

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2013

Public Authority: National Audit Office

Address: 157-197 Buckingham Palace Road
Victoria, London, SW1W 9SP

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting between Amyas Morse¹ and Dave Hartnett².
2. The Commissioner's decision is that the National Audit Office (NAO) has correctly applied section 33(2) to the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 8 May 2013, the complainant wrote to the NAO and requested information in the following terms:

"Please let me have all minutes, notes and correspondence concerning the meeting between Amyas Morse and Dave Hartnett of HMRC on 15 December 2011"

5. The NAO responded on 3 June 2013. It stated that it held nine documents within the scope of the request. However, it stated that seven of these were being withheld by virtue of section 33 of the FOIA.
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¹ Comptroller and Auditor General of NAO <http://www.nao.org.uk/about-us/role-2/what-we-do/governance-of-the-nao/nao-board/>

² Former permanent secretary at HMRC

6. The remaining two were released with some redactions under section 40(2) of the FOIA.
7. Following an internal review the NAO wrote to the complainant on 1 July 2013. It maintained its position that the withheld information was exempt from disclosure.

Scope of the case

8. The complainant contacted the Commissioner on 10 July 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the NAO has correctly applied the exemption at section 33 of the FOIA.

Reasons for decision

Section 33 – Audit Functions

10. Section 33 applies to public authorities who have functions in relation to:
 - (a) the audit of the accounts of other public authorities, or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
11. Under section 33(2) information will be exempt if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to above.
12. In this case the NAO has explained that the information requested relates to a meeting between the Comptroller & Auditor General (C&AG), Amyas Morse and Dave Hartnett of HMRC. The purpose of the meeting was a high-level discussion of the NAO's proposed approach to its audit of HMRC's settlement of large tax disputes.
13. It identified nine documents within the scope of the request. Four of those related directly to the meeting in December 2011; the other five arose in connection with articles about the meeting and related matters which appeared in the press in March 2013. The list of documents identified by the NAO is appended at the end of the decision notice.
14. The Commissioner asked the NAO:

Which of the NAO functions would, or would be likely to, be prejudiced by the disclosure of the information and in particular how would this prejudice affect the NAO's exercise of the functions set out in 33(1)(a) or 33(1)(b) and

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

15. The NAO stated that its arguments related equally to the audit of the accounts of other public authorities (section 33(1)(a)) and to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions (section 33(1)(b)).
16. Given the passage of time since the specific audit in question, the NAO was concerned that disclosure of the withheld information would be likely to prejudice its audit function generally, rather than the audit of tax settlements (or the broader HMRC audit) specifically.
17. It further explained that the NAO operates independently of government, however, the efficiency and effectiveness of the audit process rely on the cooperation of the audited body, which itself depends on the body understanding the audit approach. The NAO therefore needs space in which to discuss its proposed audit approach with the audited body before undertaking the work. Free and open engagement with audited bodies is a critically important aspect of the NAO providing an effective audit function. Disclosure of the requested information would, or would be likely to, prejudice the NAO's ability to do this.
18. Similarly, the NAO must have the freedom to undertake communications and briefings regarding its audit activities, both internally and with the Public Accounts Committee. Disclosure of the requested information which falls into this category would, or would be likely to, prejudice the NAO's ability to do this, and therefore its ability to undertake its audits effectively.
19. The NAO explained that documents **1**, **3** and **6** were internal NAO documents. All three documents refer to sensitive confidential information and had only been accessible to a very small number of NAO staff. Wider disclosure would be likely to inhibit NAO staff in preparing such internal communications in the future, which in turn would be likely to prejudice the effective operation of the NAO as an organisation; this would in effect be prejudicing the NAO's ability to undertake its statutory functions as the auditor of the UK government.

20. Document **2** is also an internal HMRC document marked "PERSONAL AND CONFIDENTIAL – PLEASE DO NOT PASS ON TO ANYONE WIHTOUT COMING BACK TO ME". Extracts have been reported in the press (and are therefore covered by s21) but NAO is not aware that it has been published in its entirety. Although it has statutory rights of access to information in order to undertake its audit, the audit process also relies on the cooperation of the audited bodies and a level of trust that the NAO will safeguard documents it has obtained using its statutory access rights; the release of this sensitive document would damage that trust. It would therefore be likely to prejudice the audit process, in relation to both the audit of HMRC and the audit of other bodies who might be aware that NAO had released such a sensitive document, by making them less willing to be cooperative and to provide it with information beyond the absolute minimum.
21. The NAO considers that the disclosure of Document **4** would set a precedent which would be likely to prejudice that NAO's ability to engage in free and frank discussions with the bodies that it audits. This is because the audit process requires space to discuss NAO's proposed audit approach with audited bodies.
22. Disclosure of documents **7** and **9** would impair NAO's ability to provide briefings about potentially sensitive issues to the Chair of the Public Accounts Committee and non-executive members of the NAO Board – and to seek their views about how it intends to handle them – without fear of such communications being made public.
23. This would therefore be likely to prejudice the effective operation of the NAO as an organisation, which would, in effect, be prejudicing the NAO's ability to undertake its statutory functions as the auditor of the UK government.
24. The threshold to prove "would be likely" to prejudice is lower than if the NAO had claimed that audit functions would be prejudiced. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
25. The Commissioner considers that if the requested information were disclosed this would be likely to prejudice the NAO's ability to conduct its audit functions generally. This is because the NAO relies on the audited bodies cooperation in carrying out its audit functions. The Commissioner

recognises that the NAO has statutory powers to request information, but considers that an audit is most effective when the NAO is able to engage in a free and frank exchange of views with the body being audited within the context of an open relationship.

