

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2011

Public Authority: Her Majesty's Revenues and Customs (HMRC)

Address: 100 Parliament Street

London

SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about liabilities outstanding from underpayments of PAYE, details of when those payments had been waived and methods of how they are collected.
2. HMRC provided some information, explained other information was not available and applied the costs limit [section 12(1)] to other information. After the Commissioner's involvement, it applied section 12(1) across the whole request.
3. The Commissioner's decision is that HMRC was entitled to rely on section 12(1) in this case. However, HMRC breached sections 16(1) and 17(5) in its handling of the complainant's request.
4. The Commissioner requires no remedial steps to be taken, because HMRC has remedied its breach of section 16(1) during the course of this investigation.

Request and response

5. The request is focused on PAYE tax liability. The Pay-As-You-Earn (PAYE) system is what is used by most people to pay income tax and national insurance through it being deducted from their wages (or other income such as a pension). The reconciliation process is when HMRC considers all of the information they have on a customer's income and tax over a given year and, if necessary, send the customer a demand or a refund. The request concerned the situation as it was on 13 December 2010.
6. On 13 December 2010 the complainant requested the following information from HMRC:

1. *'The number of cases identified by HMRC where there are liabilities arising from underpayments of PAYE tax liability for the years 2006/7 to 2009/10, broken by year.*
 2. *The number of cases in 1. where HMRC has written off the liability where ESC A19 has been applied.*
 3. *The number of cases for the years 2006/7 to 2009/10 not yet reconciled broken down by years.*
 4. *The number of case [sic] in 1. where any liability for the tax year 2006/7 will not, or is unlikely, to be recovered.*
 5. *The methods used by HMRC to recover liabilities so far identified in 1. broken down by percentages/case number.'*
7. The HMRC responded on 18 January 2011 and considered each of the requests in turn:
1. it explained the information requested for request 1 was not available. This was because an individual's liability cannot be established until all the information for the year had been reconciled and until the process was complete, the numbers would not be available;
 2. as the answer to request 1 was not known, it could not provide an answer to request 2 either;
 3. it explained that the information for 2006/7 and 2007/8 was available in its annual report and provided a link to it. It also provided more up to date numbers. It could not provide the exact numbers for 2008/9 or 2009/10, but it explained that about 90% of cases where it had received all of the information had been dealt with;
 4. as the answer to request 1 was not known, it could not provide an answer to request 4 either. However, it did explain its policy; and
 5. as the answer to request 1 was not known, it could not provide an answer to request 5 either. It explained that even if it knew the answer for request 1 it would not be able to provide an answer to request 5 within the costs limit. This was because it didn't hold the information centrally and would need to check every individual file. It did explain what happened to the majority of people, the new system it had introduced and that it would allow people to spread their payments over three years. It also provided other links that contained further explanation.
8. Following an internal review the HMRC wrote to the complainant on 3 March 2011. It upheld its original position.

Scope of the case

9. On 24 March 2011 the complainant contacted the Information Commissioner ('the Commissioner') to complain about the way his request for information had been handled. He later told the Commissioner that he considered that there was a real public interest in the public knowing this information.
10. After the Commissioner's initial enquiries, HMRC varied its position and applied section 12(1) across all five requests. It agreed that it was not right to say that the information was not available and that it should have been considering whether the information could be compiled so that it revealed its casework situation as it stood on 13 December 2010 (the date of the requests).
11. The Commissioner then discussed the case with the complainant who confirmed that he accepted the scope of his investigation would consider only the following four points:
 1. Whether HMRC applied section 12(1) correctly to all five requests;
 2. If not, whether or not relevant recorded information can be provided to the public;
 3. Whether HMRC offered adequate advice and assistance to comply with its obligations under section 16(1); and
 4. To consider HMRC's compliance with the procedural requirements of the Act.

Reasons for decision

12. As noted above, HMRC revised its position and explained that it now believed that section 12(1) applied to all five requests. Section 12(1) of FOIA states that:

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'
13. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that the cost limit for central government public authorities is £600. This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours.

