

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2021

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

Decision (including any steps ordered)

1. The complainant has requested information relating to NHS Trusts evidence that Trainee Consultant Psychiatrists (TCPs) are engaged in training contracts.
2. The Commissioner's decision is that HM Revenue and Customs (HMRC) has correctly applied section 44(1)(a) to the withheld information.
3. The Commissioner does not require the public authority to take the any steps as a result of this decision notice.

Request and response

4. On 18 November 2020, the complainant wrote to HMRC and requested information in the following terms:

"Clarification of information is sought:

With respect to the document 'Submission to Commissioners':

(1) What is the date of the document?

(2) Regarding section 5 therein, please state which NHS Trusts have 'submitted evidence'?

And please provide full copy of the 'evidence' submitted by NHS Trusts 'which they say demonstrates that TCPs are engaged in training contracts':

'A very small number of other Trusts have since submitted

documentation and evidence which takes issue with the specialists' view and which they say demonstrates that TCPs are engaged on training contracts and that refunds are due."

5. HMRC responded on 14 December 2020. It stated:

"HMRC does not hold comprehensive records of evidence provided by NHS Trusts on this matter. Our search has identified two relevant contracts which have been provided as an annex to this letter. Please note, the names of NHS Trusts who have submitted evidence is exempt from disclosure by virtue of section 44(1)(a) FOIA"

6. It also confirmed that the 'Commissioners update note' was sent on 28 November 2017.
7. Following an internal review HMRC wrote to the complainant on 21 December 2020 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 23 December 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if HMRC correctly cited section 44(1)(a) in response to the request.

Reasons for decision

10. HMRC stated that the names of the NHS Trusts who submitted evidence was exempt from disclosure by virtue of section 44(1)(a) FOIA (prohibition from disclosure).
11. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by another piece of legislation or would constitute a contempt of court. In this particular case, HMRC is relying on section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA).
12. Section 44 is an absolute exemption and not subject to the public interest test.

HMRC's position

13. HMRC explained that it is required to consider two questions:

- Is the requested information held in connection with one of its functions? and
- Does the information relate to a "person" who is identified, or who could be identified from the information requested?

14. The term "person" includes both natural and legal persons, so, for example, entities such as companies, trusts and charities. In this case, it considered the answers to both questions was "Yes".

15. First, the information is held in connection with its functions because the information is held for the purpose of assessment and collection of tax. Secondly, the request identifies information relating to an individual taxpayer which is the name of the Trusts.

16. Accordingly, the section 44(1)(a) FOIA exemption is engaged and its duty of confidentiality under section 18(1) of the CRCA removes any possibility of disclosure on a discretionary basis.

17. In its internal review HMRC clarified, the redacted sections of the previously released information were withheld by virtue of the exemption at section 44(1)(a) FOIA.

18. Although FOIA creates a duty for public authorities to provide information on request, there are prohibitions on disclosure created by other legislation, EU obligations and contempt of court. The effect of section 44 is that, if one of these other prohibitions applies, the information is exempt from disclosure under FOIA.

19. The CRCA is an example of a statutory prohibition referring to the functions of a public authority. The functions of Revenue and Customs relate to the collection and management of taxes, duties and National Insurance, including investigations and prosecutions. The department's functions and powers are set out in detail in sections 5-10 of the CRCA, including at section 9 the power to do anything which they think is necessary, expedient, incidental or conducive to the exercise of their functions.

20. Section 51 confirms that the term 'function' means "...any power or duty (including a power or duty that is ancillary to another power or duty)".

21. The CRCA therefore provides for a wide interpretation of the term 'functions'. Section 18(1) of the CRCA creates a prohibition on disclosure.

22. However, the scope of the prohibition is limited, in relation to FOIA disclosures, by section 23. This says that the prohibition on disclosing information in section 18(1) of the CRCA only applies to FOIA disclosures if the information relates to an identifiable person.
23. Section 23(3) CRCA states that 'In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19.'
24. The Explanatory Notes to the CRCA (at section 19) make it clear that a 'person' in this context means a natural or legal person, and so this includes, for example, a company or in this case an NHS Trust.
25. HMRC concluded that the request encompassed two documents which it had obtained in the course of its functions from two NHS Trusts. In an unredacted format these documents would specify the identity of the person to whom the information relates. On this basis, disclosure of these documents would clearly engage the statutory prohibition at section 18(1) CRCA.

