

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

### **Decision notice**

**Date:** 15 June 2015

**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 in relation to the amount of money recovered in 2013/14 by the authority in tax liabilities from an offshore disclosure facility covering the Crown Dependencies. The information held was withheld by the public authority in reliance on the exemption at section 31(1)(d) FOIA.
2. The Commissioner's decision is that;
  - On a balance of probabilities, the public authority did not hold an estimate of the yield expected specifically from the Crown Dependency Disclosure Facilities (CDDFs).
  - The public authority was not entitled to rely on the exemption at section 31(1)(d) to withhold the yield received from the CDDFs.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the yield received from the CDDFs up to 31 March 2014 for each of Jersey, Guernsey and the Isle of Man ("the disputed information").
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 FOIA and may be dealt with as a contempt of court.

## Background

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5. The CDDFs were introduced on 6 April 2013 to enable relevant persons to voluntarily report themselves to the public authority for tax avoidance and/or evasion type activities and face lower penalties. Alternatively, they risk the prospect of less favourable treatment (including more severe penalties) if reported by financial institutions acting in line with their obligations under Intergovernmental Agreements (IGAs) between the United Kingdom (UK) and Crown Dependencies (CDs).
6. Under IGAs, financial institutions in the CDs are required to report information on UK tax payers to the public authority via the relevant CD competent authority and vice versa. The reporting period commenced on 1 July 2014, just over year after the CDDFs were introduced, and is due to end on 30 September 2016.
7. Under the agreements, financial institutions in the CDs are legally required to notify any of their customers that they consider might be interested in utilising the CDDFs by 31 December 2013, and for a further time at some point ending on 30 September 2016.
8. Relevant persons are able to participate in the CDDFs up to and including 30 September 2016.

## Request and response

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9. The complainant initially wrote to the public authority on 10 June 2014 and requested information in the following terms:  
  
*'A breakdown of the Crown Dependency disclosure facility yields for 2013/14 compared to the original estimates. If possible, please split both figures between each Crown Dependency. If available, please also confirm the costs incurred by HMRC in implementing and administering the disclosure facilities.'*
10. On 7 July 2014 the public authority confirmed that it held information within the scope of the request. It however explained that it could not comply with the whole of the request because it considered that the cost of complying with the second part of the request for the costs incurred in implementing and administering the CDDFs would exceed the appropriate limit (section 12(1) FOIA). The authority also explained that the information held in relation to the first part of the request would in any event be exempt on the basis of section 31(1)(d) FOIA.

11. On 9 July 2014 the complainant narrowed down the scope of his original request as follows:

*'A breakdown of the Crown Dependency disclosure facility yields for 2013/14 compared to the original estimates. If possible, please split both figures between each Crown Dependency.'*

12. The public authority initially refused to comply with the revised request on the grounds that it was a *repeat request* within the meaning in section 14(2) FOIA.
13. On 1 October 2014 the complainant submitted a request for an internal review in which he challenged the public authority's reliance on section 14(2) and possible reliance on the exemption at section 31(1)(d).
14. On 22 December 2014 the public authority wrote to the complainant with details of the outcome of the review. It agreed with the complainant that the authority was not entitled to rely on section 14(2). The authority however explained that it considered the information held within the scope of the revised request exempt on the basis of section 31(1)(d).

## **Scope of the case**

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15. The complainant contacted the Commissioner on 16 January 2015 to complain about the way his request for information had been handled. He specifically challenged the public authority's reliance on the exemption at section 31(1)(d) to withhold information within the scope of his revised request. The complainant's submissions are summarised further below.
16. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemption at section 31(1)(d) to withhold the information held within the scope of the revised request that the complainant submitted to the public authority on 9 July 2014 ("the disputed information").

## **Reasons for decision**

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### **Disputed information**

17. The disputed information consists of the yield received from the disclosure facilities (CDDFs) up to March 2014 for each of the Crown Dependencies; Jersey, Guernsey and the Isle of Man.

