

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

### **Decision notice**

**Date:** 22 May 2014

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

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to any investigations conducted by HM Revenue and Customs (HMRC) into two named companies relating to their attendance at a defence and security equipment exhibition. HMRC has applied section 44(2) to refuse to confirm or deny whether it holds the requested information. This is on the basis that to do so would breach a statutory prohibition on disclosure contained in the Commissioners for Revenue & Customs Act 2005 (CRCA).
2. The Commissioner's decision is that HMRC was entitled to rely on section 44(2) in respect of the information requested.
3. The Commissioner does not require the public authority to take any further action in this matter.

### **Request and response**

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4. On 20 September 2013, the complainant wrote to HMRC and requested information in the following terms:
  1. Please provide details of your investigation (if any) into [named company A] and [named company B] for breaches of the Export Control Order 2008 at the DSEI exhibition 2013.
  2. Please provide a copy of any reports concerning enforcement action against these companies and any provide recommendations made to

the police or the government (including by email or other correspondence) as to possible enforcement action.

3. Please confirm how many investigations HMRC have undertaken in relation to companies or individuals suspected of breaching any law applicable in the UK at any DSEI exhibition (including previous DSEI exhibitions).
  4. Please supply any document setting out what equipment [named company A] or [named company B] was promoting and whether it constituted an offence – including legal advice.
  5. Please provide any documentation between HMRC and the Met Police discussing possible offences by/or enforcement action against [named company A] or [named company B], or any other exhibitor, attendee or stakeholder of the DSEI exhibition.
  7. Please provide any documents sent by HMRC to [named company A] or [named company B] (or their representatives or agents) relating to possible offences at the DSEI exhibition 2013.
5. For clarity 'DSEI' refers to the Defence Security and Equipment International exhibition which is held in London every other year. It should be noted that there is no question 6.
  6. HMRC responded on 18 October 2013. It refused to confirm or deny whether it held the information requested at points 1, 2, 4, 5, and 7, relying on section 44(2) to do so. This was on the basis that confirming it did or did not hold the requested information would breach the statutory prohibition on disclosure created by sections 18 and 23 of (CRCA). It refused to provide the information on the number of investigations conducted into breaches of export law at such exhibitions under section 31(1)(a) and (b). These exemptions protect information which, if released, would prejudice law enforcement.
  7. Following an internal review HMRC wrote to the complainant on 17 January 2014. It maintained that it was correct to refuse to confirm or deny whether it held the information sought in questions 1, 2, 4, 5, 7 and to withhold the information requested at question 3 under section 31(1).
  8. During the course of the Commissioner's investigation HMRC dropped its reliance on section 31(1) in respect to question 3. Instead it now applied section 44(2) to refuse to confirm whether the information was held. However in an attempt to informally resolve the complaint in respect of the number of investigations conducted at DSEI events, it did advise the complainant that there had been less than 5 investigations.

## Scope of the case

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9. The complainant's representatives contacted the Commissioner on 10 January 2014 to complain about the way that the request for information had been handled. This was just before HMRC completed its internal review. The Commissioner usually insists that a complainant exhausts the public authority's internal complaints procedure before he will consider accepting a complaint. However in light of HMRC's delay in providing that internal review the Commissioner accepted the complaint.
10. The statutory prohibition created by section 18 of the CRCA does not apply where a disclosure is made for the purpose of a criminal investigation. This gateway to disclosure is provided by section 18(2)(d) of the CRCA. The complainant's representatives argued that as the matters to which the requests relate concern a criminal investigation, section 18(2)(d) should be applied to allow the disclosure of the information.
11. The Commissioner considers that the matter to be decided is whether HMRC is entitled to refuse to confirm or deny whether it holds the requested information under section 44(2) on the basis that sections 18 and 23 of the CRCA prohibit such a disclosure.

## Reasons for decision

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12. So far as is relevant to this case section 44(1) of FOIA states that information is exempt if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited under any enactment.
13. Section 44(2) provides that the duty to confirm or deny if the requested information is held does not arise if that confirmation or denial would also be prohibited under any enactment.
14. The statutory prohibition relied on by HMRC is created by section 18 of the CRCA. Section 18(1) states that:  
  
Section 18 – Confidentiality  
  
(1) 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.
15. This is a very wide ranging prohibition. However its application to freedom of information requests is narrowed by section 23 of CRCA. This states that:

## Section 23 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 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 the Freedom of Information Act 2000.
16. In essence this means that for the information to be withheld under the statutory prohibition it must be both held by HMRC for one of its functions and identify a person, either directly or indirectly. The term a 'person' in this provision includes both a natural person and legal entities, such as the two companies named in the request.
  17. HMRC does have functions in respect of ensuring compliance with legislation on export controls. Clearly, if held, all the information that has been requested would be held in connection with these functions. The issue that needs to be decided therefore is simply whether confirming or denying that the requested information is held would, in itself, reveal something about a person. However before considering this point it is necessary to address the point raised by the complainant's representatives in respect of the gateway provided by section 18(2)(d) of the CRCA.
  18. So far as is relevant section 18(2)(d) provides that a disclosure which is made for the purposes of a criminal investigation or criminal proceedings relating to a matter in respect of which the Revenue and Customs have functions, is not prohibited under section 18(1).
  19. If the information was held, it is possible that HMRC would be using it for the purposes of either a criminal investigation or criminal proceedings. However, even if this were the case, a disclosure to the public under the FOIA would not itself be for that purpose. The Commissioner also understands from news reports that private proceedings have been mounted against the two named companies. However the Commissioner is not satisfied that the existence of these proceedings would be sufficient to allow a disclosure under section 18(2)(d).

