

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2018

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

Decision (including any steps ordered)

1. The complainant requested emails, notes, documents or files from or to a named official of HM Revenue and Customs ("HMRC") covering certain matters and dates, which relate to two previous information requests submitted by the complainant. HMRC refused to provide the information relying on section 40(2) (personal information).
2. During the course of the Commissioner's investigation HMRC decided to also invoke section 36(2)(b) and (c) of the FOIA as it considered that disclosure would inhibit the free and frank provision of advice or exchange of views, or would otherwise prejudice the effective conduct of public affairs.
3. The Commissioner's decision is that HMRC correctly applied section 36(2)(b) and section 40(2) of the FOIA to the withheld information.
4. The Commissioner does not require HMRC to take any steps.

Request and response

5. On 21 February 2017, the complainant wrote to HMRC and requested information in the following terms:

"Any emails from or to [name redacted] based in 'Policy and Technical within Counter Avoidance' (in the period 22 January 2017 to 16

February 2017 inclusive) that contain any of the following search terms '2017/00115'; '2017/00117'; '00115-17'; '00117-17'. Any notes, documents or files (other than emails) as held by [name redacted] based in 'Policy and Technical within Counter Avoidance' on 16 February 2017 that relate to the FOIA requests made on 22 January 2017 and allocated the reference '00115-17'; '00117-17'. In both cases the request hereby specifically excludes from its scope any information that is the same or similar to the information requested in the FOIA requests made on 22 January 2017 and allocated the reference '00115-17'; '00117-17' and any other FOIA requests made by me on 21 February 2017. You may redact or anonymise any documents as necessary"

6. On 22 March 2017 HMRC responded to the request stating that the requested information contained personal data of third persons, which are exempted from disclosure pursuant to section 40(2).
7. Remaining dissatisfied with the response, on 2 April 2017 the complainant requested HMRC to conduct an internal review.
8. Following an internal review HMRC wrote to the complainant on 18 October 2017. It stated that it had decided to uphold the initial refusal.
9. In the course of the Commissioner's investigation HMRC informed the Commissioner that, in addition to relying on section 40(2), it decided also to rely on the exemptions provided by sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs) and provided its arguments in the support of the new position.

Scope of the case

10. The complainant initially contacted the Commissioner on 11 September 2017 to complain about the lack of outcome to the internal review requested on 2 April 2017.
11. Upon the Commissioner's intervention, HMRC provided the internal review outcome to the complainant. However, the complainant was not content with the response and, therefore, requested the Commissioner to investigate the case.
12. The Commissioner has focused her investigation on examining whether HMRC correctly applied sections 36(2) and 40(2) of the FOIA to the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

13. HMRC stated that the withheld information consists of email exchanges between a number of its junior officials, which contain their personal data, such as their names, work addresses, e-mail addresses, telephone numbers and some ancillary data.
14. Section 40(2) of the FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3)(a)(ii) is satisfied.
15. One of the conditions, listed in section 40(3)(ii), is where the disclosure of the information to any member of the public would contravene any of the data protection principles.

Is the withheld information personal data?

16. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.
17. Personal data is defined in the Data Protection Act 1998 (DPA) as:
“...data which relate to a living individual who can be identified-
 - (a) from those data, or*
 - (b) from those data and other information which is in possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”*
18. With regard to the withheld information, HMRC considers that the withheld information contains personal data of the named official and that of other junior officials, who participated in the exchange of emails.
19. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable.
20. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The Commissioner has considered whether the individuals are identifiable from the withheld information.

22. She notes that the withheld information contains personal data falling into two categories:
 - a. In relation to the official who dealt with the complainant's previous FOI requests: name, job title, email address and telephone number; and
 - b. The names, job titles, departments, workplace addresses, email addresses and telephone numbers of nine other HMRC officials involved in the email exchange
23. The Commissioner considers that the information in question is related to living individuals who can be identified. The withheld information is, therefore, personal data.

Would disclosure breach the data protection principles?

24. The Commissioner has gone on to consider whether disclosure of the information in the two categories would breach any of data protection principles.
25. The data protection principles are listed in Schedule 1 of the DPA. The HMRC informed the Commissioner that it considered the first principle, which states that personal data must be processed in a fair and lawful manner.
26. When considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of disclosure and whether there is legitimate public interest in disclosure of the information in question.