The complainant's position

26. In his submission to the Commissioner the complainant provided detailed arguments in support of his position, some of which are given below. The full submission is provided in an annex at the end of this notice.

27. The complainant explained:

"HMRC FOI Response issued copies of documents (generic NHS employment contracts) provided by one NHS Trust. HMRC failed to disclose other employment contract documents provided by other NHS Trusts. The NHS documents were not used in any legal proceedings nor any legal decision notice involving HMRC. The contractual documents had been disclosed by NHS Trusts to HMRC voluntarily; and are of the same nature/content of NHS employment contracts routinely fully disclosed by NHS Trusts under provision of FOI.

However, HMRC redacted some of the information within the NHS documents; which HMRC asserted was redacted to conceal personal information. The redacted information is not personal information. The redacted information is information of the exact same type/content that is routinely freely disclosed by NHS Trusts."

28. With regard to the above point, the issue is not whether the Trusts would redact the information, but whether there is a legal restriction on HMRC disclosing it.

29. The complainant further stated HMRC has wrongly applied section 44(1)(a) FOI Act 2000 in order to assert non-disclosure of personal information.
30. The complainant then stated that on 21 December 2020 HMRC asserted that section 44(1)(a) FOI Act 2000 applied due to section 18 Commissioners for Revenue and Customs Act 2005.

The Commissioner's decision

31. 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.

32. It is clear that the information requested has been obtained by HMRC in connection with one of its functions as it relates to the collection of income tax and National Insurance contributions.

33. Section 23 CRCA states:

Freedom of information

(1) 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 (c. 36) (prohibitions on disclosure) 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.

34. As explained at paragraph 23, the definition of 'person' in this context means a natural or legal person, and so this includes NHS Trusts. The Commissioner therefore finds that the NHS Trusts are deemed to be 'persons' for the purposes of FOIA.
35. Having considered all the above the Commissioner is satisfied that HMRC has correctly applied section 44(1)(a) to the withheld information.

Right of appeal

36. 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

37. 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.
38. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Complainant submission

HMRC FOI Response issued copies of documents (generic NHS employment contracts) provided by one NHS Trust. HMRC failed to disclose other employment contract documents provided by other NHS Trusts. The NHS documents were not used in any legal proceedings nor any legal decision notice involving HMRC. The contractual documents had been disclosed by NHS Trusts to HMRC voluntarily; and are of the same nature/content of NHS employment contracts routinely fully disclosed by NHS Trusts under provision of FOI.

However, HMRC redacted some of the information within the NHS documents; which HMRC asserted was redacted to conceal personal information. The redacted information is not personal information. The redacted information is information of the exact same type/content that is routinely freely disclosed by NHS Trusts.

HMRC has wrongly applied s.44(1)(a) FOI Act 2000 in order to assert non-disclosure of personal information.

HMRC applied the wrong section of the FOI Act 2000 for the purposes of refusing disclosure of (alleged) personal information. In any event, the information redacted is not personal information; and is not information that the NHS Trust deem exempt from disclosure.

HMRC now (21/12/2020) asserted that s.44(1)(a) FOI Act 2000 applied due to s.18 Commissioners for Revenue and Customs Act 2005.

It is evident that s.18 Commissioners for Revenue and Customs Act 2005 does not apply to the information disclosed by HMRC; for the very fact that HMRC has actually disclosed copies of a number of documents used by HMRC. Therefore, due to the very fact that HMRC has disclosed copies of documents, s.18 Commissioners for Revenue and Customs Act 2005 cannot be said to apply to the information requested from HMRC. Therefore, s.44(1)(a) FOI Act 2000 cannot apply. In any event, HMRC had originally applied s.44(1)(a) FOI wrongly; wrongly using s.44(1)(a) FOI Act to redacted information that HMRC alleged was personal information (which it is not personal information).