18. Estimates of the yield expected from the CDDFs have not been included. According to the public authority, that is because there were no individual forecasts for the disclosure facilities and forecast amounts encompassed other yielding activity, not just the disclosure facilities. The authority pointed out that this was mentioned by the Office of Budget Responsibility (OBR) in its Economic and Fiscal outlook report published in December 2013.<sup>1</sup>

19. The Commissioner notes that the following statement on page 115 of the OBR report suggests that the public authority did not estimate the yield expected specifically in relation to the disclosure facilities in the CDs:

*'In Budget 2013, we certified the expected yield from other tax agreements and disclosure facilities, such as those with Jersey, Guernsey and the Isle of Man. The overall yield from these agreements between 2013-14 and 2017-18 is expected to be just over £1 billion. Reflecting experience of the Swiss agreement, we have re-profiled the yield between years, but left the total unchanged. Compared with the Swiss agreement, there is better information on the size of funds and we have reduced the estimate of UK funds by around 80 per cent to allow for substantial numbers of individuals having non-domicile status and for many to be compliant already or to have disclosed via previous HMRC schemes. This is a larger reduction than assumed in the UK-Swiss tax agreement.'*

20. The Commissioner therefore finds that, on a balance of probabilities, the public authority did not hold an estimate of the yield expected specifically from the CDDFs.

### **Section 31(1)(d)**

21. Information is exempt from disclosure on basis of section 31(1)(d) if it would, or would be likely to, prejudice the assessment or collection of any tax or duty or of any imposition of a similar nature.

22. The public authority's submissions are summarised further below. In the meantime, to contextualise some of the complainant's arguments below, it is necessary at this stage to summarise the thrust of authority's position, which is that; disclosing the yield from the CDDFs would

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<sup>1</sup> <http://cdn.budgetresponsibility.independent.gov.uk/Economic-and-fiscal-outlook-December-2013.pdf>

discourage relevant persons from self-reporting and consequently, would be likely to prejudice the assessment or collection of tax.

*Complainant's submissions*

23. The complainant's submissions are summarised below.
24. The complainant argued that relevant persons likely to be interested in using the CDDFs would have been best advised to do so at some point between their introduction (6 April 2013) and the commencement of the reporting period under the IGAs (1 July 2014). Therefore, disclosure is unlikely to have any impact on the yield from the CDDFs because most relevant persons likely to do so would have reported by May 2014.
25. Furthermore, any reticence to use the CDDFs will merely render relevant persons liable to greater penalties when they are exposed by financial institutions reporting under the IGAs. Relevant persons would therefore be less likely to subject themselves to greater penalties. The public authority would also be able to assess and collect tax due in any event.
26. Publicity generated by a release of figures showing the success of the CDDFs to date would tend towards fuelling further publicity of their existence, acting as a prompt to any relevant persons who had been less than diligent in taking up the opportunity. On the other hand, if the yield from the CDDFs is significantly lower than estimated, a greater amount would ultimately be collected by the UK due to the increased interest and penalties arising once relevant persons were reported under the IGAs. In the complainant's opinion, the actual reason the public authority had refused his request was because the yield fell a long way short of the anticipated and published estimates for recovery under the IGAs and the CDDFs which, according to him, was £1.05 billion over five years, with £80 million allocated to 2013/14.
27. By way of comparison, the Liechtenstein Disclosure Facility (LDF) which is widely regarded as a great success has had monthly yield disclosures on a regular basis and in considerable detail since at least April 2012, and similar concerns have not been raised.

*Public authority's submissions*

28. The public authority's submissions are summarised below.
29. The public authority explained that although the first information to be reported under the IGAs may date from 1 July 2014 when they came into effect, the first data period does not end until 31 December 2014 and the data are in any event required to be transferred to the authority at any time up until 30 September 2016 when the IGAs are no longer operational.

