

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 January 2018

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the public authority for a copy of the guidance issued to officials on the qualifying remunerative work test for self-employed persons claiming working tax credits pursuant to the Tax Credits Act 2002. The public authority withheld the guidance on the basis of the exemptions at section 31(1)(a) and section 31(1)(g) - by extension, section 31(2)(a) FOIA.
2. The Commissioner has concluded that the public authority was entitled to withhold the guidance on the basis of section 31(1)(g) and by extension, section 31(2)(a) FOIA.
3. No steps required.

## Request and response

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4. The complainant submitted a request for information to the public authority on 18 May 2017 in the following terms:

"HMRC's tax credit manual at TCM0118180 defines self-employment as the carrying on of a trade, profession or vocation which is commercial with a view to the realisation of profits.

Please may I have a copy of the guidance issued to tax credit staff on the meaning of 'commercial' and 'with a view to the realisation of profits' and what factors that they should consider in determining if a claimant's trade, profession or vocation is commercial and carried on with a view to the realisation of profits.

The word and expression I have asked about are very similar to the tests applied to losses for income tax purposes (see BIM85701 where the test is on a commercial basis and with a view to the realisation of profits of the trade). Do the commissioners consider that the relevant words in TCM0118180 and BIM85701 have the same or different meanings?"

5. The public authority provided its response on 9 June 2017. It advised that some of the information within the scope of the request was available in the published general guidance on the qualifying remunerative work test for self-employed persons receiving working tax credits (WTC).<sup>1</sup> It explained that it considers the words 'commercial basis' and 'profits' have the same meaning in TCM0118180 and BIM85701, and that they are not defined in legislation so would take their everyday dictionary meanings. The public authority explained that the additional information held on the meaning of commercial with a view to the realisation of profits, and on the factors that its officials consider in determining if a claimant's trade, profession or vocation is commercial and carried on with a view to the realisation of profits was being withheld on the basis of section 31(1)(d) FOIA.
6. The complainant requested an internal review of the public authority's response above on 15 June 2017. He thanked the authority for referring him to the published TCTM02415 guidance but added that it gave "no detailed guidance" on how to interpret 'on a commercial basis with a

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<sup>1</sup> TCTM02415 - <https://www.gov.uk/hmrc-internal-manuals/tax-credits-technical-manual/tctm02415> The public authority subsequently advised the Commissioner during the course of her investigation that this information was provided in order to be helpful, suggesting that it no longer considered that the information was caught by the request.

view to a profit tests...' He also argued that the public authority was not entitled to rely on section 31(1)(d).

7. On 7 August 2017 the public authority wrote to the complainant with details of the outcome of the internal review. It upheld the decision to rely on section 31(1)(d) as the basis for withholding information within the scope of his request.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 14 August 2017 in order to complain about the public authority's handling of his request. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
9. During the course of the investigation the public authority reviewed its position and upon reflection withdrew reliance on section 31(1)(d) and sought to rely instead on the exemptions at section 31(1)(a) and section 31(1)(g) FOIA. It advised the complainant accordingly on 27 October 2017.
10. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at section 31(1)(a) and section 31(1)(g) as the basis for withholding the information held within the scope of the request.

## **Reasons for decision**

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11. The public authority has submitted that disclosure of the withheld information could assist individuals with such intent to change the information given to officials and/or its presentation in an attempt to receive WTC that they are not entitled to. It argued that in all cases this would constitute a failure to comply with the law and in some cases constitute criminal activity.

### Section 31(1)(g)

12. The Commissioner has first considered whether the public authority was entitled to rely on section 31(1)(g).
13. The exemption states:  
  
"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

14. The public authority has stated that the relevant function for the purposes of its reliance on this provision is that contained in section 31(2)(a) FOIA which states:

“the purpose of ascertaining whether any person has failed to comply with the law...”

Withheld information

15. The guidance which has been withheld sets out how officials should assess and test the evidence supplied by self-employed persons applying for WTC in order to ensure that they are eligible. It includes questions officials should ask themselves as part of assessing and testing the evidence provided pursuant to satisfying the criteria that the self-employment is on a commercial basis with a view to the realisation of profits.

