

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 January 2013

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Decision (including any steps ordered)

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1. The complainant requested details of payments made to the Counsel for the public authority in respect of a claim at the High Court between October 2009 and July 2010.
2. The Commissioner's decision is that the public authority was entitled to withhold the information requested on the basis of the exemption at section 40(2) FOIA.

### Request and response

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3. On 3 November 2011 the complainant wrote to the public authority and made four separate requests. However, of relevance to the Commissioner's investigation is the third request which was made in the following terms:

*'3. My question is*

*"How much did HMRC pay:*

- a) *Counsel for work done in connection with, and for representing the Department at the pre-Hearing Review in respect of, (HSWA) claim 3201481/2006 at Stratford Employment Tribunal on 2<sup>nd</sup> November 2006?"*
- b) *Counsel for work done in connection with, and for representing the Department at the hearings at the Queens bench Division of the High Court in respect of (Harassment Act) claim HQ09X04811 between October 2009 and July 2010?'*

4. The public authority responded to the four requests on 30 March 2012. In respect of the third request, it explained that it could not comply with Part a by virtue of section 12(2) FOIA (appropriate limit) and the exemption at section 40(2) FOIA (personal data). It confirmed it held information within the scope of Part b but refused to disclose the relevant information by virtue of the exemption at section 40(2).
5. On 19 April 2012 the complainant requested a review of the public authority's decision specifically in respect of Part b of the request above. He submitted that the information requested *'concerns not "personal data" but "public expenditure". Else virtually all public expenditure becomes personal data because it is almost always paid to somebody. And, if that were really so, it would be impossible for there ever to be any public accountability for how public monies were spent by HMRC for the amounts would always remain unknown....'* He added that he would be content with a response that provided the hourly HMRC<sup>1</sup> rate for Counsel on a similar level as the Counsel relevant to his request and the number of hours the Counsel (relevant to his request) was engaged.
6. Following an internal review the public authority wrote to the complainant on 22 June 2012. It upheld the original decision to rely on section 40(2).

### **Scope of the case**

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7. On 6 August 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the investigation is to determine whether the public authority was entitled to rely on the exemption at section 40(2) FOIA to withhold the information within the scope of Part b of the request above of 3 November 2011.

### **Reasons for decision**

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#### Section 40(2)

9. Information is exempt from disclosure on the basis of the exemption at section 40(2) FOIA if it constitutes third party personal data (i.e. the
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<sup>1</sup> HM Revenue & Customs

personal data of anyone other than the individual making the request) and either the first or second condition in section 40(3) is satisfied.

10. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'*

Is the requested information personal data?

11. The Commissioner is aware that the complainant had named the Counsel he was referring to in Part b of his request as part of the notes he provided to assist the public authority in locating the information requested. The public authority submitted that although the complainant did not name the Counsel in his actual request, it is clear from the notes he provided that he knew the name of the Counsel. It confirmed that the payments within the scope of the request were made to the named Counsel. The identity of the data subject (i.e. the named Counsel) was therefore already known to the complainant and the public authority.
12. The Commissioner considers the amount paid to Counsel for representing the public authority at the Queens Bench Division of the High Court in respect of claim HQ09X04811 is data which relates to him/her and from which they can be identified. The payments made are linked to the data subject because they are for work he/she carried out. The Counsel can therefore be identified from the payments not only because it relates to the work he/she had undertaken but also from other readily available information like court records. The fact that the complainant already knows the name of the Counsel is also significant because that in itself is information which can be used to link him/her to the payments. The Commissioner therefore finds that, in the circumstances of this case, the payments made to Counsel for representing the public authority in respect of claim HQ09X04811 is personal data within the meaning of section 1 of the DPA. He believes that the number of hours worked by the Counsel in question together with set remuneration rates (which the Commissioner understands are publicly available) would enable the complainant to calculate the payments made by the public authority to the Counsel. For that reason, he additionally finds that, in the circumstances of this case, the number of hours worked by Counsel in respect of claim HQ09X04811 also constitutes personal data within the meaning of section 1 of the DPA.

13. The Commissioner accepts that the requested information relates to public expenditure. However, that does not mean that it cannot also constitute personal data. He disagrees with the view that if public expenditure were to also constitute personal data, accountability would somehow be lost. Section 40(3) FOIA, which sets out conditions that have to be satisfied in order to withhold personal data, envisages circumstances whereby personal data could be disclosed. It is to these conditions in section 40(3) that the analysis now turns.

Would the disclosure of the requested information contravene any of the Data Protection Principles?

14. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
15. The first data protection principle states:  
  
*'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-*  
  
*(a) at least one of the conditions in schedule 2 [of the DPA] is met....'*
16. The Commissioner first considered whether disclosing the requested information would be fair to the Counsel in question in the circumstances of this case. In considering the fairness element of the first data protection principle, the factors taken into account by the Commissioner in the circumstances of this case include the reasonable expectations of the data subject and the impact of disclosure.
17. The public authority submitted that the Counsel in question would not expect details of payments made to him/her in the circumstances to be disclosed under FOIA. Such unrestricted disclosure would be excessive and consequently unfair. To ensure accountability for public expenditure and consequently meet a legitimate public interest (not an individual's private interest), it was already publishing expenditure information in line with the government's transparency agenda. Therefore, in the circumstances, the Counsel would reasonably expect that payments specifically made to him/her will not be singled out for disclosure under FOIA and to do otherwise would be unfair.
18. The Commissioner accepts it would be reasonable for the Counsel to expect that the public authority would not publish details of payments specifically made to him/her in relation to work undertaken in respect of claim HQ09X04811. He also considers disclosure would constitute an intrusion on the private life of the Counsel because it would reveal information related to his/her financial affairs. As mentioned,

accountability for public expenditure which includes legal costs was being met via publications in line with the transparency agenda.

Disclosing payments specifically made to the Counsel in question is not necessary in the circumstances of this case to meet the legitimate public interest in accountability for public expenditure.

19. In view of the above, the Commissioner finds that the disclosing the payments made to the Counsel for work undertaken in representing the public authority in respect of claim HQ09X04811 would contravene the first data protection principle. The public authority was therefore entitled to rely on section 40(2) to withhold the information.

## Right of appeal

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20. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

21. 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.
22. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**