

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 August 2008

Public Authority: Her Majesty's Revenue and Customs ('HMRC')
Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Summary

The complainant, a firm of accountants, asked HMRC to provide various pieces of internal correspondence which related to the tax affairs of one of its clients. HMRC initially refused to disclose any information on the basis of the exemption contained at section 31(1)(d) of the Act. HMRC subsequently provided the complainant with copies of the correspondence but with redactions made on the basis of 31(1)(d). During the course of the Commissioner's investigation HMRC then withdrew its reliance on section 31(1)(d) and argued that the redacted information was exempt on the basis of section 44(1)(a) of the Act because of the prohibition on disclosure provided by the Commissioners for Revenue and Customs Act 2005. The Commissioner has concluded that the redacted information is exempt on the basis of section 44(1)(a) but has also found that HMRC committed a number of procedural breaches in handling this request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 18 December 2006 the complainant submitted the following request to HMRC for information about a particular company, which for the purposes of this notice the Commissioner will refer to as company x:

- Copies of internal HMRC memorandum and communications between Wear and South Tyne (C) Compliance Office and Edinburgh Special Civil Investigation Office from 1 October 2003 onwards.
 - Copies of internal HMRC memorandum and communications between Wear and South Tyne (C) Compliance Office and Edinburgh Special Civil Investigation Office and Head Office, Specialist Office or other departments within HMRC from 1 October 2003 onwards.
3. In submitting this request the complainant noted that a particular HMRC employee at the Edinburgh Special Civil Investigation (SCI) office would probably hold the majority of the information falling within the scope of the request.
 4. On 22 January 2007 HMRC refused the request on the basis that it was estimated that to comply with the request would exceed the appropriate cost limit. The only exception to this was the information and material held by the Edinburgh SCI which could be provided within the cost limit. Consequently HMRC explained that this part of the request had been 'processed'. However, the complainant was informed that this information was being withheld on the basis of section 31(1)(d) of the Act.
 5. The complainant subsequently asked for an internal review to be conducted into the decision to withhold the information on the basis of section 31(1)(d). On 20 March 2007 HMRC informed the complainant that an internal review had been conducted and this had concluded that the exemption contained at section 31(1)(d) had been correctly applied to all of the information held by the Edinburgh SCI.
 6. The Commissioner understands that the complainant and HMRC then held a meeting to discuss this request for information. Following that meeting HMRC issued a revised version of its internal review on 1 June 2007. As part of this revised response the complainant was provided with documents falling within the scope of its request which had been located within the cost limit, although a number of redactions were made on the basis of section 31(1)(d).

The Investigation

Scope of the case

7. On 28 June 2007 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant asked the Commissioner to consider HMRC's decision to redact some of the documents on the basis of section 31(1)(d). The complainant did not ask the Commissioner to consider HMRC's decision that to comply with the request in full would exceed the cost limit.

Chronology

8. On 4 April 2008 the Commissioner wrote to HMRC and asked it to provide him with a detailed explanation as to why it considered the redacted sections of the various documents disclosed to the complainant to be exempt from disclosure on the basis of section 31(1)(d). The Commissioner also asked HMRC to provide him with unredacted copies of the documents in question.
9. The Commissioner received a response from HMRC on 30 April 2008. In this response HMRC informed the Commissioner that it was no longer seeking to rely on section 31(1)(d) to withhold the redacted information. Rather it was now seeking to rely on the exemption contained at section 44 of the Act – prohibition on disclosure. HMRC provided a detailed explanation as to why it believed that the interaction of sections 18(1) and 23 of the Commissioners for Revenue and Customs Act 2005 (CRCA) provided a prohibition on disclosure of this information.
10. HMRC did not provide the Commissioner with unredacted copies of the requested information because in HMRC's opinion as it was now relying on section 44(1)(a), rather than section 31(1)(d), 'it is our [i.e. HMRC's] view that there is no need for you to see the documents to consider the prejudice that could occur if they were disclosed'.