30. Therefore, relevant persons will understand that the earliest possible date for receipt of information by the public authority is 1 January 2015, with the reality being that no significant transfer of information to the authority is likely to occur until 1 January 2016 at the earliest and in many cases, not significantly before 30 September 2016. The secondary notification period imposed on financial institutions suggests it is acknowledged that relevant persons would be likely to delay utilising the CDDFs until very late in the available period. The public authority explained that this eventuality is actually supported by the authority's experience in relation to the Offshore Disclosure Facility it operated in 2007. In that instance, around three quarters of individuals registering to disclose did so in the final seven days of the available period. Taking into account the differing length of the registration periods, the equivalent for the CDDFs would be for three quarters of the registrations to occur from May 2016 onwards.
31. The public authority noted that the period between the commencement of the CDDFs to 5 April 2014 actually represents less than one third of their full terms. Therefore, it did not consider that the requirement for the first notification to take place by 31 December 2013 will result in the levels of engagement envisaged by the complainant. In fact it considers that the majority of engagement by relevant persons remains to be made. Disclosure would therefore present an incomplete picture of the level of engagement with the CDDFs and could undermine their effectiveness.
32. Although the public authority accepted the general premise that strong yields would be likely to have a positive impact in encouraging relevant persons to make use of the CDDFs, it was nevertheless concerned that publication could influence the behaviour of relevant persons in deciding how to respond. The authority specifically argued that it could prejudice the assessment or collection of tax directly associated with relevant persons.
33. The public authority accepted the complainant was correct that the reporting by financial institutions under the IGAs may enable the public authority to assess liabilities which were not voluntarily reported by relevant persons. However, it argued that the completeness of any such assessments would be subject to the extent of the authority's ability to fully investigate and identify all relevant matters, potentially outside its tax jurisdiction, as compared to the full and complete disclosure required to utilise in the CDDFs.
34. Furthermore, the investigation activity envisaged by the complainant would necessarily require far greater resource from the public authority than that required to administer the same level of tax flowing through the CDDFs. The authority argued that compliance resource of this

nature, displaced from other yield generating activities, would be likely to prejudice the assessment or collection of tax relevant to its wider compliance function.

35. The public authority explained that although the IGAs will also be effective in determining income and assets relevant to jurisdictions at a particular time, they do not have any capacity to restrict asset movement. It argued that where a relevant person is discouraged from self-reporting and awaits the authority's assessment, there was clear scope for assets identified from reporting under the IGAs and potentially relevant to the settlement of liabilities to be moved to a further jurisdiction beyond the immediate reach of the public authority.
36. With regards to the LDF, the public authority explained that the earliest publication of the yield for that facility was in May 2011, some 20 months after its inception in September 2009, and at the time, updates were only provided every six months. It further explained that the date indicated by the complainant (ie April 2012) may have been when monthly updates began, but is itself more than 30 months after the beginning of the facility. The public authority therefore submitted that the decision to publish the disputed information has always been subject to relevant consideration of the merits of doing so and there was in fact parity between the CDDFs and the LDF rather than any distinction that has been claimed. It was [as per the public authority's submission to the Commissioner in early 2015] now intended to make a recommendation to the Commissioners for the public authority that the performance of the CDDFs is published towards the middle of 2015.

### *Commissioner's findings*

37. Each of the arguments above have been considered by the Commissioner when reaching his decision, even where he has not felt it necessary to address a particular argument further in the body of this notice.
38. In order to engage a prejudice based exemption<sup>2</sup> such as section 31(1)(d), the applicable interest within the exemption must be identified, the nature of the prejudice must be considered and the likelihood of the prejudice occurring must be considered.

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<sup>2</sup> A prejudice based exemption requires the likelihood of "harm" to be established before it can be engaged.

