Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **30 July 2015**

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

Decision (including any steps ordered)

1. The complainant has requested the number of penalties charged by HMRC for Petroleum Revenue Tax under the Finance Acts 2007-2009. HMRC advised the complainant that the number of penalties charged since 2007 was 'fewer than 5' but refused to provide the exact number, withholding this information under Section 44(1)(a) of FOIA. The Commissioner's decision is that HMRC has correctly applied the exemption and he does not require HMRC to take any further steps.

Request and response

2. On 6 May 2014, the complainant wrote to HMRC and requested information in the following terms:

   'Please could you provide details of the number and value of penalties imposed under the Oil Taxation 1985, for which you hold records to date. If no penalties have been issued, please could this be indicated'.

3. HMRC responded on 4 June 2014 and requested clarification of the request. It noted that there was no such legislation in 1985 and queried whether the complainant intended to ask about the Oil Taxation Act 1975 (OTA). HMRC advised that it held information for penalties in more than one location and to locate information for 'Oils' penalties charged under the OTA or subsequent provisions it would be necessary to search individual records. HMRC confirmed it did not hold records of penalties going back to 1975.

4. The complainant wrote to HMRC on 4 June 2014 and explained that what he had meant by his request was '*whether any penalties had been*

issued under the 1975 Act and if so, how many and what kind?' The complainant acknowledged the difficulties noted by HMRC and confirmed that he was happy to refine his request to, *'any penalties under the Finance Acts 2007-2009 in connection with petroleum revenue matter'* and for this request to be limited to any records held centrally by HMRC. The complainant stated that, *'if there remains a problem any information on penalties in this area held and immediately available would be useful'*.

5. HMRC responded to the refined request on 2 July 2014 and confirmed that penalties had been charged for Petroleum Revenue Tax (PRT) and that the number charged since 2007 was *'fewer than 5'*. HMRC refused to provide the exact number of penalties charged, citing Section 44(1)(a) of FOIA as the basis for withholding this information. HMRC stated that they were unable to provide the precise figure, *'as doing so might enable individual companies to be identified and this would breach our statutory duty of confidentiality'*.

6. The complainant requested an internal review of the decision on 14 July 2014. He stated that HMRC's reasoning was incorrect and that, *'the mere giving of a particular number less than 5 does not enable me to draw any inferences as to whom received penalties nor would it enable anybody else to draw an inference as to the party involved'*. The complainant further contended that:

   'A distinction needs to be drawn between the question actually asked and one which would filter the class of potential penalty recipients. Questions such as 'How many companies with oil production in the North Sea of over 10 billion gallons have received penalties?' could I see limit the range of companies that might have been the subject of penalty action but not the question under this FOI request. In all the circumstances there is therefore no risk of a breach of taxpayer confidentiality if the question under FOI is answered'.

7. HMRC provided the complainant with its internal review on 14 August 2014. The review advised that although it had not been explicitly stated previously, the original response provided was based on information held in central HMRC records dating from 2007 onwards. The review confirmed that penalties had been charged for PRT since 2007 and that the number charged was fewer than 5. The review noted that the penalties fell within the provisions of guidance to which a link had been provided to the complainant. Noting that Section 44 of FOIA applies where the requested information would be prohibited from disclosure under any enactment, HMRC confirmed that the relevant enactment is Section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) with reference to Section 18(1) of CRCA.

8. In its internal review, HMRC addressed the points made by the complainant by stating that:

'We consider that your request does in effect filter the class of potential penalty recipients because the liability to PRT is limited to a relatively small number of participators (currently around 40). There is information in the public domain which would enable the participators to be identified, for example, from information published by DECC' (Department for Energy and Climate Change).

9. HMRC provided the complainant with two links to information published by DECC, and advised that:

'Participators within this sector will themselves be aware of their competitors and may have additional knowledge/information that would enable them to deduce the identity/identities of the company/companies involved. FOI is applicant and purpose blind and it does not impose any restriction on onward disclosure of information released under FOI. In considering a disclosure under FOI, we must necessarily assume that any information released could be placed in the public domain. For that reason, the precise figure is being withheld under Section 44(1)(a) of the FOIA'.