20. In any event the Borders, Citizenship and Immigration Act 2009 amends section 23 of the CRCA to the effect that the gateways provided by section 18(2) are disregarded when considering a disclosure under the FOIA. Section 23 of the CRCA now reads:
- (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 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.
  - (1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purpose of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.
  - (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 the Freedom of Information Act 2000.
21. The issue which now needs to be decided is whether responding to the request would involve disclosing information relating to an identifiable person. When applying exemptions from the duty to confirm or deny whether the requested information is held, the Commissioner's approach is to consider whether either response would engage the exemption. That is, a public authority can consider whether either a confirmation that the information is held, or a denial that the information is held, would engage the exemption. It is not limited to only considering the response that it would have to give in the absence of the exemption.
22. The Commissioner will look at the application of section 44(2) to questions 1,2,4,5 and 7 first. All these questions make reference to the two named companies. It is clear therefore that any response to these questions would involve the disclosure of information relating those companies. For example if HMRC was to confirm that it held the information requested in question 1, this would reveal that HMRC had investigated those companies for breaches of the Export Control Order 2008. In this particular case the alternative response, ie if HMRC denied holding the information would also reveal information about the two named companies. That is say, confirming no information was held would reveal that neither company had been investigated.
23. The Commissioner is therefore satisfied HMRC is prevented from confirming whether it holds the information requested in those questions

by the statutory prohibition created by section 18(1) and 23 of the CRCA.

24. The information requested in question 3 does not refer specifically to either of the companies named in other parts of the request. However it is necessary to consider what would be revealed if, hypothetically, HMRC had to respond to this request by confirming that it did not hold any information about investigations it had conducted into any company that had ever exhibited at the DSEI. This would equate to a disclosure that no companies had been investigated. In theory this would be information about every company that had ever exhibited. More importantly though, it would directly reveal whether either of the two companies named in other parts of the request had been investigated. This would undermine the application of section 44(2) to the other questions. The Commissioner would stress that this analysis is based on the principle that a public authority only needs to be able to demonstrate that either of the alternative responses required when confirming whether information is held, would engage the statutory prohibition. It should not be taken to necessarily mean HMRC does not hold any information.
25. The Commissioner recognises that HMRC has volunteered the information that less than five investigations have been conducted in an attempt to resolve the complaint in respect of question 3. The Commissioner welcomes attempts to informally resolve complaints. The Commissioner accepts that a response of this nature is as far as the HMRC could go in providing at least some information without running the risk of revealing information about the two named companies.
26. In light of the explanation provided above the Commissioner is satisfied that HMRC is also entitled to rely on the exemption provided by section 44(2) to refuse to confirm whether it holds the information sought by question 3.

## **Other matters**

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27. The complainant's representatives have also raised concern over the length of time which HMRC took to conduct the internal review of its handling of the request.
28. Although there is no statutory requirement for a public authority to provide an internal complaints procedure, major public authorities are expected to provide one, as HMRC does. Indeed the code of practice produced under section 45 of the FOIA explains that public authorities should have such an internal complaints procedure in place.

29. That code of practice recognises that there are no statutory time limits on how long the internal review should take to complete. Nevertheless it provides that any deadlines set by the public authority should be reasonable.
30. The Commissioner considers that generally an internal review should take no longer than twenty working to complete. In exceptional circumstances it may be necessary to extend that to forty working days. This is set out in the Commissioner's Guide to Freedom of Information – When we refuse a request for information? – What if the requestor is unhappy with the outcome?, which is published on his website at [http://ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide/refusing\\_a\\_request#when-can-we-refuse-a-request-for-information-20](http://ico.org.uk/for_organisations/freedom_of_information/guide/refusing_a_request#when-can-we-refuse-a-request-for-information-20) .
31. In this case the complainant's representatives requested an internal review on 30 October 2013. HMRC did not receive the request until 4 November 2013. The twenty working days in which public authorities are expected to have completed a review would have elapsed on 2 December 2013 and the forty working days would have elapsed on the 6 January 2014, allowing for the bank holidays. HMRC did not provide the complainant with the outcome of its internal review until 17 January 2014, the forty ninth working day following receipt of the request for a review.
32. The Commissioner does not consider this to be satisfactory and would expect HMRC to deal with reviews within the suggested deadlines in the future.

## Right of appeal

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33. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

34. 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.
35. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**