39. The Commissioner is satisfied that the public authority's arguments in support of its reliance on section 31(1)(d) to withhold the disputed information are applicable to the exemption. Engaging with the CDDFs is directly relevant to the public authority's function of assessing and collecting tax, interests which the exemption is designed to protect.
40. With regards to the likelihood of prejudice occurring in the circumstances of this case, the Commissioner considered whether there was in fact a real and significant risk that disclosing the disputed information would prejudice the public authority's ability to assess or collect tax.<sup>3</sup>
41. The Commissioner is not persuaded that disclosure would be likely to prejudice the public authority's ability to assess or collect tax for reasons explained below.
42. The key issue for the Commissioner to determine is whether publishing the disputed information could undermine engagement with the CDDFs, thereby undermining their effectiveness and consequently posing a real and significant risk to the assessment or collection of taxes by the public authority.
43. The Commissioner notes that the public authority had previously advised the complainant on 22 December 2014 that it was planning to publish the disputed information early in 2015. The Commissioner now understands that officials were, as of early 2015, planning to recommend publication towards the middle of the year in spite of the authority's view that the most significant levels of engagement will not take place before May 2016, and early publication would not be fully representative and consequently reflect an inaccurate picture of the level of engagement with the CDDFs. Given that the public authority was considering publication for earlier this year and officials subsequently planned to recommend publication towards the middle of the year, the Commissioner finds the public authority's claims regarding the impact of publication on engagement with the CDDFs somewhat exaggerated. The Commissioner does not consider the public authority's statements regarding the possible timing of publication consistent with the level of concern expressed in relation to the impact that disclosure could have on engagement with the CDDFs.

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<sup>3</sup> The Commissioner considers that 'would be likely to prejudice' which is the threshold of likelihood that the public authority has relied on, means there must be a real and significant risk of prejudice.



44. Furthermore, there is also nothing to clearly indicate that the timing of the initial LDF publication was based on similar considerations. In any event, even if the public authority was committed to publishing the yield from the CDDFs towards the middle of 2015 (and it hasn't), it would have taken around 26 months (since the introduction of the CDDFs in April 2013) as opposed to the 20 months it took to initially publish the yield from the LDF. Since it took approximately 32 months to start publishing monthly yields from the LDF, the likely publication date for the yield from the CDDFs is actually edging closer to the length of time it took the authority to routinely publish monthly figures for LDF yields. In addition, some of the harm that the public authority anticipates could occur such as relocation of assets and incomplete disclosures by relevant persons are not time sensitive and would be as likely to occur (for reasons explained below) whenever the disputed information is eventually published.
45. The Commissioner is not persuaded by the argument that relevant persons would be more likely to move assets beyond the public authority's jurisdiction if they do not engage with the CDDFs. He is of the view that relevant persons wanting to move assets beyond tax jurisdictions would do so regardless of whether or not they feel they are able to engage with the CDDFs. As far as he understands, CDDFs do not relieve relevant persons of their tax liabilities. Rather, they reduce the penalties that would have otherwise been imposed on them by the public authority following an investigation to establish their tax liabilities. Therefore, the Commissioner is not persuaded that relevant persons who want to escape their tax obligations through asset relocations would be less likely to do so if they felt that they would be able to self-report using the CDDFs. That would suggest that relevant persons could also reduce their tax liabilities by engaging with the CDDFs, and there is nothing to indicate from the public authority's submission that that is the case.
46. Similarly, it is disingenuous in the Commissioner's view to suggest that CDDFs will result in full and complete disclosure which might not otherwise happen if an investigation was undertaken by the public authority. The fact that CDDFs rely on voluntary disclosures by relevant persons suggests that the certainty of complete discovery cannot also be guaranteed.
47. While the resource implications of conducting full investigations should not be dismissed, the Commissioner considers that it would be relevant in this context only if he accepts the public authority's arguments in support of its view that relevant persons would be less likely to engage with the CDDFs should the disputed information be disclosed, and he does not. In any event, the authority would clearly have to utilise its resources to investigate cases following reports received from financial

institutions acting in line with their obligations under the IGAs. The Commissioner doubts that the public authority has been able to precisely quantify the amount of resources it would need to deploy in those cases. Presumably, it would simply have to go where the investigation leads in order to recover tax due to the UK.

48. In view of the above reasons, the Commissioner is not persuaded that disclosing the disputed information seriously risks undermining engagement with the CDDFs thereby posing a real and significant risk to the assessment or collection of taxes. He therefore finds that the exemption at section 31(1)(d) was not correctly engaged.

## Right of appeal

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49. 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 123 4504

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)

50. 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.
51. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**