

Freedom of Information Act 2000 (Section 50)

Decision Notice

20 May 2009

Public Authority: Her Majesty's Revenue and Customs
Address: 1 Parliament Street
London
SW1A 2BQ

Summary

The complainants requested information from HMRC about the tax affairs of a named individual. HMRC refused to confirm or deny if the requested information was held by virtue of section 44 of the Act 'prohibitions on disclosure'. The Commissioner has investigated and found that the requested information, if held would be exempt by virtue of section 44(1)(a) of the Act. Further HMRC were correct to rely on section 44(2) to neither confirm nor deny if the requested information is held.

The Commissioner's Role

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

2. The complaint made the following request to Her Majesty's Revenue and Customs (HMRC) on 22 September 2008.

"The information required is all material answering to the description below, relating to the tax affairs of Mr X, which was generated in the period from 1 December 2006 to the current date:

- Copies of all internal HMRC communications – whether in the form of letter or memorandum or report or submission or 'Opinion'; or whether transmitted by post, internal circulation, fax or e-mail – between Mr X's tax office (CPR team, 3rd Floor,

Trinity Bridge House, 2 Dearmans Place, Salford, M3 5BW), and any other part of HMRC, including (but not restricted to):

- All technical specialists (including the technical specialists dealing with questions of trading / mutuality; Employment Related Securities; and Case VI)
 - Any other Head Office or Policy divisions (eg, International)
 - Any appeals units
 - The tax office of XXX; plus
- Copies of all notes of meetings and all notes of telephone conversations between persons working within any of these parts of HMRC; plus
 - Copies of any briefing papers prepared for these meetings or telephone conversations.”
3. HMRC responded on 17 October 2008 stating that it would neither confirm nor deny if it held the information requested by virtue of section 44 of the Act ‘prohibitions on disclosure’ by virtue of section 23 of the Commissioner for Revenue and Customs Act (CRCA). HMRC explained that section 18(1) of the CRCA provides that HMRC may not disclose information which is held by it in connection with a function of HMRC. Section 23(1) further provides that information relating to a person, the disclosure of which is prohibited by section 18(1) is exempt for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates. HMRC further explained that section 44(2) provides that the duty of confirm or deny that the information is held if the confirmation or denial itself would fall within any of the provisions of section 44(1). HMRC stated that section 23 makes no mention of the section 18(2) and (3) conditions which set out circumstances where the section 18(1) duty is set aside.
4. However, HMRC explained that it may, on a discretionary basis and outside of the terms of the Act, disclose information where it receives the necessary consent of the customer because of the exception in 18(2)(h) of the CRCA. However, it explained that it would only consider such a disclosure to
- The customer him / herself where the request is made by that person
 - To a person who has provided HMRC with the customer’s specific authority permitting it to disclose the information to them.

HMRC said if a request was made falling within the above definitions it would: deal with disclosure of personal data under the provision of the Data Protection Act subject to any exemptions; or for non personal data held in connection with the person’s tax affairs on a non discretionary basis outside of the terms of the Act.

5. The complainant responded on 23 October 2008 asking for a review of HMRC’s decision. The complainant stated that they agreed that section 44(1)(a) exempts information which is prohibited by any other enactment or rule and that the material requested is likely to fall within the definition of section 18(1) of the CRCA. However, the complainant stated that they believed that section 18(1)

could be overridden by one of the conditions in section 18(2). The complainant pointed HMRC to a decision by the Commissioner in case FS50168774 in which it states that:

“the Commissioner believes that he has to consider whether any of the exceptions contained within section 18(2) of the CRCA apply before he can conclude that the redacted information is exempt on the basis of section 44(1)(a).”

