

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 19 November 2007

**Public Authority:** Her Majesty's Revenue and Customs ('HMRC')  
**Address:** 4th Floor  
100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant requested copies of HMRC's internal guidance on the issuing of determinations to taxpayers who had failed to submit a self-assessment tax return not already published on its website. HMRC refused to provide the complainant with withheld guidance because it considered it to be exempt from disclosure on the basis of section 31(1)(d) (assessment or collection of any tax or duty). Having reviewed the withheld information the Commissioner has decided that HMRC appropriately relied upon section 31 when refusing to supply the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 9 March 2006 the complainant submitted the following request to HMRC:

*'I would like to make a formal application under the Freedom of Information Act 2002, for copies of all guidance on the issue of determinations which was not published on the Internet from the beginning of self assessment to date, showing the dates of all changes'.*

3. HMRC provided the complainant with a response to his request on 11 April 2006. This response explained that HMRC's internal guidance for its officers on how to process revenue determinations for self assessment ('SA') tax payers was

rewritten and published on 3 March 2006. HMRC also explained where this guidance could be located on its website.

4. The response also confirmed that the following message would appear on the website where parts of the guidance had been redacted 'The text at this point has been withheld under the Code of Practice on Access to Government Information'. HMRC explained to the complainant that this message appeared:
  - Once in the section headed 'Revenue Determinations'
  - Twice in the section headed 'The automatic calculation of a Revenue Determination'
  - Once in the section headed 'How to raise an automatic or manual Revenue Determination'
  - Twice in the section headed 'Consider raising and (sic) automatic or manual Revenue Determination'
  - Once in the section headed 'Manually calculating the amount of a Revenue Determination'.
5. With regard to the complainant's request for the unpublished sections listed above, HMRC explained that it considered this information to be exempt by virtue of section 31(1)(d) of the Act: disclosure would, or would be likely to, prejudice 'the assessment or collection of any tax or duty or of any imposition of a similar nature'. HMRC explained that it believed that disclosure of the requested information could assist dishonest individuals in adjusting the information they supply to HMRC. With regard to the public interest, HMRC explained that it believed that 'there is a strong interest in having stable and secure public finances'.
6. The complainant asked HMRC to conduct an internal review into its decision on 19 April 2006. The complainant suggested that there was no logic to HMRC's argument that disclosure of the requested information would lead to a loss in revenue because 'a determination is only ever the result of an individual's failure to supply information in the form of a tax return. If you do not agree, please explain exactly how an individual could use your guidance on determinations to adjust information supplied to you'.
7. HMRC contacted the complainant on 8 May 2006 and informed him that following an internal review it remained of the view that the requested information was exempt from disclosure by virtue of section 31(1)(d). By way of an explanation, HMRC informed the complainant that:

*'As you suggested in your letter, a determination is only raised as the result of an individual's failure to submit a completed tax return and in that all cases are therefore similar. There are situations, however, where the calculation of the amount of the determination is undertaken according to different rules. Knowledge of these rules could be sufficient, in certain cases, for an unscrupulous individual to change the information which they would have otherwise given to us, in an attempt to evade paying the correct amount of tax.'*

*I do understand that you may find this explanation insufficient, but I am unable to be more explicit without comprising the information that has been restricted'.*

## The Investigation

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### Scope of the case

8. On 10 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that HMRC had incorrectly applied the exemption contained at section 31(1)(d) because, in his opinion, disclosure of the requested information could not be used in any way by a taxpayer to change the information given the HMRC. The complainant noted that there was nothing that a taxpayer could do to prevent the issuing of a determination other than submitting the outstanding tax return; if no return was submitted HMRC would raise the determination and there was nothing that the taxpayer could do to stop that. Consequently, in the complainant's opinion, there was no method by which the requested information could be used to evade the paying of the correct amount of tax.

### Chronology

9. The Commissioner contacted HMRC on 24 July 2007 in order to discuss its handling of this request. The Commissioner asked HMRC to provide him with a copy of the withheld information, i.e. the determination guidance not published on the internet. The Commissioner also asked HMRC to provide a detailed explanation of why it believed that disclosure of the requested information would, or would be likely to, prejudice the assessment or collection of any tax or duty. In addition, the Commissioner asked HMRC to provide an explanation of the public interest factors it had considered in this case and why it had concluded that the public interest favoured withholding this information.
10. HMRC provided the Commissioner with a response on 15 August 2007. In this correspondence HMRC provided detailed reasoning as to why it considered the withheld information to be exempt under section 31(1)(d). However, HMRC explained that as the requested information itself was designed primarily for online use it was not practical to provide the Commissioner with a copy of the information in its entirety. HMRC suggested to the Commissioner that he could either visit HMRC's office in order to review the guidance online or alternatively, HMRC could send the Commissioner a representative sample of the guidance.
11. The Commissioner contacted HMRC on 3 September 2007 and asked to be provided with a representative sample of the withheld guidance.
12. HMRC provided the Commissioner with a representative sample of the withheld guidance on 5 September 2007.

