

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2011

Public Authority: National Audit Office
Address: 157-197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Decision (including any steps ordered)

1. The complainant made a request to the National Audit Office ("NAO") for the identities of the largest businesses in the UK as mentioned in their report "Management of large business Corporation Tax". The complainant also asked the NAO to specifically identify the companies who paid no corporation tax and those that paid less than £10 million per year. The NAO stated it did not hold information on the specific companies and their corporation tax payments and, whilst it did hold a list of the largest UK companies, this was being withheld under the section 44 and section 33 exemptions.
2. The Commissioner's decision is that section 44 by virtue of section 182 of the Finance Act 1989 is engaged and the NAO were correct to withhold the identities of the largest companies under this exemption. The Commissioner is also satisfied that the NAO does not hold the other information requested.

Request and response

3. On 28 April 2011, the complainant wrote to the NAO and requested information relating to the NAO report "Management of large business corporation tax". The complainant requested information in the following terms:

"In para 1.12 of the report NAO identify that of the 700 largest businesses in the UK

- 1) 220 paid no corporation Tax and

2) 210 paid less than £10 million of tax each

I would be grateful to receive any correspondence, publications or materials which identify

1) the companies in category 1) above

2) the companies in category 2) above

3) the companies outside of these but who make up part of the report identification of the 700 biggest companies in the UK

I would also be grateful for any correspondence, publications or materials of the NAO re analysis undertaken of Corporation Tax paid by the UK's biggest 700 companies."

4. The NAO responded on 24 May 2011. It stated that no information was held in relation to parts (1) and (2) of the request (the companies who paid no, or less than £10 million, corporation tax). The NAO confirmed that it did hold a list of the 690 companies identified in the report (rounded up to 700 for the purposes of the report) but this information was being withheld due to a statutory prohibition on disclosure (section 44) and because disclosure would, or would be likely to, prejudice the exercise of the NAO's audit functions (section 33(2)). With regards to the final part of the request, for any correspondence, publications or materials regarding analysis of the corporation tax paid by these companies, the NAO stated no information was held as no further analysis had taken place.
5. Following an internal review the NAO wrote to the complainant on 27 June 2011. It stated that it did not hold the identities of the companies who paid less than £10 million or no corporation tax as this information was provided to NAO in anonymised form by Her Majesty's Revenue & Customs ("HMRC"). In terms of the identities of the 690 biggest companies, NAO maintained this information was exempt from disclosure as a statutory prohibition on disclosure existed. In this case, NAO stated the Finance Act 1989 ("FA89") makes it an offence to disclose taxpayer information. The NAO also upheld its application of the exemption relating to prejudice to its audit functions.

Scope of the case

6. The complainant contacted the Information Commissioner ("the Commissioner") to complain about the way his request for information had been handled.

7. The complainant has argued that information in relation to parts (1) and (2) of his request should be held by the NAO as they produced a list in their report showing the corporation tax contributions of the largest companies in descending order. In addition to this the complainant has stated that as companies are required to publish information on their corporation tax payments in their annual reports, this information is not confidential and should therefore be disclosed.
8. The Commissioner considers the scope of the investigation to be the NAOs application of the exemptions where disclosure would prejudice the NAOs audit functions, where a statutory bar exists, and whether the NAO holds information in relation to parts (1) and (2) of the request.

Reasons for decision

Section 1(1)(a) – General right of access

9. Section 1(1)(a) of the FOIA states 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,”

10. The Commissioner has considered whether the NAO has complied with this section of the FOIA in stating that it did not hold any information in relation to certain parts of the request. For clarity the Commissioner has looked at the request in 4 parts:
 - (1) Any correspondence, publications or materials which identify the companies who paid no corporation tax;
 - (2) Any correspondence, publications or materials which identify the companies who paid less than £10 million corporation tax each;
 - (3) Any correspondence, publications or materials which identify the 690 biggest companies in the UK; and
 - (4) Any correspondence, publications or materials of the NAOs analysis of corporation tax paid by these companies.
11. The NAO has stated it does not hold information in relation to parts (1), (2) and (4) as set out above. In determining whether a public authority does hold any requested information the Commissioner considers the standard of proof to apply is the civil standard of the balance of

probabilities. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether information is held, the Commissioner may look at:

- Explanations offered as to why the information is not held; and
 - The scope, quality, thoroughness and results of any searches undertaken by the public authority.
12. In response to the Commissioner's questions NAO explained that two separate pieces of information are held: a list of the 690 companies covered by HMRCs Large Business Service; and a document showing the amount of corporation tax paid by each of the 690 companies.
 13. The first document does not contain any information on amounts of corporation tax paid by each company so cannot be used to identify which of these companies paid no corporation tax or less than £10 million. The second document does show the amounts of corporation tax paid but does not contain the names of individual companies. The NAO has explained that HMRC provided this in anonymised form in order to enable the NAO to analyse the information for the report but without unnecessarily disclosing confidential taxpayer information.
 14. The Commissioner has considered whether the NAO could provide the information requested under parts (1) and (2) of the request by combining information in the two documents which are held. He is satisfied by the NAOs explanations that the requested information cannot be provided by combining information in the two existing documents as there is no way of linking the amounts of corporation tax paid in one document with the list of companies in the other list to establish which companies paid no corporation tax or less than £10 million.
 15. The NAO has also stated no information is held in relation to part (4) of the request on the basis that no further analysis has been carried out by the NAO into the corporation tax paid by the UK's biggest companies.
 16. Having taken into account the explanations and submissions provided by the NAO as well as the submissions put forward by the complainant, the Commissioner considers that on the balance of probabilities the NAO does not hold information under parts (1), (2) and (4) of the request. Therefore the Commissioner considers that the NAO has complied with section (1)(1)(a) of the FOIA.