26. The Commissioner considers it is reasonable to conclude that the NAO's audit functions would be likely to be prejudiced if public authorities were to become more reluctant to engage in these processes. The content of the requested information in dispute relates to briefings about how the NAO was going to carry out its audit, and related correspondence.
27. The Commissioner therefore considers that section 33(2) is engaged and has next gone on to consider the public interest test.

Section 33 – Balance of the public interest

28. Section 33 can only be applied to the withheld information where the public interest in maintaining that exemption outweighs the public interest in disclosing the information. The Commissioner has therefore gone on to consider the arguments in this regard.

Public interest arguments in favour of maintaining the exemption

29. The NAO submitted the following arguments in favour of maintaining the exemption:
 - There is a strong public interest in avoiding prejudice to the NAO's functions, which include reporting to Parliament on the value for money with which public bodies use taxpayers' money. In the NAO's report on *Settling large tax disputes*³ (paragraphs 1.20 to 1.27), it explained in some depth the final approach it took to examining the issues in question. It is NAO's view that the explanations contained in the published report meet the public interest in understanding how it approached the audit, and that there is a public interest in ensuring the effectiveness of the process of the public audit.
 - In addition, NAO explained that it had released a letter that it sent to the Guardian, which sets out its position in relation to the more recent media coverage. The release of the other documents originating from 2013 would not significantly add to the public

³ <http://www.nao.org.uk/wp-content/uploads/2012/06/1213188.pdf>

knowledge of the issues, and so would not serve the public interest. The NAO therefore believe the public interest in maintaining an effective public audit function, through withholding the remaining requested information, outweighs the public interest in the disclosure of the information.

Public interest arguments in favour of disclosure

- The NAO recognised that there is a public interest in knowing that the use of public money is subject to appropriate levels of accountability and transparency, delivered through an effective audit function. Understanding how the NAO has exercised its functions is also in the public interest. It particularly recognised the public interest in the subject matter of its report *Settling large tax disputes*.

Balance of the public interest arguments

30. Having considered all the public interest arguments the Commissioner considers that there is a public interest in the transparency of audits carried out, not just of HMRC, but of public bodies in general.
31. The NAO has explained that its report, *Settling large tax disputes*, goes some way in reducing the weight of the public interest arguments favouring disclosure in relation to transparency and accountability.
32. The Commissioner accepts that there is a strong public interest in avoiding prejudice to the NAO's audit functions. The NAO provides a valuable service by identifying areas of improvement in the performance of public bodies which raise value for money implications. This has a benefit to the taxpayer as the NAO's reports and those issued by the public accounts committee help to save money and promote greater efficiency. The Commissioner has viewed the withheld information and considers that there is nothing of substance that would add to the public debate on this issue. In addition, the NAO report, *Settling large tax disputes* provides assurance regarding transparency and accountability.
33. On balance, the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest arguments in favour of disclosure.

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix

Ref	Nature of document	Document Date	Status	Exemptions applicable
1	NAO internal briefing note		Exempt	Whole document exempt under section 33 (audit functions)
2	Dave Hartnett's email to HMRC colleagues following his meeting with Amyas Morse on 15 December 2011. (This email was leaked to the press and parts of it were quoted in the media, including <i>Private Eye</i> and <i>The Guardian</i> , in March 2013)		Exempt	Each part of the document is exempt under either section 21 (information accessible to applicant by other means) or section 33 (audit functions)
3	Amyas Morse's notes from the meeting with Dave Hartnett on 15 December 2011.		Exempt	Whole document exempt under section 33 (audit functions)
4	Letter from Amyas Morse to Dave Hartnett.		Exempt	Whole document exempt under section 33 (audit functions)
5	Email from <i>Guardian</i> journalist to NAO Press Office		Already released by NAO	Minor redactions under section 40(2) (personal

				information)
6	NAO internal briefing note		Exempt	Whole document exempt under section 33 (audit functions)
7	Email from Amyas Morse to Margaret Hodge		Exempt	Whole document exempt under section 33 (audit functions)
8	Email from NAO Head of Media to <i>Guardian</i> letters		Already released by NAO	
9	Email from NAO Head of Governance to non-executive members of NAO Board, informing them of NAO letter to <i>Guardian</i>		Exempt	Whole document exempt under section 33 (audit functions)