13. Having reviewed the guidance provided to him, the Commissioner contacted HMRC again on 14 September 2007 and asked for clarification on a number of issues relating to HMRC's application of the section 31 exemption.
14. HMRC provided the Commissioner with this clarification in an email of 28 September 2007.

### Findings of fact

15. Before considering HMRC's application of the section 31 exemption, the Commissioner believes that it would be useful to briefly explain the SA tax process.
16. The SA method of collecting income tax was introduced in 1996 for taxpayers with a number of sources of income and less straightforward financial affairs. Under the SA system, taxpayers are required to complete returns to establish how much income tax they should pay and to provide HMRC with the information it needs to validate this calculation. All SA taxpayers have a statutory obligation to complete their returns for the preceding tax year by 31 January and HMRC operates a penalty system for those who fail to meet this deadline (e.g. £100 automatic fixed penalty for taxpayers who submit their returns after the filing date).
17. HMRC can also impose a determination (essentially an estimate) on a SA taxpayer who fails to file a tax return. The purpose of this determination is to encourage the taxpayer to file his or her return by raising a charge (i.e. the determination) on the taxpayer's record sufficient to encourage the taxpayer to file the return. There is no right of appeal against a determination but the submission of the return will supersede the determination and the determined amount of tax to be paid will be automatically amended to the return amount.

### Analysis

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#### Section 31- Law Enforcement

18. Section 31 is a prejudice based exemption and therefore to engage the exemption HMRC must demonstrate that disclosure would, or would be likely to, prejudice the collection of any tax or duty.
19. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty

chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

20. In this particular case because of the nature of the information withheld by HMRC, the Commissioner considers that it is not possible for him to comment in great detail on HMRC's reliance on section 31 because to do so may reveal details of the withheld information.
21. Nevertheless, the Commissioner believes that he can explain that the withheld information can be separated into two different types of information. Firstly, the sections of the text redacted from the parts of the guidance contained on HMRC's website (see paragraph 4) are essentially a description of a method used, in some cases, to determine the level of a determination. Secondly, the withheld information, not referred to on HMRC's website, is essentially a detailed breakdown and explanation of how this method is applied. The Commissioner has been provided with all unredacted copies of all of the guidance which falls within the first class of information. Whilst he has only been provided with a sample of the second class of information, the Commissioner considers this to be a sufficiently representative sample and had provided him with a sufficient understanding of how this method is used to create a determination.
22. Having reviewed this withheld information, and considered HMRC's arguments, the Commissioner is satisfied that the disclosure of both parts of this information would, or would be likely to, harm HMRC's abilities to collect income tax. This is because the information could be used by fraudulent tax payers to adjust the information they supply to HMRC in relation to their SA tax returns resulting in a loss of revenue to the Exchequer.
23. However, the Commissioner considers that a distinction can be drawn between the likelihood of harm as result of disclosure of the two classes of withheld information. With regard to the first type of information, the Commissioner considers that disclosure 'would be likely to' prejudice HMRC's ability to collect income tax. However, with regard to the second type of information the Commissioner accepts that disclosure 'would' prejudice HMRC's ability to collect income tax.
24. The Commissioner has concluded that there is a different level of prejudice between the two types of information because of the different nature of information. Simply put, the information contained in the second class of information is much more detailed than the information contained in the first class of information. As a result disclosure of the second class of information would provide dishonest taxpayers with more accurate and specific information which would enable them to evade paying the correct amount of income tax and therefore the Commissioner is satisfied that the level of harm is more probable than not. In contrast, disclosure of the more general information contained in the first class of information is unlikely to allow taxpayers to identify an explicit

method by which they could evade payment of income tax. Nevertheless, the Commissioner accepts that the information contained within the first class of information could still be used by dishonest taxpayers in attempts to pay less income tax, and possibility of this can be accurately described as real and significant.