14. If a public authority estimates that complying with a request would exceed 24 hours, or £600, section 12(1) provides that the request may be refused.
15. The Commissioner must initially consider is whether HMRC is entitled to combine the work together for all five requests, or whether each request should be considered individually.
16. When considering whether requests can be aggregated or need to be considered individually the Commissioner is guided by Regulation 5 of Fees Regulations that states:

'5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -

- (a) by one person, or*
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*
- (b) those requests are received by the public authority within any period of sixty consecutive working days.'*

17. In order to aggregate all five requests for the purposes of section 12(1) the Commissioner must determine whether they relate to any extent, to the same or similar information.¹
18. The Commissioner invited the HMRC to make its submissions concerning this point. It replied that it believed that all five requests relate to a

¹ This has been considered by the Information Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* - EA/2007/0124. It emphasised that the words in Regulation 5(2)(a) should be given their natural meaning (at paragraph 43).

single theme being the underpayment of PAYE tax. The Commissioner agrees with HMRC that the theme of all five requests make them to some extent similar to one another and this part of the test is therefore satisfied.

19. As well as the five requests being similar it is also necessary for them to be submitted within 60 working days and made by the same person. In this case they were all submitted together by the same person and the Commissioner has therefore determined that the public authority is able to aggregate the costs for all five requests.
20. The Commissioner's subsequent analysis into the operation of section 12(1) will have two parts, which are:
 1. To explain HMRC's relevant estimate; and
 2. To consider whether that estimate only related to the relevant prescribed activities and whether it is reasonable.
21. The Commissioner will consider each part in turn:

What was HMRC's relevant estimate?

22. After the Commissioner's intervention, HMRC understood that it had to read the five requests as relating to its casework situation on 13 December 2010. It agreed that it didn't do the reconciliation work all at once, however, it did not hold this information centrally and explained the only way that it could find the requested information would be to consider a very large number of individual files.
23. It also explained that it understood that it could only include in its estimate the work that was outlined in Regulation 4(3) of the Fees Regulations, which allows only the following four activities to be considered:
 - "(a) determining whether it holds the information,*
 - (b) locating the information, or a document which may contain the information,*
 - (c) retrieving the information, or a document which may contain the information, and*
 - (d) extracting the information from a document containing it."*
24. It also understood that the onus was on it to prove that the work required to process the request would take longer than 24 hours and provided the Commissioner with a detailed explanation about what work would need to be done for each request.

25. From the estimate, it is clear to the Commissioner that HMRC considers that the costs limit would be exceeded by many times.
26. HMRC explained that on 13 December 2010 it had no way of knowing the numbers of cases that had been reconciled where there were outstanding liabilities. It did not record this information electronically and could not use its casework management system to determine this information. While it was conscious to ensure that all of its open cases were completed, it did not record this information for each and every case when it was closed or have the ability to track every single case at a single point in time.
27. The Commissioner has decided to focus on the information requested for the 2008/9 and 2009/10 in his analysis.
28. HMRC explained that it ran two processes to reconcile PAYE tax liability (for the years 2008/9 and 2009/10):
 1. It considered cases individually on request from tax payers; and
 2. It then automated the remainder of files from 1 October 2010 (a process that was still continuing on 13 December 2010).
29. HMRC stated that it had to consider a very large number of PAYE cases during the reconciliation process - approximately 25 million cases annually. It explained that it considered each individual tax payer's situation on a bespoke basis and there was no way to understand the yearly breakdown on 13 December 2010 without checking all the files.
30. It explained that the automated process ran cases concurrently, but even checking the manually processed cases would exceed the costs limit and would not answer the request.
31. The need to check the files was supported by the real difficulty in splitting up the two years – because the automated process did the work for the years 2008/9 and 2009/10 simultaneously.
32. HMRC indicated that a very conservative estimate of the work required to check each of the files would be 2 minutes.
33. It follows that its estimate for **only** the 2008/9 and 2009/10 information for request one was:

25, 000, 000 [files] x 2 minutes = c **800, 000 hours.**
34. It also explained that for requests 2 and 4 that it held write off information in accounting year format rather than tax year format and the only way that it would be able to retrieve this information would for it to also check every single file.