6. The complainant stated that in this case it believed section 18(2)(h) applied as Mr X has given his consent for the information to be provided. The complainant acknowledged that he understood that a standing form 64-8 is not considered by HMRC to constitute sufficient evidence of consent and asked HMRC to provide a template declaration in a format that would satisfy its requirements. The complainant also made it clear to HMRC that the request for information was being made by themselves and not on behalf of their client Mr X and was therefore not a subject access request.
7. On 28 October 2008 the complainant wrote to the Commissioner explaining that it was still waiting for the form of 'consent' HMRC states it requires to enable for disclosure of the requested information.
8. HMRC wrote to the complainant on 29 October 2008 acknowledging the request for an internal review and explaining that there is no prescribed template for specified consent. HMRC stated that a letter from Mr X authorising the complainant to make the request for information and receive it on his behalf will be sufficient.
9. The complainant wrote to HMRC on 17 November 2008 enclosing a letter of consent from Mr X relating to his request for information under the Act:

“I, X, of XXX, am aware that PwC has made an application to HMRC under the Freedom of Information Act for information relating to me and I consent to disclosure of this information to PwC.”
10. HMRC responded on 19 November 2008 stating:

“To avoid any misunderstanding on either side I refer you back to the content of the letter to you dated 17 October 2008. The letter explains that written authority from your client will enable HMRC to consider dealing with your request under the auspices of section 7 Data Protection Act 1998 for any personal data about your client, and on a discretionary basis outside of FOI for any other information falling within the scope of the request.”
11. HMRC wrote again to the complainant on 25 November 2008 having completed its internal review. The internal review upheld the original decision to neither confirm nor deny if the requested information is held by virtue of section 44 of the Act. Further HMRC explained that it could see no evidence that consent was in place when the request was made.

12. The complainant responded on 5 December 2008 stating that HMRC's response of 25 November 2008 did not address the main point of the review request, that it did not agree with HMRC's interpretation of section 23(1) of the CRCA and its interaction with the Act. Further the complainant stated that consent was in place when the request was made in September.
13. HMRC wrote again to the complainant on 24 December 2008 explaining that it had carried out a review for information within the scope of the request that could be provided on a discretionary basis, some information was therefore disclosed. HMRC informed the complainant that following this review, no further information would be disclosed.
14. The complainant wrote again to HMRC on 5 January 2009 again stating that it disagreed with HMRC's interpretation of the interaction of sections 18 and 23 of the CRCA and section 44 of the Act.

The Investigation

Scope of the case

15. On 28 October 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - HMRC had ignored the decision by the Commissioner regarding the interaction with sections 18 and 23 of the CRCA and section 44 of the Act.
 - HMRC was provided with the consent of Mr X to disclose to the complainant the information requested.

Chronology

16. The Commissioner began his investigation by writing to the complainant on 10 February 2009 explaining the position regarding HMRC's application of section 44 of the Act.
17. The Commissioner spoke to HMRC on 12 February 2009 and HMRC responded on the same day providing the Commissioner with copies of the recent correspondence between it and the complainant.
18. The complainant responded on 18 February 2009 explaining that consent was in place at the time the request was made and that a letter had been provided to HMRC prior to the internal review confirming the consent.
19. The Commissioner wrote again to the complainant on 26 February 2009 explaining in more detail the interaction between section 18 and 23 of the CRCA and outlining the way consent would need to work for the purposes of disclosure under the Act. The Commissioner explained to the complainant that he did not

believe the 'consent' they had provided acted as consent for the purposes of 18(2)(h) and invited the complainant to withdraw.

20. The complainant responded on 18 March 2009 asking the Commissioner to confirm his position regarding HMRC's application of the statutory bar and for the Commissioner to provide him with a suggested form of words that would meet the requirements of section 18(2)(h) of the CRCA.
21. The Commissioner responded on 24 March 2009 explaining that there was no standard wording and again explained to the complainant the implications of their client consenting to disclosure under the Act, that disclosure would not be limited to a single individual but would be disclosure to the wider public.