25. In assessing the likelihood of prejudice as a result of disclosing both classes of the information, the Commissioner has taken into account a number of factors:
26. The Commissioner understands that there are a significant number of taxpayers who pay their income tax through the SA system. The numbers of those currently falling within this system are 8.7 million self employed and higher rate PAYE taxpayers, 570,000 partnerships and 225,000 trusts. (Source: [http://www.nao.org.uk/publications/nao\\_reports/06-07/0607626.pdf](http://www.nao.org.uk/publications/nao_reports/06-07/0607626.pdf) )
27. Obviously, the Commissioner is clearly not suggesting that all taxpayers who pay their income tax through SA may consider using the withheld information to adjust the information they provide to HMRC in attempt to pay less income tax. However, given the significant number of individuals and organisations who do use the SA system, the Commissioner considers the likelihood of harm occurring to be relatively high. For example, even if only 0.5% of the individuals who currently use the SA system were to adjust the information they provide to HMRC as a result of disclosure of the exempt information, then 43,500 taxpayers would have altered their returns.
28. Furthermore, the Commissioner has established that organised criminal gangs have systematically targeted HMRC's SA process by filing bogus returns and fraudulently claiming millions of pounds in repayments. Such was the intensity of the frauds that in one case 50 purported tax agents were used to run a scam that involved 14,000 returns claiming £34m in false payments. (Source: <http://www.accountancyage.com/accountancyage/news/2194531/crime-gangs-attack-self> ). Whilst the Commissioner accepts that this method of fraud did not involve the determinations aspect of the SA process, he considers that it is clear evidence that the SA process is being systematically targeted by criminal gangs intent on tax fraud.
29. On the basis of the above, the Commissioner is satisfied that the exemption contained at section 31(1)(d) is engaged.
30. Section 31 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that information is exempt information where the public interest, in all the circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing that information.

#### Public interest factors in favour of disclosure

31. The Commissioner acknowledges that there is strong public interest in HMRC being accountable for its decisions and that it is as transparent as possible about the ways in which it makes those decisions. Disclosure of the withheld information



would provide the public with further details of how HMRC processes SA returns and in particular how it deals with SA taxpayers who do not file their returns on time. This would reassure the public, and in particular, SA taxpayers that the processes and procedures HMRC uses to deal with late SA taxpayers are fair and honest. The Commissioner accepts that as result public confidence in HMRC's ability to collect tax in an honest and fair manner would be increased. A result of this increased confidence could be increased payments and compliance.

32. In addition, the Commissioner considers that disclosure of the withheld information could deter potential fraudsters because they would be more aware of the strength of HMRC's detection processes and measures. There is a clear public interest in potential taxpayers being deterred from submitting false tax returns; firstly, if there were fewer attempts at tax evasion, HMRC would have to invest less time and resource into investigating fraudulent SA tax returns, and secondly, the level of income tax collected by HMRC may increase if there were fewer fraudulent SA returns.
33. The Commissioner believes that there is a public interest in people being able to challenge decisions made by public authorities which affect them from an informed standpoint. If the withheld information were disclosed this may assist SA taxpayers to better understand why they had been issued with a determination and in particular also help SA taxpayers understand how HMRC had calculated that level of a determination. SA taxpayers who had been issued with a determination would then be in a position to challenge that determination from an informed position.
34. The Commissioner also believes that there is a public interest in enabling debate about the way HMRC collects income tax, particularly through SA, and such a debate could improve the quality of decisions made by HMRC. The Commissioner considers that this argument is particularly relevant in light of the National Audit Office's ('NAO') comments in relation to the fraud attempts discussed at paragraph 28. The NAO's review of HMRC's Accounts for 2006-07 was critical of the HMRC processes which may have led HMRC being susceptible to frauds related to SA: 'A lack of formalised accountabilities has historically made it difficult for the Department [HMRC] to establish central oversight and responsibility over repayments, including the extent to which agreed controls were being operated. Deficiencies in management information have also made it difficult to establish the degree to which these controls could prevent or detect error and irregularities'. Disclosure of the requested information could be used by the public to scrutinise the systems HMRC has in place and help buttress high standards of performance and governance at HMRC.

#### Public interest factors in favour of withholding

35. The Commissioner acknowledges that the arguments surrounding accountability and transparency have considerable weight in principle. However, in this case the Commissioner believes that there are number of mitigating factors which limit the strength of the above arguments outlined in paragraphs 31 and 32.