Complainant's submissions

16. The complainant's submissions focus primarily on the reasons why he disagrees with the new eligibility criteria introduced by the government in April 2015<sup>2</sup> for the self-employed claiming WTC. The criteria requires all self-employed claimants to show that they are trading on a commercial basis and their business is done with a view to achieving profits. The self-employment must also be structured, regular and ongoing.
17. He has however also stated that he needs to see the guidance officials rely on to interpret the data in the eligibility questionnaire claimants are required to complete as part of their application for WTC especially in relation to how they distinguish “the commercial from the non-commercial and so on.”
18. Furthermore, in his own words, “I have not asked for any information concerning any person. None of the information I have asked for involves HMRC's ascertainment of any particular person's failure to comply with the law. Sections 31(1)(g) and 31(2)(a) are simply not applicable.”

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<sup>2</sup> Published 25 March 2015 - <https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2015-new-rules-for-the-self-employed-claiming-working-tax-credit/revenue-and-customs-brief-7-2015-new-rules-for-the-self-employed-claiming-working-tax-credit>

Public authority's submissions

19. The public authority's submissions are summarised below.
20. It explained that the new eligibility criteria for the self-employed claiming WTC was introduced in order to make sure that claimants are genuinely in work, rather than carrying out a hobby business for reasons other than making a profit. WTC's purpose is to support people who are in work, and other support is available through benefits administered by the Department for Work and Pensions for those in other circumstances. The purpose of the withheld guidance is to instruct officials on how to ascertain whether or not a claimant is eligible for WTC by checking the nature of their self-employment. It sets out the questions officials need to ask themselves and how they should assess and test the evidence provided by the customer. In particular it sets out the points that they need to weigh up in coming to a decision.
21. It therefore submitted that disclosing the guidance would be likely to undermine the compliance activity that it undertakes pursuant to the Tax Credits Act 2002 with regards to assessment of WTC eligibility and consequently would be likely to prejudice HMRC's ability to accurately and effectively assess WTC claimants' self-employment status and ultimately their eligibility for WTC. It argued that knowledge of the information given to officials in order to support this compliance activity could assist opportunistic individuals to tailor their claims accordingly in an attempt to receive WTC that they are not entitled to. Such individuals would also be able to construct records that meet the letter of the guidance in order to claim WTC to which they are not entitled. While there was always a risk of fraudulent claims, this risk would increase if people knew exactly how officials make their assessment. It added that the new eligibility test would reduce the cost of tax credits by hundreds of millions of pounds in the period up to 2021 so even a small uptake by opportunistic individuals would have a substantial impact on the Exchequer. In 2015/16 alone there were 110,000 incidents of fraud in relation to tax credits as a whole costing the tax payer £370 million.
22. With respect to the balance of the public interest, the public authority acknowledged that disclosure of information such as the withheld information in this case helps promote greater awareness of how taxes and tax credits work and that in turn makes it easier for individuals to claim the right amount of tax credits. Disclosure could also reassure the public that compliance activities are fair, robust and applied equitably.
23. It however pointed that it is subject to regular scrutiny by bodies such as the National Audit Office, the Public Accounts Committee and the Treasury select Committee. It argued that through this scrutiny, the effectiveness of its strategic decisions can be challenged to ensure it is accountable. Specifically, in terms of scrutiny of the guidance, it had

published information on the 'Self Employed Test' in its Annual Report 2016/17. The guidance itself has been shared on a confidential basis with trusted external stakeholders in the Benefits and Credits Consultation Group in order to seek their views. This group includes customer representatives such as the Low Incomes Tax Reform Group and Citizens Advice. This engagement provides for the public benefit of scrutiny without releasing information that would prejudice the assessment of tax credits eligibility. It also took a phased approach to applying the new eligibility criteria during 2015/16, testing the communications and the approach to checking eligibility through the year.

24. Furthermore, if a claimant disagrees with a decision by the public authority they can ask it to reconsider that decision. If they continue to disagree then they can take their case to the independent Tribunal.<sup>3</sup> In addition, it is committed to ensuring WTC claimants have authoritative and helpful advice to enable them make their claim. For self-employed WTC claimants, it publishes a range of accessible guidance including technical manuals.<sup>4</sup>
25. On the other hand, there is a strong public interest in not disclosing information which would put the public authority's compliance activities at risk, increase the level of fraud, and result in payment of tax credits to individuals who are not entitled. In addition, overpaying entitlement to WTC is unfair to honest tax payers because the public authority may need to deploy extra resources to investigate fraudulent claims and consequently there is less in the Exchequer for other spending.
26. Therefore, in light of the information that is already publicly accessible, the overall benefit of disclosing the guidance would not be sufficiently great to justify the risk of the information being used by opportunistic individuals to claim WTC to which they are not entitled. Disclosure is likely to have a significant impact on the public purse and that would not be in the public interest in the circumstances.