Scope of the case

10. On 19 August 2015 the complainant contacted the Commissioner to complain about the response provided by HMRC to his request. He stated that:

'It is respectfully suggested that the review contains incorrect reasoning. The matter can be shortly put. Any answer given does not enable any taxpayer to be identified. HMRC suggest that given there are 40 registered traders identification of an individual taxpayer is possible. This is plainly not correct. As pointed out there is no attempt in the question to filter out possible taxpayers where that might be an argument about identification'.

11. During the course of the his investigation, the Commissioner advised HMRC to provide the complainant with a clearer rationale as to the basis for its concern that those with insider knowledge of the oil industry might be able to make identification from disclosure of the actual number of relevant penalties charged. HMRC provided the complainant with further explanation of its position on 24 November 2014 (the Commissioner considers this further explanation later in this notice).

12. The scope of the Commissioner's investigation has been to determine whether HMRC was correct to withhold the information requested (i.e. the precise number of penalties charged for PRT) on the basis of Section 44(1)(a) of FOIA.

Reasons for decision

13. Section 44(1)(a) of the FOIA provides that a public authority may refuse to disclose information if its disclosure by the public authority holding it is prohibited by, or under, any enactment. As an absolute exemption it is not subject to the public interest test.

14. HMRC has stated that it is prohibited from disclosing the information requested by virtue of the provisions of Sections 18(1) and 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA).

15. Section 18(1) CRCA states:

'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'.

16. The Commissioner is satisfied that PRT penalty related information is held by HMRC in connection with its function to assess and collect tax.

17. Although there are exceptions to Section 18(1) contained in Sections 18(2) and (3) CRCA, Section 23 CRCA was amended by Section 19(4) of the Borders, Citizenship and Immigration Act 2009 to make clear that Sections 18(2) and (3) are to be disregarded when considering disclosure of revenue and customs information relating to a person under FOIA.

18. Notwithstanding the above, Section 23(1) (CRCA) states:

'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 Section 44(1)(a) of the Freedom of Information Act 2000'.

19. Therefore, information prohibited from disclosure by virtue of Section 18(1) CRCA is exempt information by virtue of Section 44(1)(a) FOIA only if its disclosure would identify a 'person' to whom it relates or would enable the identity of such a 'person' to be deduced. The term 'person' includes both natural and legal persons.

20. In the further explanation of its position provided to the complainant on 24 November 2014, HMRC advised that its refusal to provide a figure fewer than 5 was based on recommendations by HMRC statisticians that the risk of identification is increased where very small numbers are involved. HMRC referred to Principle 5 and Protocol 3 of the United Kingdom Statistics Authority (UKSA) Code of Practice for Official Statistics (published in January 2009) which requires all producers of Official Statistics to publish a clear statement on confidentiality and access of data holdings used in producing statistical outputs.

21. Principle 5 deals with confidentiality and states that, *'Private information about individual persons (including bodies corporate) compiled in the production of official statistics is confidential, and should be used for statistical purposes only'*. HMRC cited point 1 under Practices (attached to Principle 5) which reads that producers of Official Statistics should *'ensure that official statistics do not reveal the identity of an individual or organisation, or any private information relating to them, taking into account other relevant sources of information'.* However, the Commissioner would note that point 4 states that producers of Official Statistics should, *'ensure that arrangements for confidentiality protection are sufficient to protect the privacy of individual information, but not so restrictive as to limit unduly the utility of official statistics'*.

22. Protocol 3 of UKSA deals with the use of administrative sources for statistical purposes and states that administrative sources should be fully exploited for statistical purposes, subject to adherence to appropriate safeguards. Point 1 under Practices (attached to Protocol 3) reads that producers of Official Statistics should, *'observe all statutory obligations and relevant codes of practice in relation to the protection of confidentiality and the handling of personal data'*.

