

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2015

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

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information in relation to two tax avoidance arrangements known as "Pendulum" and "Alphabeta" vehicles.
2. The Commissioner's decision is that;
 - The public authority was not entitled to withhold all of the information within the scope of the request (the disputed information) on the basis of the exemption at section 31(1)(d).
 - The public authority was entitled to withhold the following information only on the basis of the exemption at section 44(1)(a):
 - lowest penalty levied as a percentage of the tax due where there was an admission of fraud
 - The public authority was not entitled to withhold the following information on the basis of the exemption at section 44(1)(a):
 - highest penalty levied as a percentage of the tax due where there was an admission of fraud
 - lowest and highest penalties levied as a percentage of the tax due where there was no admission of fraud
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the highest penalty levied as a percentage of the tax due where there was an admission of fraud,

- Disclose the lowest and highest penalties levied as a percentage of the tax due where there was no admission of fraud, and
 - Disclose the median penalties levied as a percentage of the tax due.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 1 September 2014 the complainant wrote to the public authority and requested information in the following terms:

'This request relates only to cases concerning taxpayers who have been under investigation in respect of arrangements involving AlphaBeta or Pendulum vehicles which are well known to HMRC's Specialist Investigation teams. For all cases that have concluded by way of contract settlement by today's date that were operated under Code of Practice 9 but where fraud has not been admitted please supply:- the lowest, highest and median penalties levied as a percentage of the tax due. Please supply the same data for all such cases where fraud was admitted. There is no need to identify the tax payers involved.'

6. On 29 September 2014 the public authority informed the complainant that the information held within the scope of his request was considered exempt from disclosure on the basis of section 31(1)(d) FOIA.
7. On 13 October 2014 the complainant requested an internal review of the decision not disclose the information held within the scope of his request.
8. On 9 December 2014 the public authority wrote to the complainant with details of the outcome of the review. It upheld its original decision to withhold information held within the scope of the request in reliance on the exemption at section 31(1)(d).

Scope of the case

9. The complainant contacted the Commissioner on 12 December 2014 to complain about the way his request for information had been handled. He made submissions in support of his view that the public authority

was not entitled to withhold the information held within the scope of his request in reliance on section 31(1)(d).

10. The public authority subsequently informed both the Commissioner and the complainant that it considered some of the information within the scope of the request additionally exempt on the basis of section 44(1)(a) FOIA. The complainant wrote to the Commissioner once more setting out arguments in support of his view that the exemption at section 44(1)(a) was incorrectly engaged.
11. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 31(1)(d) and 44(1)(a) FOIA to withhold the information held within the scope of the request ("the disputed information").
12. The submissions from both the public authority and complainant in support of their positions are summarised further below.

Reasons for decision

Disputed information

13. The public authority explained that there are in fact two tax avoidance arrangements under the overall descriptive term of "Pendulum". However, the disputed information is a set of figures for both the Alphabeta and Pendulum vehicles.
14. As requested, the disputed information is also in two categories; the lowest, highest and median penalties levied in cases where fraud has not been admitted, by refusal of the invitation to enter the contractual disclosure facility, and the lowest, highest and median penalties levied where fraud has been admitted, by acceptance of the invitation to enter the contractual disclosure facility.

Section 31(1)(d)

15. Information is exempt from disclosure on basis of section 31(1)(d) if it would, or would be likely to, prejudice the assessment or collection of any tax or duty or of any imposition of a similar nature.
16. The public authority considers all of the disputed information exempt on the basis of section 31(1)(d).

Complainant's submissions

17. The complainant's submissions challenging the public authority's reliance on section 31(1)(d) are summarised below.
18. The complainant argued that the exemption cannot be engaged because the request relates solely to penalties, not tax or duty. Furthermore, a penalty cannot be described as an "imposition of a similar nature" (as per the wording in section 31(1)(d)). Penalties are distinguishable from tax/duty as the purpose of a penalty is not to raise revenue for government but to change tax behaviour. Therefore, in the complainant's view, disclosure would not have any impact on the tax discussions or the amount of tax that is rightly due.
19. The complainant submitted that the public authority has previously disclosed information similar to the disputed information. In support of this contention, the complainant referred to page 19 of the *Office of Tax Simplification Report of November 2014*.¹

Public authority's submissions

20. The public authority's submissions in support of the reliance on section 31(1)(d) are summarised below.
21. Disclosure of the disputed information would be likely to encourage agents acting on behalf of users of particular tax avoidance arrangements and who are under investigation by the public authority to encourage their clients to argue that the penalty to be applied in their case should be at the lower end of the range, even if the circumstances of their case indicate the penalty should be geared towards the top of the penalty charging scale.
22. The public authority revealed that it was aware of representations by agents on behalf of their clients that the basis of net penalty loadings purportedly being exercised in other cases should represent some form of benchmark in relation to settlement of all cases. The authority however explained that, notwithstanding the fact that the information adduced to support those representations has in large part been incorrect, the authority cannot accept the principle that the nature of offences committed give rise to any form of "across the board" net

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf

penalty loading to be applied. Each case must be considered on its own individual merits and evidence.