36. Firstly, the Commissioner has established that HMRC already publishes a substantial amount of information about SA. These disclosures include detailed guidance for the public which is designed to provide comprehensive information and assistance about all aspects of SA. Furthermore, HMRC also publishes on its website its internal guidance used by its employees to process SA tax returns with sections only redacted or not published where HMRC considers the information to be exempt from disclosure under the Act (e.g. the withheld information about determinations in this case).
37. Furthermore, the Commissioner considers that the argument that disclosure of the withheld information would ensure that HMRC was accountable for the decisions it takes is mitigated, to some degree, by external audit procedures that HMRC is already subject to. For example, as mentioned above, the NAO audits HMRC's annual accounts in order to ascertain that adequate regulations and procedures have been framed to secure an effective check on the assessment, collection and proper allocation of revenue.
38. With regard to the argument that disclosure of the withheld information would deter potential fraudsters, the Commissioner notes that HMRC's penalties for late and/or deliberately inaccurate return of a SA tax return are already well publicised by HMRC. In particular the guidance published on HMRC's website makes it clear that a determination will be issued if a taxpayer fails to file his or her SA return and in order to encourage the filing of the return, that determination will represent a 50% increase on the previous year's figure. Consequently, the Commissioner believes that it is already public knowledge that HMRC has a system of robust penalties for failure to submit a correct SA return. Therefore, the Commissioner does not accept that disclosure of detailed information about how these enforcement processes actually work will be likely to significantly increase compliance.
39. The Commissioner also recognises the importance to the public interest of being able to make informed challenges to decisions made by public authorities (see paragraph 33). However, as the Commissioner has explained above, there is already a clear and direct method for SA taxpayers to challenge a determination which has been served upon them; namely by providing HMRC with their SA tax return. The amount of tax payable would then be that detailed on the taxpayers' SA return. Should HMRC and the taxpayer disagree about the level of tax liability based on the information supplied by the taxpayer, HMRC has an internal complaints procedure for dealing with such matters. Should taxpayers be dissatisfied with HMRC's handling of their complaint, they have the right to complain to The Adjudicator's Office which will investigate whether HMRC has failed to handle their tax affairs fairly and consistently and in line with its own practices. Furthermore, taxpayers also have the right to complain to the Finance and Tax Tribunal which deals with appeals against assessments and amendments to SA made by HMRC.
40. Consequently, the Commissioner believes that a number of the public interest arguments in favour of disclosure of the withheld information are weakened on the basis of the above points.



41. Furthermore, the Commissioner accepts that there is a very strong public interest in HMRC being able to collect the correct amount of tax due to the Exchequer in order to support public services. Clearly, if disclosure of the withheld information resulted in less income tax being collected by HMRC, over time there would be less money available for the Government of the day to spend on public services. Moreover, tax evasion or fraudulent claims ultimately means that a greater tax burden falls unfairly on honest, compliant taxpayers
42. As has been noted above, the Commissioner has identified examples of how organised criminal gangs have developed systematic methods to de-fraud HMRC. However, having reviewed the nature of the withheld information, the Commissioner believes disclosure would not only assist organised criminals intent on committing tax evasion but also encourage opportunistic individual taxpayers to alter the information they provide to HMRC in an attempt to pay less income tax. The Commissioner believes that there is a strong public interest in not encouraging tax fraud by either individuals or groups by making the process of tax fraud any easier.
43. The Commissioner also recognises that there is a public interest in HMRC collecting tax at the least cost to the public purse. Clearly, the less money HMRC has to expend in order to collect the correct the amount of tax due to the Exchequer will obviously leave further public funds to be spend on the delivery of public services. Furthermore, the Commissioner accepts that it will benefit the public if HMRC can process SA tax returns with the minimum level of burden to honest taxpayers. The Commissioner accepts that if the withheld information were disclosed HMRC may have to adjust its methods of processing SA tax returns in order to ensure that this part of SA was secure and that this could make the SA collection process not only lengthier, but also more costly.
44. Finally the Commissioner accepts that there is a public interest in the behaviour of compliant, honest taxpayers not being undermined by the actions of the dishonest or fraudulent taxpayers. If the withheld information makes it easier for dishonest SA taxpayers to pay less income tax, honest taxpayers' confidence in HMRC collecting tax in a fair and equitable way could be undermined. This could damage the general climate of business honesty upon which the economy depends, i.e. individuals are prepared to pay the tax that they are liable for because they believe that all other taxpayers will voluntarily pay, or be forced to pay by HMRC, the tax to which they are liable.. The Commissioner accepts that this argument is particular relevant given that the method of collecting tax in this case is that of SA, which obviously relies on taxpayers honestly declaring their tax returns; although HMRC does have various methods for checking the accuracy of SA returns, given the number of returns it obviously cannot forensically check over 9 million SA forms.
45. Having weighed the public interest arguments for both disclosing and withholding the information, the Commissioner has concluded that in this case the public interest is weighed in favour of not disclosing both classes of the withheld information. Given the higher likelihood of harm in disclosing the second class of information, the Commissioner believes that with regard to this information the public interest is particularly weighed in favour of withholding this information.

46. In reaching this conclusion, the Commissioner has been particularly persuaded by the strong public interest in HMRC being able to collect taxes which are due to the Exchequer in the cheapest and easiest way in order to ensure that Government has sufficient funds to fund the delivery of public services. The Commissioner also considers that the public interest argument which suggests that disclosure would improve the public's understanding of the SA process is mitigated to a large extent by the volume and detail of information about SA already in the public domain. Furthermore, a SA taxpayer has the established right to challenge a determination made by HMRC by submitting his or her SA tax return and therefore, disclosure of the withheld information would not assist taxpayers in challenging a determination that they may receive.
47. The Commissioner is therefore satisfied the requested information is exempt from disclosure on the basis of section 31(1)(d) of the Act.

### **The Decision**

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48. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

### **Steps Required**

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 19<sup>th</sup> day of November 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 31(1)** provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."