Reasonable expectations

27. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an individual in their professional role or to their private life, and in the case of employees, the individual's seniority or whether they are in a public-facing role.
28. In the present case, the withheld information relates to junior staff members below the Senior Civil Service (SCS) holding a discussion in relation to the complainant's previous FOI requests.
29. HMRC explained that its officials holding positions of this rank would not expect that their personal data would be publicly disclosed. In addition it confirmed that the named individuals involved in the discussion contained in the withheld information have not consented to the release of information.

30. The Commissioner's published guidance on personal data about public authority employees¹ quotes the Information-rights Tribunal: "...while officials who speak to the media or represent the Department at outside functions may expect their names to be disclosed, this was not the case for junior civil servants who only corresponded with members of the public."²
31. The Commissioner notes that some of the participants in the discussion included detailed contact information in their signatures, such as mobile phone numbers. In addition the subject line of the email exchange was labelled as "*OFFICIAL – SENSITIVE*".
32. In light of this, the Commissioner is satisfied that the data subjects would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties.

Consequences of disclosure

33. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals in question.
34. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the information in question. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
35. The Commissioner considers it can be difficult to quantify what damage and distress may be caused but in any event it is only necessary to show that there is a possibility of this happening. For much the same reasons as above, the Commissioner acknowledges there is a possibility of the individuals concerned being distressed by the disclosure of their names and the fact they were involved in these, contrary to the reasonable expectation of privacy covered above.

Legitimate public interest in disclosure

36. The Commissioner must also consider whether there is a wider legitimate public interest in the disclosure of the requested information. The question here is whether there is a legitimate public interest in

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

² *Joe McGonagle v Information Commissioner and Ministry of Defence*
<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i603/20111104%20Decision%20EA20110104.pdf>

disclosure of such significance that this outweighs the factors against disclosure covered above.

37. The Commissioner notes that there is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability of public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and to participate in decision-making processes.
38. However, given the importance of protecting an individual's personal data, the Commissioner's default position in cases where section 40(2) has been cited is in favour of protecting the privacy of the data subjects. Therefore in order to find in favour of disclosure, it would need to be shown that there is a sufficiently compelling interest in disclosure which would make it fair to do so.
39. Having considered HMRC's submission, the Commissioner is satisfied that the arguments for disclosing the specific information are not as compelling as the need to protect individuals' personal data, due to:
 - the individuals' reasonable expectation about how their personal data will be managed;
 - the individuals' lack of consent to its disclosure; and
 - the possible negative consequences to the individuals of disclosing the information.
40. Consequently, the Commissioner has decided that HMRC has correctly applied section 40(2) in relation to the part of the requested information that contains personal data of the individuals involved in the email exchange.
41. The Commissioner has gone on to consider the application of section 36(2) regarding the remainder of the requested information.

Section 36(2)(b)(i) and (ii) and (2)(c) – Prejudice to effective conduct of public affairs

42. In relation to the remainder of the withheld information, for which section 40(2) was not cited, HMRC relied upon sections 36(2)(b)(i) and (ii) and (2)(c) of the FOIA.
43. Section 36 of FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

would or would be likely to inhibit;

(2)(b)(i) the free and frank provision of advice;

(2)(b)(ii) the free and frank exchange of views for the purpose of deliberation.

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

44. The Commissioner first considered whether the public authority was entitled to withhold the information within the scope of the complainant's request on the basis of the exemptions at section 36(2)(b)(i) and (ii).
45. In determining whether these exemptions were correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly, the Commissioner must:
- establish that an opinion was given;
 - ascertain who was the person or persons;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
46. In this case, HMRC explained that the qualified person is Ms Penny Ciniewicz (Commissioner in HMRC), who issued the opinion engaging the exemption on 8 January 2018.
47. Section 36(5) of the FOIA specifies who may act as a *qualified person* for various categories of public authorities for the purposes of section 36(2) of the FOIA.³
48. HMRC is a non-ministerial government department and therefore the "qualified person" are its Commissioners (section 36(5)(c)). The Commissioner is satisfied that Ms Ciniewicz is one of HMRC's Commissioners. HMRC provided the Commissioner with a copy of

³ A full text of section 36 FOIA can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

submissions that were sent to Ms Ciniewicz, which the Commissioner accepts as evidence that an opinion was given by an appropriate person.

