

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **15 September 2021**

**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 requested communications between the public authority and a named group of companies in relation to tax avoidance schemes. The public authority refused to confirm or deny whether it held the requested information on the basis of the exemption at section 44(2) FOIA (Prohibitions on disclosure).
2. The Commissioner's decision is that the public authority was entitled to rely on section 44(2) FOIA.
3. No steps are required.

## Request and response

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4. On 1 October 2020 the complainant submitted a request for information to the public authority in the following terms:

“Please provide ALL correspondence including emails, letters, meetings , transcripts of phone call recordings etc. between HMRC and the [Name Redacted] Group of Companies (including, but not limited to, [Names Redacted].) which relates to Disguised Remuneration arrangements and/or the Loan Charge and/or any reference to the POTAS (Promoters of Tax Avoidance Schemes) legislation.”
5. The public authority provided its response on 21 October 2020. Relying on section 44(2) FOIA by virtue of section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA), it explained that it could neither confirm nor deny whether it held the requested information because the information sought is about an identifiable person.
6. The complainant requested an internal review of that decision on 29 October 2020.
7. On 19 November 2020 the public authority wrote to the complainant with details of the outcome of the review. The review upheld the decision to rely on section 44(2) FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 2 December 2020 to complain about the public authority's response to his request.
9. The Commissioner's investigation considered whether the public authority was entitled to rely on the exemption at section 44(2) FOIA.

## Reasons for decision

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### Section 44(2) FOIA

10. Section 44 FOIA states:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any retained EU obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

### Complainant's position

11. The complainant's relevant submissions are set out below.

12. “...the basis of HMRC's refusal is that compliance of this request and provision of the information would 'identify' individuals, which would breach selective regulations within the FOIA. I have made it abundantly and transparently clear that I do not seek this information in any way - my only interest is in the actual substance of those communications (on specific subject matter, as clearly outlined in my original submission) which have been sent to the group of companies referenced in my request. These are publicly listed companies, with all 'identifiable' individuals and persons of significance already known - I have asked for fully redacted versions of all documents (emails, letters, call transcripts etc.), none of which would be able to establish the identity of any one of those persons.”

13. “It is clear from previous FOI requests (e.g. FOI2020/00053 and FOI2020/00559) that precedents have been set with regard to correspondence between HMRC (and HM Treasury) and other bodies/individuals, scores of whom were clearly identified in the subsequent disclosure(s) of information<sup>1</sup>. With fully redacted content in

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<sup>1</sup> The complainant did not provide copies of the relevant correspondence.

relation to the identification of individuals, it therefore must be considered a reasonable request for HMRC to release those communications which they purport to have been sending to those high-profile promoters and companies involved in the provision of so-called 'disguised remuneration' schemes, to finally prove and more importantly, evidence their persistent claims of pursuit and the dutiful enforcement of the relevant legislation. I see no distinction between those communications which have been previously disclosed (in the aforementioned FOIs) and this request - if HMRC, as the UK's tax authority, consistently claim to be tackling promoters of tax avoidance, yet refuse to provide any (suitably redacted) evidence that they are doing so, this leaves the general public justifiably believing there is no alternative conclusion to be reached other than these claims are false, misleading and disingenuous."

14. "The UK government, HM Treasury and HMRC have all made public statements and announcements in relation to promoters of tax avoidance schemes and the measures they have already (supposedly) taken, are currently taking and will take in future to tackle the behaviour of such bodies. This particular group of [Name Redacted] companies are well-known in this field and have been marketing these schemes for many years; they are also known to have made very large financial donations to the party currently in government, as evidenced and recorded on the Electoral Commission website."

#### Public authority's position

15. The public authority's submissions are summarised below.
16. The requested information, if held, would be prohibited from disclosure by virtue of sections 18(1) and 23(1) CRCA and as such would fall under section 44(1)(a) - information prohibited from disclosure by or under any enactment.
17. Similarly, confirming or denying whether the requested information is held is prohibited under sections 18(1) and 23(1) CRCA and as such engages the exemption at section 44(2). This is because confirmation or denial that the requested information is held would reveal whether the named companies are involved in the promotion of tax avoidance. This information clearly relates to the companies and they will be identifiable from the information.

Commissioner's considerations

18. The Commissioner first considered whether the CRCA prohibits the public authority from confirming or denying whether the requested information is held.

19. 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.'*

20. The Commissioner is satisfied that the requested information which relates to tackling tax avoidance schemes if held, would be held in connection with a function of the public authority. Section 18(1) CRCA is clear that the public authority may not disclose such information.

21. 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.

22. However, for the purposes of the FOIA, section 18(1) only acts as a statutory prohibition where section 23(1) CRCA is also satisfied.

23. 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.'*

24. 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.

25. It is worth restating at this point that the exemption in section 44(2) from the duty to confirm or deny is engaged if providing confirmation or denial that requested information is held would itself be prohibited by virtue of section 44(1)(a).
26. The term "person" includes both natural and legal persons.
27. Does the requested information relate to a "person"? The requested information relates to a named group of companies.
28. Would confirming or denying whether the requested information is held specify the identity of the person to whom it relates or would it enable the identity of such a person to be deduced? The group of companies to whom the requested information relates is named in the complainant's request. The Commissioner considers that where a request names any person, the answer to that request, anonymised or not, inherently discloses the information contained in the request.
29. The Commissioner is satisfied that confirming or denying whether the requested information is held is prohibited under section 23(1) CRCA. This is because, confirming or denying whether the requested information is held would reveal information held in connection with a function of the public authority – ie tackling tax avoidance and, would identify the persons to whom the information relates.
30. The Commissioner therefore finds that the public authority is entitled to rely on the exemption at section 44(2) FOIA, an absolute exemption not subject to the public interest test in section 2(1)(b) FOIA.
31. The Commissioner notes that the complainant's focus is on disclosing the requested information which he considers is held by the public authority. However, the focus of the investigation has been on whether the public authority is prohibited from merely confirming or denying whether the requested information is held. Nothing in this notice should be construed as confirming or denying that the requested information is held by the public authority.
32. The Commissioner is satisfied that the above considerations address the complainant's comments in relation to redacting the information that he considers is held by the public authority.
33. Furthermore, while it may be the case that the named group of companies is well-known in relation to Disguised Remuneration schemes, the correct question to ask is whether the CRCA prohibits the public authority from confirming or denying whether the requested information is held. The answer to this question is that it does, for the reasons set out above. The prohibition in the CRCA from disclosure under the FOIA does not make an exception for the fact that a person is

well-known. In addition, the fact that similar information has been released in the past does not undermine the public authority's position that it is prohibited under the CRCA from confirming or denying whether the requested information is held in response to a freedom of information request.

## **Right of appeal**

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34. 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)

35. 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.
36. 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**