Findings of fact

11. The Commissioner has established that the complainant is an accountancy firm which in terms of its tax affairs, represents company x.
12. There were 10 documents which HMRC disclosed to the complainant on 1 June 2007. Of these 10 documents, 7 were provided to the complainant with no redactions made and by implication, 3 were provided to the complainant with redactions.
13. Of the information disclosed by HMRC on 1 June 2007, i.e. the 7 unredacted documents and the 3 partially redacted documents included information which identified company x, its subsidiary companies, the names of the directors of these companies and details of balances of the accounts of the various directors and companies.

Analysis

Section 44 – prohibition on disclosure

HMRC's position

14. HMRC has noted that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law. The prohibition relied upon by HMRC is that contained in the CRCA.
15. Section 18(1) of the CRCA provides that HMRC officials may not disclose information which is held by HMRC in connection with one its functions. Section 23(1) of the CRCA further provides that information relating to a person, the disclosure of which is prohibited by 18(1), is exempt information for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity to be deduced. HMRC has highlighted the fact paragraph 110 of the explanatory notes of CRCA that 'person' includes both natural and legal persons such as companies.
16. HMRC has acknowledged that section 18(2) sets aside the duty of confidentiality in some circumstances, including where HMRC has the consent of the 'person' to which, or to whom, the information in question relates. HMRC's view is that section 18(2) does not affect the interaction of sections 18(1) and 23 of the CRCA so as to negate the application of section 44 of the Act. Rather, it stands outside the Act and its affect is that HMRC may, on a discretionary basis, disclose information it holds.
17. The Commissioner understands that HMRC's reasoning for this position is that section 23 of the CRCA makes no mention of sections 18(2) and 18(3) and the conditions which are noted above.
18. Moreover, HMRC has suggested that the clear intention of Parliament was to remove information from the right of access under the Act as shown by the following statement made by the then Paymaster General, Dawn Primaralo on the introduction of section 23 of CRCA, which followed concerns expressed during the passage of the bill through Parliament that information HMRC held about taxpayers might be disclosed under the Act:

'Taxpayer confidentiality remains of paramount importance in the new department. As I have said, for that reason, the Bill ensures that information connected with a taxpayer is not discloseable under the Freedom of Information Act. That was always the intention, but the new clause puts that beyond doubt – that information will not be discloseable under the Act. However, much of the information that Her Majesty's Revenue and Customs will hold is not taxpayer confidential – for example, information about the department's internal processes. The new clause identifies that such information will be subject to the Freedom of

Information Act. Therefore, if a person requests information that it is not taxpayer confidential, that request will be considered under the Act'.

19. In HMRC's view, if Parliament had intended for section 23 of the CRCA to take account of section 18(2) and section 18(3) exceptions it would have said so.
20. HMRC argues that section 44 applies to the redacted information in this case because it is held for the purpose of assessing and collecting tax, and thus meets section 18(1) of CRCA, and relates to an identifiable person, company x, and thus meets section 23 of CRCA.
21. HMRC has also explained to the Commissioner that although it initially confirmed that it held information about the company x and in fact provided some of this information, if it received this request now its response would be different. As suggested above, it would refuse this request on the basis of section 44(1)(a). Moreover, it would refuse to confirm or deny whether it held any information falling within the scope of the complainant's request. This is on the basis that section 44(2) of the Act provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of the provisions of 44(1). If HMRC revealed that it held something about company x, then it could be revealing something about the affairs of company x whether HMRC went on to disclose the information or not. This would fall within section 44(1)(a) and therefore section 44(2) exempts HMRC from the duty to confirm or deny in this case.
22. HMRC has also explained that if it received this request now it would also suggest that the complainant obtain consent from the authorised officers of company x permitting HMRC to disclose information about the company so that it could consider disclosing information 'on a discretionary basis'. HMRC indicated that when it disclosed information on a discretionary basis it tried to be as open as possible, but for example, would not disclose legal advice or information which it felt might prejudice its enforcement activities.