23. HMRC explained that before releasing any information relating to individuals and businesses it needs to ensure that the data and statistics are not disclosive. HMRC noted that, *'this applies to all data we release, including ad hoc requests (such as FOI requests), not just regular statistical publications'*. HMRC explained that it is important that it has clear guidance in place to support the public policy on confidentiality so that it is able to defend its publication practices from challenge.

24. Noting that Section 23(1)(b) of CRCA makes clear that a disclosure that would enable the identity of a person (or body corporate) to be deduced

will engage Section 44(1)(a) of FOIA, HMRC advised that in considering its position, its must carefully weigh up the likelihood of identification because the consequences of unlawful disclosure are not trivial. It stated that, *'by providing taxpayers with the assurance that details of their personal and corporate financial affairs will remain confidential, trust and candour between the taxpayer and the tax authorities is fostered and maintained'*. HMRC explained that this principle of confidentiality is vitally important as in most cases taxpayers are under a legal obligation to provide considerable amounts of sensitive and personal information to HMRC. It noted that not only does it owe customers a duty to protect their information but also it is more likely that customers will more willingly comply with their obligations if they feel confident that their details are safeguarded.

25. HMRC further advised the complainant that, *'for the entities involved, disclosure of taxpayer specific information may give competitors access to commercially sensitive information'* and that for HMRC officials, unlawful disclosure of information is both a criminal and disciplinary offence.

26. HMRC confirmed that it was aware of the Commissioner's Anonymisation Code of Practice[1] and stated that whilst this specifically addresses issues with reference to the personal data of living individuals, the principles regarding identifying information are equally applicable to information about legal entities, as in the present case. HMRC noted that the Code of Practice sets out the key factors required to ensure that data is sufficiently anonymised so that it is no longer 'personal data' as defined by the Data Protection Act 1998. In applying those principles to this request, HMRC stated that it had to decide whether disclosing the precise figure (of penalties charged) would enable the identity of legal entities to be deduced and therefore engage Section 23(1)(b) of CRCA.

27. The key and most information relevant part of the further rationale provided by HMRC to the complainant was as follows:

'In this particular case, we have concluded that the risk of identification is greater than remote. We consider that there is a reasonable risk of re-identification by a third party within the sector itself; by managers or employees or professional advisers (accountants/lawyers) acting for the companies in this sector. The sector is quite specialised and it is reasonable to assume that managers, employees and professional advisers might move between companies within the sector. As a result,

[1] Anonymisation: managing data protection risk code of practice

they may already have information, which when put together with the precise figure here, would be likely to enable them to deduce which companies received or did not receive penalties.

'In a competitive market, it is reasonable to conclude that re-identification is likely to be attempted because of the potential advantage that such confidential information might give to others in the sector. It is likely that those who did not receive penalties would be happy to confirm this to others in the sector, making it more likely that any that did receive a penalty could then be identified'.

28. HMRC confirmed that it had concluded that there was a *'reasonable likelihood'* that disclosing the precise figure might enable identification of those who have or have not been charged a PRT penalty in this sector. HMRC explained that they had provided the *'fewer than 5'* information *'outside of our obligations under the FOIA'* because it considered that this confirmation, *'would leave a reasonable element of uncertainty such that specific entities were less likely to be identified from that information'*. In providing this information, HMRC had sought to provide the complainant with *'meaningful data'* that would satisfy his request.

29. On 24 November 2014 the complainant acknowledged receipt of the further explanation provided by HMRC but advised them that despite its length he was of the view that HMRC had not justified the refusal to provide the requested information.

