Commissioner’s view is that in support of disclosure the main factor to consider is to what extent the disclosure would inform the public about the way HMRC handled the Loan Charge issue and whether this outweighs the public interest in maintaining the exemption.
43. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
44. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have, that communications will remain confidential, undermines the ability of parties to seek or provide legal advice appropriately and thus erodes the rule of law and the individual rights it guarantees.

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<sup>5</sup> Paras, 62-63

45. Having examined the withheld information, the Commissioner notes that the withheld information provides an accurate and comprehensive picture of the considerations taken by HMRC when considering how to proceed in complex circumstances and he appreciates that this could to an extent assure the public that a public authority acted properly in seeking legal advice.
46. However, although he recognises the benefit to the public in HMRC's openness and transparency, having reviewed details of the withheld information, the Commissioner is not satisfied that the disclosure would further inform the public about HMRC decision making with regard to the Loan Charge policy. He therefore cannot attach sufficient weight to the public interest in favour of disclosure as to outweigh the inherently strong principle of legal professional privilege.
47. The Commissioner considers that the balance of public interest in this case lies in maintaining the exemption and protecting HMRC's ability to collate information necessary to give or obtain legal advice without the fear of disclosure and he accepts that this would likely be undermined as a result of disclosure in this particular case. Whilst the Commissioner has considered the complainant's public interest arguments, he does not consider that they are sufficiently strong to counter or even equal the public interest in maintaining the exemption.
48. 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 on section 42(1) in order to withhold the information in question.



## Right of appeal

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49. 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](mailto:grc@justice.gov.uk)

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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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