The Commissioner's position

23. The Commissioner is satisfied that the redacted information falls within the scope of section 18(1) of the CRCA because it is clearly held by HMRC for the purposes of one of its functions, namely the assessment and collection of tax. He is also satisfied that the redacted information relates to identifiable persons, company x and its directors, and therefore meets the requirements of section 23 of the CRCA. Consequently, the Commissioner recognises that the redacted information is potentially exempt from disclosure under the Act on the basis of the exemption contained at section 44(1)(a).
24. However, the Commissioner's disagrees with HMRC's position that section 18(2) of CRCA does not affect the interaction of sections 18(1) and 23 of the CRCA. Rather the Commissioner believes that it is not possible to determine whether or not section 18(1) is engaged without reference to section 18(2).

25. In the Commissioner's opinion the correct application of this particular statutory bar is the following: first whether the information is held in connection with a function of HMRC and thus meets the requirements of section 18(1); second, where none of the exceptions in section 18(2) apply; and third, whether the information relates to identifiable person and thus the requirements of section 23(1) are met.
26. In the recent Information Tribunal decision *Mr Andrew John Allison v Information Commissioner and HMRC* (EA/2007/0089) the Tribunal agreed with the Commissioner's interpretation of the application of this statutory bar:

'The Tribunal feels that on balance the arguments of the Commissioner are to be preferred. First, the Tribunal finds it difficult to find any ambiguity on the face of section 18(1) and section 18(2) of the 2005 Act such as to import the necessity to have recourse to Hansard under the well known principles considered in Pepper v Hart. The language of the relevant provisions in the 2005 Act is clear. It is simply not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). Moreover, on a clear reading of the statute, in the Tribunal's view, it is only if the information is such that none of the exceptions in section 18(2) apply that it can be said that section 18(1) is fully engaged and that the information may not be disclosed. Next and perhaps crucially, section 18(1) whether or not coupled with section 18(2) does not represent a complete code whereby the question as to whether disclosure should be made can be answered. As the Additional Party [HMRC] itself accepts, whether information prohibited from disclosure under section 18(1) is in fact exempt depends on section 23. As a matter of statutory construction, therefore, the Tribunal finds that in the absence of clear words which would expressly distance the operation of section 18(2) from section 18(1) such as to make section 18(1) a complete code in the way suggested, it is necessary to consider whether any of the exceptions in section 18(2) apply before an answer can be given to the question of whether disclosure is prohibited under section 18(1).'

27. Therefore, the Commissioner believes that he has to consider whether any of the exceptions contained within section 18(2) of the CRCA apply before he can conclude that the redacted information is exempt on the basis of section 44(1)(a). In the circumstances of this case the only exceptions that the Commissioner considers may be relevant are those contained at section 18(2)(a) and 18(2)(h). These two sub-sections provide that:

'18(2) But subsection (1) does not apply to a disclosure—

(a) which—

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners,

(h) which is made with the consent of each person to whom the information relates.'