35. For request 3, it explained that due to the automated process being ongoing, it would also have needed to check every file to see which ones remained outstanding on 13 December 2010.
36. The Commissioner also notes that if it was able to focus solely on the cases that were identified in its annual report as being not reconciled, it still would need to check over 13 million files. It would not reduce the estimate enough.
37. The Commissioner was given further estimates about the work that would be required to be done for the other requests. However, given the amount of work that has already been accumulated, he has not considered it necessary to detail that work in this Notice.

Was the estimate reasonable?

38. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
 - *"Only an estimate is required"* (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be *"sensible, realistic and supported by cogent evidence."*
39. Following those points, the Commissioner is satisfied that HMRC has only included the activities that are specified in Regulation 4(3) in its estimate. He is also satisfied that it hasn't included any time for considering redactions or any time taken to consider validating the information.
40. He is satisfied that the estimate is based on the circumstances of this case. The Commissioner has also considered whether or not there are reasonable alternatives in this case.
41. When considering this issue the Commissioner has been guided by the Information Tribunal in the case *Alasdair Roberts v the Information Commissioner* [EA/2008/0042] which provided some general comments on alternative methods of extraction such as whether there is an

alternative so obvious to consider that disregarding it renders the estimate unreasonable.

42. The Commissioner has therefore considered whether such alternatives exist in this case. HMRC informed the Commissioner that it had carefully considered whether there were any alternatives and it could confirm that there were none. It did process monthly reports as it did the work on its old system, but it no longer used this system and these reports were not kept by it.
43. HMRC also could not provide the complainant with all of the information for him to do the work himself. This is because the provision of the information in this way would both be impracticable and failing to respect the duty of confidentiality that is imposed on it by section 18(1) of Commissioners for Revenue and Customs Act (CRCA) 2005 and this would lead it to commit a criminal offence.
44. HMRC also did not have a computer system that enabled it to consider the situation on 13 December 2010. It did not record the information in the way that the complainant wanted it at the date of the request and the Commissioner considers that it has evidenced why this is so.
45. Having considered all the relevant evidence above, the Commissioner has been satisfied that there are no reasonable alternatives to checking all the records that may contain relevant information in this case and extracting them manually.
46. He is satisfied that HMRC has evidenced that to answer the five requests it would take more than 24 hours' work. The Commissioner is satisfied that this estimate is based only on a reasonable assessment of the activities that are allowed by Regulation 4(3) of the Fees Regulations. He is satisfied that this estimate is '*sensible, realistic and supported by cogent evidence.*' He therefore determines that section 12(1) was applied correctly in this instance.

Procedural Requirements

Section 16(1)

47. Section 16(1) imposes an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
48. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for HMRC to provide advice and assistance to enable the complainant to obtain information without

attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for HMRC to have advised the complainant to reduce the scope of his request.

49. Firstly, it must be noted that HMRC was not clear about its position in the refusal notice and this prevented the complainant from being able to consider narrowing down his request.
50. HMRC accepted that the advice and assistance it provided was not adequate and agreed to rectify this during his investigation.
51. The Commissioner's view is that HMRC was right in stating that it had offered inadequate advice and assistance. In particular, it had further information about the methods that it used to recover liabilities and this information should have been provided as part of its obligation to provide advice and assistance. The Commissioner asked HMRC to rectify this and it did so during the course of his investigation.
52. The Commissioner also asked HMRC to provide the complainant with the publicly available material that was relevant to his concerns. HMRC also provided this information to the complainant during the course of his investigation.
53. The failure to provide reasonable advice and assistance was a breach of section 16(1). However, the Commissioner does consider that there is no further advice and assistance that can now be provided and thus requires no remedial steps to be taken.

Section 17(5)

54. Section 17(5) states that any public authority relying on section 12(1) must within the time limit for complying with section 1(1) give the applicant a notice stating that fact. The time limit for complying with section 1(1) is found in section 10(1). This states that a response should be issued as soon as possible and in 20 working days in any event.
55. HMRC failed to explain that it was relying on section 12(1) for the work required to answer all five requests until the Commissioner's investigation. Its failure to do this was a breach of section 17(5). The Commissioner does not require any remedial steps for this breach as the content of any new refusal notice would be upheld by this Decision Notice.

Right of appeal

56. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

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