Analysis

Exemption

22. Section 44(1)(a) provides that information is exempt information if its disclosure is prohibited by or under any enactment. Section 44(2) provides that the duty to confirm or deny does not arise if the confirmation or denial that would have to be given in order to comply with section 1(1)(a) would fall within the 44(1)(a). The prohibition relied upon by HMRC is that contained within the CRCA.
23. Section 18(1) of the CRCA provides that HMRC official may not disclose information which is held by HMRC in connection with one of its functions. Section 23(1) of the CRCA further provides that information relating to a person, the disclosure of which is prohibited by 18(1), is exempt information for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity of the person to be deduced.
24. HMRC has acknowledged that section 18(2) sets aside the duty of confidentiality in some circumstances, including where HMRC has consent of the 'person' to which, or to whom, the information in question relates. HMRC's view is that section 18(2) does not affect the interaction of section 18(1) and 23 of the CRCA so as to negate the application of section 44 of the Act. Rather, it stands outside of the Act and its affect is that HMRC may, on a discretionary basis, disclose information it holds.
25. The Commissioner understands that HMRC's reasoning for this position is that section 23 of the CRCA makes no mention of section 18(2) and 18(3) and the conditions which are noted. In HMRC's view, if Parliament had intended for section 23 of the CRCA to take account of section 18(2) and 18(3) exceptions it would have said so.
26. HMRC argue that the information sought, if held would be held in connection with its function to assess and collect tax, and thus meets section 18(1) of the CRCA and relates to an identifiable person and thus meets section 23.

27. The complainant does not dispute that the requested information falls within the definition of section 18(1) and 23 of the CRCA. The Commissioner is also satisfied that the information, if held, would meet the requirements of section 18(1) and 23 as it would clearly be held for the purpose of one of HMRC's functions and would relate to identifiable persons.
28. However, the Commissioner disagrees with HMRC's position that section 18(2) of the CRCA does not affect the interaction of section 18(1) and 23 of the CRCA. Rather the Commissioner believes that it is not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). In the Commissioner's opinion in order to correctly apply this particular statutory bar the following must be considered:
- first whether the requested information would, if held, be held in connection with a function of HRMC and thus meet the requirements of section 18(1);
 - second whether any of the exceptions in section 18(2) apply; and
 - third whether the information relates to an identifiable person and thus the requirements of section 23(1) are met.
29. In the recent Information Tribunal decision *Mr Andrew John Allison v Information Commissioner and HMRC (EA/2007/0089)* the Tribunal agreed with the Commissioner's interpretation of the statutory bar:
- "The Tribunal feels that on balance the arguments of the Commissioner are to be preferred. First the Tribunal finds it difficult to find any ambiguity on the face of section 18(1) and section 18(2) of the 2005 Act such as to import the necessity to have recourse to Hansard under the well known principles considered in *Pepper v Hart*. The language of the relevant provision in the 2005 is clear. It is simply not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). Moreover, on a clear reading of the statute, in the Tribunal's view, it is only if the information is such that none of the exceptions in section 18(2) apply that it can be said that section 18(1) is fully engaged and that the information may not be disclosed. Next and perhaps crucially, section 18(1) whether or not coupled with section 18(2) does not represent a complete code whereby the question as to whether disclosure should be made can be answered. As the additional party (HMRC) itself accepts, whether information prohibited from disclosure by section 18(1) is in fact exempt depends on section 23. As a matter of statutory construction, therefore the Tribunal finds that in the absence of clear words which would expressly distance the operation of section 18(2) from section 18(1) such as to make section 18(1) a complete code in the way suggested, it is necessary to consider whether any of the exceptions in section 18(2) apply before an answer can be given to the question of whether disclosure is prohibited under section 18(1)."
30. Therefore, the Commissioner believes that he has to consider whether any of the exceptions contained within section 18(2) of the CRCA apply before he can conclude that the information, if held, would be exempt on the basis of section