28. With regard to the exception contained at section 18(2)(a) of CRCA the Commissioner is satisfied that making a disclosure of information under section 1(1) of the Act cannot be correctly described as a 'function' of HMRC. Rather complying with statutory obligations, including those imposed by the Act is one of HMRC's general responsibilities as a public authority but is not a specific or unique function of HMRC. This position is supported by the Tribunal decision in the case *Mr N Slann v Information Commissioner* (EA/2005/0019). Therefore the Commissioner is satisfied that the exception cannot be relied upon.
29. Turning to the exception contained at section 18(2)(h), in the Commissioner's opinion the issues of consent is somewhat confused by HMRC's comments in its response of 30 April 2008 to the Commissioner. As noted above, in this response HMRC indicated that if it received this request now it would suggest that the complainant obtain consent from the authorised officers of company x permitting HMRC to disclose its information about company x to the complainant on a 'discretionary basis'. This is because HMRC does 'not regard the usual authority that our customers sign authorising an agent to act in their tax affairs as providing consent to allow them to have our information'.
30. It is the Commissioner's understanding that HMRC's suggestion that the complainant should seek consent from company x so that it could consider a discretionary disclosure outside of the Act, does **not** equate to seeking consent in line with section 18(2)(h) of the CRCA. HMRC's suggestion is simply that a tax agent needs consent from a client in order to see some information held about that client by HMRC. For the purposes of removing the application of 18(1) of the CRCA consent in terms 18(2)(h) means that the persons to which the information relates must consent to disclosure of that information under the Act. It is the Commissioner's opinion that HMRC is not suggesting that if it dealt with this request now, this is the type of consent it would seek.
31. The Commissioner does not intend to speculate as to whether company x, if consulted, would consent to disclosure of its information under the Act. Nor has he taken steps to contact company x in order establish whether it would provide such consent.
32. The Commissioner has taken this approach because the Tribunal in *Allison* indicated that in terms of consent under section 18(2)(h) of CRCA the key issue was that such consent was in place, or sought, at the time of the request:

'In paragraph 61 [of decision notice FS50079644], the Commissioner made the point, again in the view of the Tribunal perfectly properly, that with regard to the need to seek consent for the purposes of section 18(2)(h) of the 2005 Act [the CRCA], it was entirely clear that at the time the Appellant [Mr Allison] had made his original request, quite apart from any later period, no consent had been given. Moreover, section 18(2)(h) did not impose any obligation on the Additional Party [HMRC] to seek consent.' (Tribunal at paragraph 23).

33. HMRC received this request in December 2006 and on the basis of the facts outlined in the chronology it is clear to the Commissioner that at this time no consent, in terms of the consent required for the exception contained at section 18(2)(h) of the CRCA to apply, was given, or indeed sought. Therefore the Commissioner is of the opinion that the exception contained at 18(2)(h) cannot apply in this case. Obviously the Commissioner is mindful of the fact that it was not until April 2008 that HMRC indicated that it considered the requested information exempt on the basis of section 44(1)(a) of the Act and therefore when dealing with the request in early 2007 the issue of consent was not considered. The Commissioner has commented further on how HMRC's late application of section 44(1)(a) has affected the handling of this case in the 'Other Matters' section at the end of this notice.
34. On the basis of the above, the Commissioner is satisfied that on the basis of the interaction of sections 18(1) and 23 of CRCA the redacted information is exempt on the basis of section 44(1)(a) of the Act.
35. The Commissioner has gone on to consider HMRC's argument that if it received this request now it would refuse to confirm or deny whether it held the information on the basis of section 44(2). The Commissioner accepts that when it first received this request HMRC could have correctly refused to confirm or deny whether it held any information falling within the scope of the request. This is because section 44(2) provides that the duty to confirm or deny does not apply if to do so would fall within any of the provisions of section 44(1). The Commissioner agrees with HMRC's position as summarised in paragraph 21 that when it initially dealt with this request if it confirmed that it held information of the nature requested then it would be revealing something about the affairs of company x, namely that at some point its tax affairs had been investigated by HMRC. Consequently simply providing confirmation that it held this information would fulfil sections 18(1) and 23(1) of the CRCA and thus on the basis of sections 44(1) and 44(2) of the Act the duty to confirm or deny contained at section 1(1)(a) of the Act is removed.
36. However, as the chronology clearly demonstrates, HMRC in responding to this request, did in fact confirm that it did hold some information and ultimately disclosed some of this information. The Commissioner has therefore gone on to consider whether if HMRC received a similar request in the future whether it would be correct to rely on section 44(1) to refuse to disclose similar information requested about company x and, moreover, whether it would be correct to rely on section 44(2) to refuse to confirm or deny whether it in fact held any such information.
37. The Commissioner acknowledges the slightly perverse nature of such a consideration – how can a public authority refuse to confirm or deny whether it holds information when it has previously disclosed the very same information in response to an earlier request under the Act? However, in the Commissioner's opinion because of the way in which the relevant sections of CRCA and the Act work, in this particular case, even if it received a further request for similar

information about company x, HMRC would be entitled to refuse to confirm or deny whether it held this information.