23. The public authority stated that disclosure would only serve to exacerbate any existing uncertainty as to the basis upon which the public authority is prepared to exercise its powers to mitigate penalties charged.
24. The public further argued that if information on the range of penalties (ie the disputed information) were disclosed, it could be used to encourage wider participation in avoidance schemes, which would prejudice the assessment or collection of tax.
25. With regards to the complainant's submission that the exemption could not be engaged because the disputed information relates to penalties, not tax or duty, the public authority noted that penalties are imposed where a person has failed to comply with their tax obligations. It therefore argued that the prejudice (to the assessment or collection of tax in this case) arises because disclosing the level of penalties would be likely to result in users of the tax avoidance vehicles in question failing to engage with the process of disclosing their participation in such tax avoidance arrangements and/or seek to settle for less than the full amount of tax that is due, thereby prejudicing the assessment or collection of tax.
26. With regards to the complainant's claim that similar information to the disputed information has previously been disclosed by the public authority in the Office of Tax Simplification Report of November 2014, the public authority explained that the disputed information relates exclusively to penalties charged under section 95 of the Taxes Management Act 1970. However, as noted on page 3 of the Office of Tax Simplification Report, such penalties were outside the scope of the report. Furthermore, none of the information contained in the report relates to the percentage of penalty to be charged in relation to any particular case or narrow range of cases exhibiting similar characteristics.

Commissioner's findings

27. Each of the arguments above have been considered by the Commissioner when reaching his decision, even where he has not felt it necessary to address a particular argument further in the body of this notice.

28. In order to engage a prejudice based exemption² such as section 31(1)(d), the applicable interest within the exemption must be identified, the nature of the prejudice must be considered and the likelihood of the prejudice occurring must be established.
29. The Commissioner is satisfied that the public authority's arguments in support of its reliance on section 31(1)(d) to withhold the disputed information are applicable to the exemption. There is no doubt in his mind that the imposition of penalties for tax avoidance is directly relevant to the public authority's function of assessing and collecting tax. He does not accept the proposition that the exemption envisages penalties for tax related offences as a distinct category. Regardless of the objective of issuing penalties, the fact is that they are a useful deterrent to tax avoidance/evasion behaviour and in that way affect tax revenue. They are therefore relevant to the assessment and collection of tax/duty and consequently relevant to the broad interests (ie not just tax/duty; *impositions of a similar nature* as well) that the exemption at section 31(1)(d) was designed to protect.
30. With regards to the likelihood of prejudice occurring in the circumstances of this case, Commissioner considered whether there was in fact a real and significant risk that disclosing the disputed information would prejudice the public authority's ability to assess or collect tax.³
31. The Commissioner is not persuaded that disclosure would be likely to prejudice the public authority's ability to assess or collect tax for reasons explained below.
32. It is clear from the public authority's submissions that the disclosure could make it more difficult for the authority to impose appropriate penalties primarily as a result of appeals in relation to the amount of penalties imposed from culpable individuals using the disputed information as a benchmark. However, in the Commissioner's view, the increased difficulty would be unlikely to translate or extend to not being able to actually issue appropriate penalties.
33. From its own submissions, the public authority is clear that it would not accept a form of "across the board" penalties and that each case would

² A prejudice based exemption requires an element or the likelihood of "harm" to be established before it can be engaged.

³ The Commissioner considers that 'would be likely to prejudice' which is the threshold of likelihood that the public authority has relied on, means there must be a real and significant risk of prejudice.

have to be considered on its own merits. In light of that statement, it is difficult to see how disclosure of the disputed information would result in a real and significant risk of prejudice to the public authority's ability to issue appropriate penalties.