30. In subsequent submissions to the Commissioner the complainant acknowledged that, *'it is plainly right as a general proposition that information should be able to be withheld if a publication could lead to others drawing inferences which would result in confidential information being revealed'*. However, the complainant contended that, *'the difficulty in the current case is that HMRC have not gone on to explain in any way how* there *is a risk of disclosure of confidential information in the particular case. Despite the length of response from them there is a lack of a concluded argument. Their argument simply asserts a risk of disclosure but does not explain how this will result in any sensible way'*. The complainant contended that if HMRC was correct in its arguments then its objections to disclosure would be clear and understandable but it was not.

31. In submissions to the Commissioner HMRC provided further information and clarification as to why it considered that disclosure of the precise figure requested by the complainant would, in the circumstances of this case, enable the identities of the company or companies concerned to be deduced and thus breach Section 23(1) of CRCA. HMRC recognised that the Commissioner expects public authorities to provide evidence to support a claim that information is identifying. Referring to the policies

of the Office of National Statistics and those of HMRC's own statisticians, HMRC advised that *'based on statistical probability, there is a significant risk that a figure fewer than 5 will be disclosive'*.

32. HMRC explained that any derogation from its policy on small numbers would only be possible where the risk of confidentiality being breached was less than in the general taxpayer population. HMRC advised the Commissioner that, *'we do not consider the risks to be less in the case of Petroleum Revenue Tax. In fact, we consider that the likelihood is greater given the small size of the sector and the particular arrangements which are in place where more than one oil company is operating on a particular oil field'*.

33. HMRC explained that oil companies operating in the North Sea do so via specific arrangements known as joint ventures and it is very rare for a single oil company to be the sole licensee of an oil field. Instead, one of the field participators is identified as the field operator, who conducts all the business of the field and the rest have the right of audit on payments made. The result, as HMRC stated, *'is that whilst a significant amount of information is shared, this merely focusses attention on the small amount of confidential tax detail: i.e. participators will know a fair amount about how their fellows are taxed and are therefore more likely to be able to identify circumstances behind any penalty activity'*.

34. HMRC noted that there are a small number of participators compared to the general taxpayer population and considerable interchange between the oil company in-house staff and advisers. It advised the Commissioner that, *'it may therefore be possible to build on information already held about activity in a field or errors which may have been identified and link this into the number of penalties that have been issued. Similarly, the advisers of one participator who has suffered a penalty might want to identify whether similar considerations apply to other joint venturers and the precise number of penalties could allow identification'*.

35. In submissions to the Commissioner HMRC contended that it could see no general basis for wanting disclosing of the precise number of penalties *'other than to extrapolate in specific participator circumstances and, as such, we believe the policy of non-disclosure is justified'*.

36. The Commissioner notes that in this particular case, HMRC is not contending that the disclosure of an exact penalty figure would enable the complainant or a member of the public to deduce the identity of the company or companies concerned. Rather, it is their contention that it may be possible for some within the oil industry to link pre-existing knowledge or information held with the number of penalties issued so as to enable identification of the company or companies to be deduced. The

test for assessing whether such identification could be made is whether in all the circumstances of the case it is reasonably likely that an individual (company) could be identified. If this were to be the case then Section 23(1) of the CRCA would apply and the information would be exempt by virtue of Section 44(1)(a) of FOIA.

37. The Commissioner recognises that there can be a risk of re-identification where one individual or group of individuals already knows a great deal about another individual. Such individuals may be able to determine that anonymised data relates to a particular individual, even though an 'ordinary' member of the public or an organisation would not be able to do so. The Commissioner would also accept the argument by HMRC that in the competitive market of the oil industry, re-identification of anonymised data is likely to be attempted because of the potential advantage which such confidential information might give to other companies within the sector.

38. However, the issue for the Commissioner to consider in this matter is whether disclosure of the information requested by the complainant (the precise number of penalties charged) would, in all the circumstances of the case, make it reasonably likely that the relevant company or companies could be identified.