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<sup>3</sup> Presumably the Social Security and Child Support Tribunal.

<sup>4</sup> <https://www.gov.uk/working-tax-credit>

<https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2015-new-rules-for-the-self-employed-claiming-working-tax-credit/revenue-and-customs-brief-7-2015-new-rules-for-the-self-employed-claiming-working-tax-credit>

<https://www.gov.uk/hmrc-internal-manuals/tax-credits-technical-manual/tctm01001>

Commissioner's position

27. The Commissioner has first considered whether the exemption at section 31(1)(g) and by extension, section 31(2)(a), was correctly engaged.
28. It is a prejudice based exemption which means that some demonstrable harm to the applicable interest must be shown before it can be engaged. The Commissioner considers that the following criteria must be met: the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interest within the exemption, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to prevent, and it is necessary to establish whether the level of likelihood of prejudice being relied upon is met – ie disclosure 'would be likely to prejudice' or disclosure 'would prejudice'. The Commissioner considers that 'would prejudice' means the likelihood of prejudice is more probable than not, and 'would be likely to prejudice' on the other hand means that there is a real and significant risk of prejudice.
29. The Commissioner is satisfied that the likelihood of fraudulent claims for self-employed WTC relates to the purpose of ascertaining whether any person has failed to comply with the law. This compliance activity is pursuant to the Tax Credits Act 2002. She is also satisfied that there is a causal relationship between the disclosure of the withheld guidance and the likelihood of prejudice to the ability to ascertain whether a self-employed WTC claim meets the eligibility criteria.
30. Having inspected the withheld guidance and considered the public authority's submissions, the Commissioner is satisfied that its disclosure would result in a real and significant risk of fraudulent claims for self – employed WTC. Whilst the guidance may be less revelatory to those with experience in submitting claims for self-employed WTC since April 2015 and/or those who have carefully considered published guidance including internal manuals, particularly TCTM02415, it provides useful insight into how officials are expected to consider, interpret and assess evidence in order to determine eligibility. It would therefore assist individuals so inclined to submit fraudulent claims with evidence tailored accordingly in order to increase their chances of receiving benefits to which they are not entitled. It would almost certainly also assist such individuals in answering follow up questions by officials testing the evidence submitted in support of their claims. It is immaterial with respect to the likelihood of prejudice whether the information requested relates to an individual as has been suggested by the complainant.

31. The Commissioner has therefore concluded that the public authority was entitled to engage the exemption at section 31(1)(g) and by extension, section 31(2)(a).

Public interest test

32. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld guidance.
33. The fact that the complainant disagrees with the new eligibility criteria does not in the Commissioner's view provide sufficient justification for disclosing the withheld guidance in the public interest. The proper place to pose the sort of questions that the complainant has raised with respect to the eligibility criteria has to be first and foremost with the public authority, followed by an independent Tribunal and perhaps ultimately at the High Court. The primary consideration for the Commissioner is whether on balance disclosure of the guidance is necessary in the public interest.
34. Having considered the submissions in this case and the withheld guidance, the Commissioner is not persuaded that there is a strong public interest in disclosing it in order for claimants to be able to distinguish whether a vocation is commercial and is being carried out with a view to the realisation of profits. She is satisfied that published guidance including internal manuals would assist claimants in properly making that distinction. Inevitably, there will be cases where the distinction might not be easy to make. However, individual cases can be tested at the Tribunal. The withheld guidance is unlikely to be able to offer definitive answers in every case.
35. The Commissioner accepts that there is a strong public interest in not disclosing the guidance in view of the real and significant risk it would pose to the public authority's compliance activities. There is a significant public interest in not releasing information which would assist individuals in submitting fraudulent WTC claims. Indeed, in his request the complainant added that he would like to know the factors officials consider in determining if a claimant's trade, profession or vocation is commercial and carried on with a view to the realisation of profits. There is no doubt such insight would be useful to those with fraudulent motives. She shares the view that the overall benefit of disclosure does not justify the risk of disclosure in the circumstances of this case.
36. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.



37. In view of her decision, the Commissioner did not consider the applicability of section 31(1)(a). However, if she had, it is highly likely she would have concluded the public authority was entitled to also rely on this exemption for the same reasons she has found section 31(1)(g) was correctly engaged.

## Right of appeal

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38. 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: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.

40. 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 .....**

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**