38. The Commissioner has reached this conclusion on the following basis:
39. For the sake of simplicity if the gateways contained at section 18(2) of the CRCA are set aside for a moment, for the statutory bar to apply to information it simply has to be held by HMRC for the purposes of one its functions (section 18(1)) and relate to a person if whose identity would be revealed if the information was disclosed (section 23(1)). If HMRC received this request again in the Commissioner's opinion the statutory bar would still apply because the information being sought, including that which was previously disclosed by HMRC, would still meet the requirements of section 18(1) and 23(1) of the CRCA. Given the wording of the statutory bar contained in the CRCA, the bar does not stop applying to information simply because information has been previously disclosed.
40. Furthermore, as the Commissioner has argued above in paragraph 35, he accepts that simply confirmation of the fact that such information about company x is held would fulfil sections 18(1) and 23(1) of the CRCA and thus on the basis of sections 44(1) and 44(2) of the Act the duty to confirm or deny contained at section 1(1)(a) of the Act is removed.
41. The Commissioner notes the CRCA does not provide for situations where information has been previously disclosed under the Act and as a consequence the statutory bar does not apply or the principle of confirm or deny is removed. (In particular none of the gateways listed at section 18(2) anticipate such situation.) Therefore, although on the face if it such a position appears illogical, the Commissioner accepts that if it received this request again, HMRC would be entitled to rely on section 44(2) and the provisions of the CRCA to refuse to confirm or deny whether it held this information.

Procedural matters

42. The complainant submitted this request on 18 December 2006. In refusing this request on 22 January 2007 HMRC refused to disclose all of the information on the basis of section 31(1)(d) of the Act. On 1 June 2007 HMRC withdrew its reliance in respect of some of this information and provided redacted copies of the documents in question. By failing to provide the information that was initially withheld, the Commissioner considers that HMRC breached sections 1(1)(b) of the Act and section 10(1) of the Act.
43. By failing to provide the complainant with a refusal notice citing the exemption contained at section 44(1)(a) of the Commissioner considers that HMRC breached section 17(1)(b) and (c) of the Act.

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- HMRC was correct to refuse to disclose the redacted information on the basis that it is exempt from disclosure by virtue of section 44(1)(a).
45. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- HMRC breached section 1(1)(b) and section 10(1) of the Act by failing to disclose the information it provided on 1 June 2007.
 - HMRC breached section 17(1)(b) and (c) of the Act by failing to provide a refusal notice citing the exemption contained at section 44(1)(a) upon which it later relied.
46. Despite the circumstances in which HMRC have handled this request, the Commissioner is satisfied that should HMRC receive a similar request for information about company x in the future, it would be correct in refusing to confirm or deny whether it held any information.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of August 2008

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 31(1) provides that –

“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-

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature”

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

Commissioner for Revenue and Customs Act 2005

Section 18 provides that -

“18. Confidentiality

- (1) 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.
- (2) But subsection (1) does not apply to a disclosure –
 - a) which –
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,
 - (h) which is made with the consent of each person to whom the information relates.
- (3) Subsection (1) is subject to any other enactment permitting disclosure.”

Section 19 provides that -

“19. Wrongful Disclosure

- (1) A person commits an offence if he contravenes section 18(1) or 20(9) by disclosing revenue and customs information relating to a person whose identity –
 - (a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) “revenue and customs information relating to a person” means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty’s Revenue and Customs (whether relating to Commissioners, officers or others)”.

Section 23 provides that -

“23. Freedom of Information (1) 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 (c. 36) (prohibitions on disclosure) 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 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.

(3) In subsection (1) “revenue and customs information relating to a person” has the same meaning as in section 19.”