49. The submissions explained to the qualified person that the withheld information concerned discussions in relation to some previous requests submitted by the complainant. The qualified person has given her opinion that disclosing this information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation.
50. The Commissioner is satisfied that HMRC has obtained the opinion of the proper qualified person. Therefore, this element of the exemption under 36(2)(b)(i) and (ii) is met.
51. The Commissioner will consider the application of section 36(2)(b)(i) and (ii) in the first instance. It will only therefore be relevant to consider the application of section 36(2)(c) if the Commissioner does not find sections 36(2)(b)(i) or (ii) to be engaged.
52. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
 - Whether the prejudice claimed relates to the specific subsections of section 36(2) that HMRC is relying on;
 - The nature of the information and the timing of the request; and
 - The qualified person's knowledge of or involvement in the issue.
53. The Commissioner has published guidance on section 36⁴ and with regard to what can be considered a "reasonable opinion" it states the following:

"The most relevant definition of 'reasonable' in Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."
54. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.

⁴ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

55. Having examined all the information provided to the qualified person, the Commissioner is satisfied that the information included the relevant arguments. The qualified person had access to email exchange that took place between HMRC officials which constitutes the withheld information. In addition, the qualified person was also provided with a draft response to the complainant explaining subsequent relying on section 36, a draft response to the Commissioner's initial letter and a background submission in relation to the information request.
56. The Commissioner notes that HMRC's submission confirms that the qualified person has given a consideration to the matter and authorised application of section 36(2).
57. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation.
58. As a result, the Commissioner is satisfied that section 36(2)(b) of the FOIA is engaged and has now gone on to consider whether the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

59. Section 36(2)(b) is qualified by the public interest. This means that even though the exemption is engaged, it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The exemption can only be applied if it does.
60. HMRC recognises that *"There is a public interest in releasing the information about the handling of the FOI request because it is desirable for the public to be confident that decisions are taken on the basis of the best available information; the correct weighting is given to the various factors; to ensure there is transparency and accountability; and it would increase public confidence in the FOIA as a robust public access regime."*
61. However, HMRC is of the opinion that in the present case the arguments in favour of withholding information are more convincing than those in favour of disclosure.
62. HMRC explained that the withheld information contain free and frank provision of advice (section 36(2)(b)(i)). It argued that it is important that junior officials with responsibility for co-ordinating the responses to information requests (such as the person mentioned in the complainant's information request), are required to consider all available options and to consult with a number of internal stakeholder with the

requisite knowledge and expertise. HMRC considers that this is an essential process to ensure that it is able to reach an informed and balanced view.

63. In addition, HMRC considers that *"it is essential that officials processing FOI requests can have candid open discussions with colleagues in respect of handling, impact of disclosure and consideration of alternate response options. There is a real risk that disclosure of the withheld information would inhibit this one individual's ability to discharge HMRC's obligations under FOIA as well as other individuals in similar roles."*
64. Due to the fact that the withheld information contains free and frank advice and exchange of opinions between a number of individuals, HMRC considers that *"...the impact on disclosure is not limited to this case alone, but could have implications on how FOI requests are handled across the wider department for other officials who witness how they can be targeted by members of the public dissatisfied with the outcomes of their requests for information."*
65. The Commissioner has agreed that the opinion of the qualified person was reasonable. This gives some weight to the arguments that disclosing the information would have an inhibiting effect. With that in mind the Commissioner now goes on to consider the severity, extent and frequency of that inhibition in reaching her decision.
66. In the present case, broadly speaking, the information concerns an email exchange containing deliberations on the options to respond to the complainant's information requests, which were initiated by a specific HMRC official who was handling the requests. Having examined carefully the withheld information, the Commissioner agrees with HMRC that its normal process of decision-making in relation to FOI requests would be likely to be severely inhibited in future by the disclosure of the withheld information.
67. The Commissioner agrees that the disclosure of the withheld information would affect the confidence with which the HMRC officials approached the discussion and deliberation with the purpose of reaching a decision on the matter related to the FOI request in question. This would be likely to have an inhibiting impact on frankness with which views could be expressed and the quality of deliberation.
68. In conclusion, the Commissioner does not require HMRC to take any steps in relation to the information withheld under this section.

Right of appeal

69. 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

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

70. 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.

71. 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

Ben Tomes
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