34. In the Commissioner's view, the fact that it could make it more difficult to do so given the likelihood of increase in appeals and/or individuals becoming less willing to reveal their participation in the tax avoidance vehicles in question does not pose a real and significant risk to the public authority's ability to impose appropriate penalties. Disclosure is highly unlikely to undermine the public authority's statutory responsibility of investigating tax avoidance arrangements such as the Pendulum and Alphabeta vehicles and to issue appropriate penalties to those found to have engaged in such practices. Whilst it might make the process lengthier than it otherwise would, the test in section 31(1)(d) is actually whether there is likely to be any prejudice to the public authority's ability to carry out its function of assessing or collecting tax as a result. The Commissioner is not persuaded that the extent and/or severity of that difficulty would pose any real and significant risk to the authority's ability to assess or collect tax.
35. Furthermore, the Commissioner does not accept that the disputed information alone could encourage those wanting to participate in tax avoidance generally. As the public authority itself has consistently maintained, the figures are not a benchmark and each case would have to be decided on its merits. In addition, without knowing the actual number of cases to which each figure applies, it would be difficult to draw a conclusion one way or the other in relation to the extent or number of times the public authority might be prepared to impose a particular penalty.
36. Consequently, the Commissioner finds that the exemption at section 31(1)(d) was not engaged because disclosure of the disputed information would be unlikely to prejudice the public authority's ability to assess or collect tax.
37. Having found that the exemption was not engaged, the Commissioner did not have to conduct a public interest test.

Section 44(1)(a)

38. The public authority considers the lowest and highest penalties levied under the two categories⁴ additionally exempt on the basis of section 44(1)(a). The authority does not consider the median penalties exempt on the basis of section 44(1)(a).
39. Information is exempt on the basis of section 44(1)(a) if its disclosure is prohibited by or under any enactment.

Public authority's submissions

40. Some of the public authority's submissions in support of the reliance on section 44(1)(a) are summarised below. The rest of the submissions have been reproduced in a confidential annex which the Commissioner has not revealed to the complainant or made public because they refer directly to the disputed information as well as other confidential tax payer information.
41. The public authority submitted that it is prohibited from disclosing the lowest and highest penalties levied by virtue of the combined provisions of sections 18(1) and 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA).
42. The public authority argued that the lowest and highest penalties are prohibited from disclosure under CRCA because they are held by the authority in connection with its functions and relate to a "person" who could be identified from the information (ie the lowest and highest penalties).

Complainant's submissions

43. The complainant's submissions challenging the public authority's reliance on section 44(1)(a) are summarised below.
44. The complainant noted that he had not asked for details of any persons affected by the penalties. He submitted that he could not see how disclosing the highest and lowest penalties levied could in any way possibly identify or lead him to deduce the identity of the persons to whom it relates. In his own words: *'All I will have are two percentage figures in isolation, nothing more. From that data alone it is impossible to deduce who was the subject of the penalty.'*

⁴ Where there was an admission of fraud, and where there was no admission of fraud.

45. He further argued that if the public authority was correct, then it would never have to disclose any information under FOIA as all tax data relates to a person, and that could not be right. The correct question, in his view, was whether, the data could, in reality lead to the identity of a person (to whom it relates) being deduced and that was clearly not the case in relation to the disputed information in question.

Commissioner's findings

46. Inevitably, some of the Commissioner's findings have only been revealed in the confidential annex for the same reasons that some of the public authority's submissions have not been revealed here.

47. 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.'

48. The Commissioner is satisfied that the lowest and highest penalties (and indeed the rest of the disputed information) are held by the public authority in connection with its function to assess and collect tax.

49. 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.

50. 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.'

51. 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.

52. For reasons explained in the confidential annex, the Commissioner is satisfied that the lowest penalty levied where there was an admission of fraud is exempt on the basis of section 44(1)(a). He considers that it is information which would enable the identity of a person (to whom it relates) to be deduced.
53. However, for reasons also explained in the confidential annex, the Commissioner is not persuaded that the highest penalty levied where there was an admission of fraud and the lowest and highest penalties levied where there was no admission of fraud are exempt on the basis of section 44(1)(a). He does not consider that it is information which would specify the identity of a person to whom it relates or would enable the identity of such a person to be deduced.
54. The Commissioner therefore finds that the public authority was entitled to withhold the lowest penalty levied where there was an admission of fraud in reliance on section 44(1)(a). However, he finds that the public authority was not entitled to withhold the highest penalty levied where there was an admission of fraud and the lowest and highest penalties levied where there was no admission of fraud in reliance on section 44(1)(a).
55. For the avoidance of doubt, section 44(1)(a) is an absolute exemption. Therefore, there is no requirement to conduct a public interest.

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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Alexander Ganotis
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