HMRC has evidently redacted information that should not be redacted. In order to redact the information, HMRC wrongly applied s.44(1)(a) FOI Act 2000. Then, having wrongly applied s.44(1)(a) FOI Act, HMRC has attempted to justify the use of s.44(1)(a) FOI Act by wrongly asserting that the information is subject to s.18 Commissioners for Revenue and Customs Act 2005.

The documents disclosed by HMRC (see attached) are not subject to s.18 Commissioners for Revenue and Customs Act 2005. None of the various documents already disclosed by HMRC under FOI are subject to s.18 Commissioners for Revenue and Customs Act 2005.

The redacted information (see attached documents) is not subject to s.44(1)(a) FOI Act 2000.

HMRC has wrongly asserted that NHS Trust the documents are.

The NHS Trust that supplied the documents to HMRC did not redact the information.

In the event that HMRC properly disclosed the name of the NHS Trust that supplied the documents, then that same NHS Trust would readily disclose the documents without redaction under the FOI Act 2000.

s.23 Commissioners for Revenue and Customs Act 2005 refers to s.18(1) Commissioners for Revenue and Customs Act 2005; which HMRC relies on in order to apply s.44(1)(a) FOI Act 2000 in order to refuse to provide non-redacted documents.

However, s.18(2) Commissioners for Revenue and Customs Act 2005 states:

(2) But subsection (1) does not apply to a disclosure—

(a) which—

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners,

(b) which is made in accordance with section 20 or 21,

Section 20 Commissioners for Revenue and Customs Act 2005 - Public Interest Disclosure - provides for disclosure of the non-redacted NHS Trust documents:

s.20(2):

(2) This subsection applies to a disclosure made—

(a) to a person exercising public functions (whether or not within the United Kingdom),

s.20(6):

(6) This subsection applies to a disclosure if it is made—

(a) to a person exercising public functions in relation to public safety or public health, and

(b) for the purposes of those functions.

HMRC asserts that s.23 Commissioners for Revenue and Customs Act 2005 provides for an exemption of disclosure of the redacted information; and asserts that s.23 provides an exemption in respect of information about a 'person'; and asserts that the NHS Trust is a 'person'.

However, HMRC has redacted more than just the name of the NHS Trust.

Furthermore, in respect of a 'person', s.23(3) Commissioners for Revenue and Customs Act 2005 refers to the meaning as contained within s.19 Commissioners for Revenue and Customs Act 2005. S.19 Commissioners for Revenue and Customs Act 2005 does not cite NHS Trusts as being defined as a 'person'.

Furthermore, information disclosed by HMRC shows that the documents supplied by the NHS Trust were not used to make a legal decision (HMRC explicitly declared that no legal decision was issued by HMRC as a result of the information provided by NHS Trusts). The NHS Trust documents were used internally by HMRC to advise the Commissioners for Revenue and Customs about the existing internal administrative decisions made by HMRC. HMRC disclosed copy of the internal administrative update provided to Commissioners for Revenue and Customs. Therefore, the NHS Trust documents were used for internal HMRC administrative purposes. Therefore, under provision of s.19(2) Commissioners for Revenue and Customs Act 2005 the NHS Trust documents (redacted information) is not exempt from disclosure:

(2) In subsection (1) "revenue and customs information relating to a person" means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

Therefore, HMRC has wrongly redacted information that is not exempt from disclosure; and that does not pertain to a 'person'; and that is not subject to exemption under any of the sections of the Commissioners for Revenue and Customs Act 2005 cited by HMRC; and is not exempt from disclosure under s.44(1)(a) FOI Act 2000, which has been wrongly applied by HMRC.

The redacted information is not exempt from disclosure and is in the Overriding Public Interest for disclosure; as the information pertains to the daily business of a Public Authority (NHS Trust); and is of the same

type/content routinely disclosed by NHS Trusts; and pertains to internal administrative functions of HMRC.