Section 44 – statutory prohibitions on disclosure

17. Section 44(1)(a) of the FOIA states that information is exempt if its disclosure is prohibited by or under any enactment.
18. The NAO has explained that the list of 690 companies (part (3) of the request) was collected and held by HMRC in connection with the exercise of their tax functions. HMRC has an organisational unit – the Large Business Service (“LBS”) which deals with the tax affairs of large businesses. The list of companies in the LBS will change over time depending on the criteria used to establish which companies should be covered by the LBS.
19. HMRC are under a duty of confidentiality set out in sections 18 and 23 of the Commissioners for Revenue and Customs Act 2005 (“CRCA”) which prohibits disclosure of confidential taxpayer information. Both HMRC and the NAO consider the list of companies to be confidential taxpayer information because the selection of companies covered by the LBS is based on criteria derived from tax returns and therefore disclosure of the names of the companies would be a disclosure of confidential taxpayer information.
20. The Commissioner accepts the view that to disclose the list of companies would be to disclose taxpayer information in that it would reveal something about those companies such as the fact that they have a high turnover or a large number of total UK assets. However the Commissioner has considered whether the duty of confidentiality under the CRCA which covers HMRC would also extend to the NAO.
21. Section 18 makes it an offence for “Revenue and Customs officials” to disclose information which is held by Revenue and Customs in connection with Revenue and Customs functions. The Commissioner does not consider the duty under section 18 of the CRCA would carry across to the NAO as section 18 specifically relates to members of staff at HMRC. The Commissioner has therefore gone on to look at the provisions of the Finance Act 1989 (“FA89”) as a statutory bar on disclosing the requested information.
22. Section 182(4) of the FA89 states that:

“a person who discloses any information which –

(a) he holds or has held in the exercise of functions –

(i) of the Comptroller Auditor General and any member of the staff of the National Audit Office

- (b) *is, or is derived from, information which was held by any person in the exercise of tax functions, and*
- (c) *is information about any matter relevant, for the purposes of tax functions or social security functions –*
 - (i) *to tax or duty in the case of any identifiable person is guilty of an offence.”*

23. "Person" in this context has been defined in the CRCA as including "natural and legal persons, and, for example, the tax affairs of a limited company". The NAO has argued that the fact that companies are in the LBS tells you something about them because it reflects things about their size, complexity of affairs or profits. Therefore this information is held by HMRC in connection with the exercise of their tax functions.
24. On this basis the names of limited companies covered by HMRC's LBS would be covered by section 182(4) of the FA89 as it is information held in the exercise of functions of the Comptroller Auditor General, it is derived from information which was held by a person in the exercise of tax functions as the information was collected by HMRC, and is information relevant for the purposes of tax functions in respect of any identifiable person in light of 'person' extending to include the tax affairs of limited companies. The NAO states the information is clearly held by them so section 182(4)(a)(i) applies and was derived from information held by HMRC in connection with the exercise of tax functions so section 182(4)(b) and (c) apply.
25. The Commissioner therefore accepts that it would be an offence under section 182(4) for any official of the NAO to disclose this information, however the Commissioner has gone on to consider whether disclosure could be permitted under sections 182(5) or (6) which do allow disclosure in certain circumstances.
26. Section 182(5) allows disclosure where there is lawful authority, consent has been given by the person to whom the information is about, or where the information has already lawfully been made available to the public.
27. Section 182(6) further states that disclosures that can be made under section 182(5) can only be made with lawful authority if they are made by certain designated people and, most relevant in this case, "to, or in accordance with an authorisation duly given by, the person responsible". The 'person responsible' includes the Comptroller and Auditor General.
28. The NAO argues that while section 182(6) of the FA89 does allow the Comptroller and Auditor General to authorise the disclosure of any

information, he can only do so if he acts consistently with public law requirements. This requires that the decision on whether to release taxpayer information is lawful, rational and fair. Factors to take into account include that he is not bypassing the protection to a taxpayer afforded by other statutory codes. Moreover the Comptroller and Auditor General also needs to take into account as a material consideration the fact that a Commissioner of HMRC would refuse to provide the information.

29. The Commissioner accepts that the requested information is prohibited from disclosure under section 182(4) of the FA89. The Commissioner also accepts that the provisions of sections 182(5) and (6) cannot be met to allow disclosure, particularly when considering that the information would likely be refused if requested from HMRC due to their duty of confidentiality to taxpayers under section 18 of the CRCA.
30. The Commissioner's decision is that that the NAO dealt with the request in accordance with the FOIA and correctly applied section 44 by virtue of section 182 of the FA89 to withhold the names of the 690 companies as requested in part (3) of the request. As the Commissioner is satisfied that a statutory prohibition on disclosure applies he has not gone on to consider whether the disclosure would prejudice the NAO's audit functions.

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Pamela Clements
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