39. As a general proposition, the smaller the pool of potential individuals the greater the risk of re-identification from the release of numerical or statistical data. In this particular case HMRC has advised that the number of participators (i.e. the oil companies potentially subject to a penalty for PRT) concerned is relatively small at around 40. However, this small pool has been made considerably smaller by HMRC confirming that the number of companies which have had a penalty charged is *'fewer than 5'.*

40. In disclosing that the actual number of such penalties charged is *'fewer than 5'*, the Commissioner recognises that HMRC was trying to be helpful to the complainant by providing him with some information relevant to his request rather than none at all. However, such a significant reduction in an already small pool of potential participators runs somewhat contrary to HMRC's position in this matter.

41. By reducing the pool of participators potentially subject to a penalty from around 40 to a maximum of 4, HMRC has not explained why there would apparently be no risk of identification from a figure of 5 but would be such a risk from a potential figure of 4. There is no apparent difference between such numbers in terms of the gradation of identification risk. However, the Commissioner acknowledges and accepts that the disclosure limit of 5 was based on the experience and recommendations of HMRC statisticians in such matters.

42. In correspondence with the complainant, HMRC directed him to information in the public domain published by DECC (given by way of example) which they stated *'would'* enable the relevant participators to be identified. However, HMRC did not provide any explanation or rationale as to how or why this particular information would enable such identification.

43. The Commissioner has examined the DECC information concerned and notes that it is generalised overview information about oil and gas field development and various statistical data concerning UKCS (UK Continental Shelf) Field Information (citing such values as field type, operator, discovery date, production start, current field partners, percentage of equity holding and production history). It is not clear how any of this information could be cross-referenced or linked to the disclosure of a simple numerical figure so as to lead to a reasonable likelihood of identification of the company or companies concerned.

44. In submissions to the Commissioner, HMRC has advised that participators will know a fair amount about how their fellows are taxed and are therefore more likely to be able to identify, *'circumstances behind any penalty activity'*. However, the Commissioner notes that the complainant did not request such background circumstantial information concerning PRT penalties; he requested the *number* of penalties charged only. In order for such purely numerical information to present a risk of identification it would need to provide some linkage to pre-existing penalty information or knowledge held by individuals within the oil industry sector.

45. However, in terms of such pre-existing information/knowledge, HMRC has noted that the sector is quite specialised and has made the important point that, *'it is reasonable to assume that managers, employees and professional advisers might move between companies within the sector'*. The Commissioner would agree that this is a reasonable assumption and that such individuals will take with them knowledge acquired from one company to another company. Some of that knowledge, on the part of at least some individuals, will inevitably include information as to whether a particular company has been subject to a penalty for PRT.

46. The Commissioner considers that such knowledge, when combined with the disclosure of a very small number of potential participators as in this case, could well allow some individuals within the oil industry sector to deduce the identity of the company or companies concerned. Such insider knowledge is, by its very nature, difficult to demonstrate conclusively and certainly HMRC has struggled to do so in this case. However, the test for whether disclosure of the requested information

would identify or allow identification of individuals (companies in this case) is reasonable likelihood.

47. The Commissioner considers, given the very small numbers concerned in this case, that there is at least a reasonable likelihood of identification if the information requested were to be released under the FOIA. He does not consider the risk to be fanciful or unreasonably speculative and is mindful of the serious consequences for HMRC under the CRCA for an unlawful disclosure of information.

48. The Commissioner is therefore satisfied that the requested information is prohibited from disclosure under Section 23(1)(b) of the CRCA. This is because HMRC holds the information in order to fulfil one of its functions and because disclosing it would enable the identity of a person (company) or person (companies) to be deduced. His decision is therefore that the information is consequently exempt from disclosure under Section 44(1)(a) of the FOIA.

Other matters

49. The Commissioner considers that a balance must be struck between the utility of statistical information and the need to protect confidentiality. That balance will necessarily differ depending on the facts and circumstances of each individual case. In this particular case, HMRC has satisfactorily met this balance by confirming that the number of penalties charged for PRT is fewer than 5.

Right of appeal

50. 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 123 4504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.

52. 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
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