- 44(2). In the circumstances of this case the relevant exception is that contained at 18(2)(h) which refers to a disclosure “which is made with the consent of each person to whom the information relates”.
31. The complainant argues that consent was in place at the time the request was made as HMRC was in possession of a form 64-8 which gives consent for the complainant to act on behalf of a tax payer. Further the complainant argues that the consent provided in their letter of 17 November 2008 provides consent to disclosure for the purposes of section 18(2) (h).
 32. It is the Commissioner’s understanding that HMRC’s suggestion that the complainant should seek consent from the individual so that it could consider disclosure outside of the Act, does not equate to seeking consent in line with section 18(2)(h) of the CRCA. HMRC’s suggestion is simply that a tax agent needs consent from a client in order to see information held about that client from HMRC. The Commissioner considers that the context of the request is important, in this case the request for information was been made under the Act and the consent in place must therefore be consent for disclosure of information under the Act. For the purposes of removing the application of section 18(1) of the CRCA consent for the purposes of 18(2)(h) must be consent to disclosure under the regime or legislation that the request was made under. This means that in this case the persons to which the information relates must consent to disclosure of the information under Act which means disclosure is to the public. The consent provided in this case is for the information to be disclosed to a specific party.
 33. The Commissioner has viewed the structure of the standing form 64-8 and the consent provided to HMRC on 17 November 2008 prior to the internal review. The Commissioner does not consider that either form meets the requirements of consent for the purposes of section 18(2)(h) as they restrict disclosure of the information to the complainant. If disclosure of the requested information is to be made under the Act, the consent must be to release of the information to the general public as under the Act disclosure cannot be restricted to a named recipient or for a specific purpose.
 34. The Commissioner is satisfied that no consent was given, in terms of the consent required for the exception contained at section 18(2)(h) of the CRCA to apply. Therefore the Commissioner is of the opinion that the exception contained at 18(2)(h) cannot apply in this case.
 35. On the basis of the above the Commissioner is satisfied that as a result of the interaction of section 18(1) and 23 of the CRCA the requested information, if held would be exempt by virtue of section 44(1)(a). The Commissioner also accepts that HMRC are entitled to refuse to confirm or deny whether or not it holds any information falling within the scope of the request, this is because section 44(2) of the Act provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of paragraphs (a) to (c) of subsection (1). In this case confirming or denying if the requested information is held would specify the identity of the person to whom the information relates and would reveal to the public something about Mr X’s tax affairs, namely that HMRC had, or had not, investigated his tax affairs, whether

HMRC. Consequently simply providing confirmation or denial that information is held would fall within sections 18(1) and 23(1) of the CRCA and thus by virtue of sections 44(1)(a) and 44(2) of the Act the duty to confirm or deny contained at section 1(1)(a) of the Act does not apply.

The Decision

36. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.
- HMRC were correct to neither confirm nor deny if the requested information is held by virtue of section 44(2) of the Act.

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. 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.
Website: www.informationtribunal.gov.uk

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.

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 20th day of May 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

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

Legal Annex

General Right of Access

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 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Prohibitions on disclosure.

Section 44(1) provides that –

“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 Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –

“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).”

Commissioners for Revenue and Customs Act 2005

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.

(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,

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(e) which is made in pursuance of an order of a court,

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or

(h) which is made with the consent of each person to whom the information relates.

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section—

(a) a reference to Revenue and Customs officials is a reference to any person who is or was—

(i) a Commissioner,

(ii) an officer of Revenue and Customs,

- (iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or
- (iv) a member of a committee established by the Commissioners,
- (b) a reference to the Revenue and Customs has the same meaning as in section 17,
- (c) a reference to a function of the Revenue and Customs is a reference to a function of—
 - (i) the Commissioners, or
 - (ii) an officer of Revenue and Customs,
- (d) a reference to the Scottish inspectors or the Northern Ireland inspectors has the same meaning as in section 27, and
- (e) a reference to an enactment does not include—
 - (i) an Act of the Scottish Parliament or an instrument made under such an Act, or
 - (ii) an Act of the Northern Ireland Assembly or an instrument made under such an Act.

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 (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.
- (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.
- (3) In subsection (1) “revenue and customs information relating to a person” has the same meaning as in section 19.