

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2019

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested a list of Disguised Remuneration Schemes held by the public authority including a breakdown to show whether it considered any of the schemes legal or illegal. The public authority withheld the requested information on the basis of the exemption at section 44(1)(a) FOIA (Prohibitions on disclosure).
2. The Commissioner's decision is that the public authority was entitled to rely on section 44(1)(a).
3. No steps are required.

Request and response

4. On 1 August 2018 the complainant submitted a request for information to the public authority in the following terms:

'In a letter dated July 2018 it states the following:

"DR Schemes are artificial arrangements that pay a carefully calculated amount through the payroll; just enough to give enough to give the employee entitlement to state pension credits, and make full use of their personal allowance so that little, or no, tax is paid. Most of their income is paid in the form of loans, often routed through an offshore trust. Loans are not taxable, but these are loans in name only. They are usually given interest free and allegedly repayable on demand, but there is no intention to repay them and they are not repaid. HMRC has proven in court that they are taxable as earnings, but no income tax and NICs were paid at the time"

Please can you answer these questions to enable my full understanding of the legal status of such schemes:

1) Please can you provide a full list of schemes that you are aware of and if at any time they were considered by HMRC legal representatives to be

1a) Legal under UK LAW (i.e not illegal)

1b) Illegal under UK LAW

1c) Are still legal under UK LAW as of the date of this request

1d) Have since been made illegal under UK LAW as of <given date>'

5. The public authority provided its response on 30 August 2018. It confirmed that it held information within the scope of the request which it considered exempt from disclosure on the basis of section 31(1)(d) FOIA.
6. The complainant requested an internal review of that decision on 30 August 2018.
7. On 15 October 2018 the public authority wrote to the complainant with details of the outcome of the review. The review concluded that the list of DR schemes was exempt from disclosure on the basis of section 44(1)(a) FOIA and that as such it also could not provide the breakdown requested in parts 1 (a-d) of the request.

Scope of the case

8. The complainant contacted the Commissioner on 8 November 2018 to complain about the public authority's refusal to disclose the information he requested on 1 August 2018.
9. The focus of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemption at section 44(1)(a).

Reasons for decision

Section 44(1)(a)

10. Information is exempt from disclosure on the basis of section 44(1)(a) if its disclosure is prohibited by or under any enactment.¹
11. The public authority's position is summarised below.
12. The requested information is held in connection with the public authority's function of assessing and collecting of tax.
13. The list provided to the Commissioner pursuant to the first part of the request contains the scheme names as they are known to the public authority. In 2004 the Disclosure of Tax Avoidance Schemes (DOTAS) rules were introduced. Under these rules promoters are required to give scheme users tax avoidance 'Scheme Reference Number (SRN)' issued by the public authority when an avoidance scheme is disclosed to the public authority under DOTAS.
14. Some schemes will have been created prior to the introduction of DOTAS in 2004; others may not have been described as disclosable under the DOTAS regime when there were first marketed, as DOTAS has been extended and expanded over the years to keep pace with the changing avoidance landscape. Such schemes will only have an internal HMRC reference number rather than a SRN.

¹ For a full text of the exemption, visit <http://www.legislation.gov.uk/ukpga/2000/36/section/44>

15. The requested information is therefore prohibited from disclosure under section 18(1) CRCA by virtue of being held in connection with a function of the public authority.
16. Further, the requested information is specifically prohibited from disclosure under section 23(1) CRCA because it would reveal the identity of legal entities and where such schemes are not in themselves legal entities, the names associated to them relate to a person who could be easily identified from the list of schemes held within the scope of the request.
17. It is on this basis that the public authority does not publish the names of the DOTAS registered schemes on GOV.UK but rather anonymise these through the published scheme reference numbers.

Commissioner's considerations

18. 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.'

19. The Commissioner shares the view that the list of DR schemes is held by the public authority in connection with its function of assessing and collecting of tax.
20. Although there are exceptions to section 18(1) contained in sections 18(2) and (3) CRCA, section 23 CRCA was amended by section 19(4) of the Borders, Citizenship and Immigration Act 2009 to make clear that sections 18(2) and (3) are to be disregarded when considering disclosure of revenue and customs information relating to a person under FOIA.
21. Notwithstanding the above, section 23(1) CRCA 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.....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.'

22. Therefore, under section 23(1) CRCA, information prohibited from disclosure by virtue of section 18(1) CRCA is specifically designated as exempt from disclosure under section 44(1)(a) FOIA if its disclosure would identify the person to whom it relates or would enable the identity of such a person to be deduced.
23. The term "person" includes both natural and legal persons.
24. The list of schemes clearly relates to identifiable persons. Similarly a breakdown of the list of schemes to provide the information requested in parts 1 (a-d) of the request would clearly relate to identifiable persons.
25. The Commissioner therefore finds that the public authority was entitled to withhold the requested information on the basis of section 44(1)(a) FOIA.
26. For the avoidance of doubt, the Commissioner considered the complainant's submissions before making her decision. However, the submissions which are generally focussed on the public interest in releasing the withheld information carry no weight with respect to the application of the absolute exemption at section 44(1)(a).²

² Absolute exemptions are not subject to the public interest test set out in section 2(2)(b) FOIA.

Right of appeal

27. 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@hmcts.gsi.gov.uk

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

28. 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.
29. 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