

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2015

Public Authority: Her Majesty's Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information from Her Majesty's Revenue and Customs (HMRC) about the staff forum held internally on its intranet. HMRC refused to disclose the information relying on FOIA section 36(2)(b) and (c) – prejudice to effective conduct of public affairs. The Commissioner's decision is that HMRC was entitled to rely on section 36(2)(b) and (c) to refuse this request. He does not require HMRC to take any steps.

Request and response

2. On 12 February 2015, the complainant wrote to HMRC and requested information in the following terms:

"a full copy of HM Revenue and Customs Staff Community Forum held internally on HMRCs intranet. I understand per HMRCs own guidance that this forum can be released under an FOI request.

I know that forum postings that have been partially deleted or fully deleted by the forum moderators are archived and can be retrieved and I ask that these postings are also included in their unedited form that is before any edits/deletions were made by the moderators."

3. On 16 March 2015 HMRC responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: section 36(2)(b) and (c) – prejudice to effective conduct of public affairs.

4. The complainant requested an internal review on 10 May 2015. HMRC sent the outcome of its internal review on 11 June 2015. It upheld its original position.

Scope of the case

5. The complainant contacted the Commissioner on 21 June 2015 to complain about the way her request for information had been handled. She set out her position that she believed HMRC was using a generic clause to block the release of non-sensitive, non-commercial information. She asserted that the information requested would not compromise the delivery or integrity of the public service HMRC provides.
6. The Commissioner considers the scope of the investigation is to determine whether HMRC was correct to rely on section 36(2)(b) and (c) to refuse the request for information.

Reasons for decision

Section 36

7. Section 36(2)(b) and(c) of the FOIA states:

'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-...

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

The Community Forum

8. The HMRC Community Forum is an online discussion area where staff members can post questions, comments or views, and read and respond to posts by other forum members. It can be used to share knowledge,

access communities of interest, talk through work issues with colleagues from other departments or find expertise in certain areas of the business. Registration is required. Following registration an individual can browse through different sections of the forum and individual posts or submit a new post for other members to view and comment.

9. The Community Forum exists to allow people of all locations, grade and job role to discuss work-related issues in a secure and welcoming place. This could be general HMRC information or issues or could relate to something specific, such as IT or VAT queries. Individuals are able to access posts submitted by location and view site-based communication boards.
10. The Community Forum is run and moderated by the Internal & Change Communications team, for all staff. Staff must comply with HMRC Values, and comments should be constructive and not cause offence.

Engagement of section 36

11. HMRC is a non-ministerial government department and therefore the "qualified person" are its commissioners (section 36 (5)(c)). The Commissioner is satisfied that the identity of the individual, the Director General of Benefits and Credits, who provided his opinion in respect of section 36, is one of HMRC's commissioners.
12. In order for the Commissioner to determine whether the exemption at section 36(2) is engaged, he must determine whether the qualified person's opinion is a reasonable one. In doing so, he has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
13. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. This is not the same as saying that it is the only reasonable opinion that could be held

on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

14. In the qualified person's opinion, which was issued on 13 March 2015, he set out that the Community Forums are part of HMRC's suite of employee feedback channels. The purpose of these is to give employees an opportunity to raise questions or concerns and suggest improvements. The forum provides a friendly place for constructive discussion about work issues where people can share information and advice. Staff can access business area discussions, communities of interest, open conversations and private discussion areas, all of which, HMRC asserts, serve to increase collaboration and improve staff engagement. Individuals can raise issues which are personal to them or more widely relevant. It is a channel intended for a candid and more informal exchange of views between colleagues in HMRC. This is something HMRC wants to encourage and protect.
15. The qualified person explained that if staff members thought that conversations, questions and/or concerns held on the forum would be published externally, it is likely that this would hinder their frankness in raising those questions, concerns and suggestions. This in turn would reduce the usefulness of the channel for open discussion and feedback.
16. The forum supports the culture change and transformation work being delivered by HMRC. The open views of staff are integral to this and HMRC asserts that to stifle this free and frank exchange would be likely to impact on HMRC's ability to operate effectively.
17. The submission from HMRC has, at the Commissioner's request, also addressed the complainant's concern that the forum information pack states that the forum is subject to the FOIA and that content could be released publicly under the Act.
18. HMRC has explained that whilst contributors to the forum are asked to bear in mind that the forum is subject to FOIA requests and that their views 'could' be released publicly, it is the case that in future staff might be less frank or forthcoming around issues of concern or areas for improvement if they believed these views 'would' be published more widely. It is HMRC's position that the forum states that any of the content may be subject to an FOI request but it does not claim that any of the content will either be released or treated as exempt under the provisions of FOIA. The Commissioner accepts that information can be

subject to a request under FOIA without any automatic right to disclosure and that a public authority should consider each request on merit in accordance with the FOIA.

19. Having specifically addressed the issue of the forum wording with HMRC, the Commissioner is pleased to note that HMRC recognises that the wording could be misinterpreted and that it now intends to amend the forum statement to avoid any future misinterpretation. HMRC has confirmed that it of course remains the case that all information it holds is subject to FOIA. Each request under FOIA will continue to be considered on its merits taking into account public interest arguments as appropriate.
20. HMRC has also submitted that in this case, the age of the material is irrelevant as it is the entirety of the request which is exempt under section 36, irrespective of age or subject matter. HMRC has explained that disclosure of views submitted several years ago would still have an inhibiting effect; disclosure would mean that shared concerns and suggestions for improvement would not be expressed and explored which will impact on HMRC's function and delivery of service to the public.
21. The Commissioner is of the view that it is acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection. He has therefore considered whether the lower threshold of prejudice (ie would be likely) has been met in the case of both section 36(2)(b) and (c). In the Commissioner's opinion, this means that there must be a real and significant possibility of prejudice.
22. He has considered the qualified person's opinion and accepts as reasonable the opinion that disclosure of the entire content of the forum would be likely to impact on the usefulness of the forum as a tool for feedback. In reaching this view, the Commissioner also accepts as reasonable the opinion that staff would feel inhibited by the prospect of external publication to the world at large. The Commissioner notes too that HMRC has set out that its staff are bound by the Civil Service Code which states that staff must act in a way that is professional and which deserves and retains the confidence of all those with whom you have dealings. It also states:

"You must not disclose official information without authority"
23. HMRC asserts therefore that to air private views about the internal operation of HMRC in the public domain would breach the Civil Service Code.

24. In terms of operational efficiency, the Commissioner accepts HMRC's position that the forum supports the culture change and transformation work being delivered by HMRC. It is important that HMRC is allowed to engage with its staff in an open and honest manner and this is promoted through the use of the forum. It is likely that stifling these views by putting them in the public domain would impact on HMRC's ability to operate effectively.
25. The Commissioner therefore finds that the qualified person has adequately set out a reasonable position in relation to the free and frank provision of advice and exchange of views for the purposes of deliberation. He also accepts as reasonable the qualified person's opinion in respect of the likely prejudice in relation to the effective conduct of public affairs. The Commissioner accepts therefore that the exemptions at section 36(2)(b) and (c) are engaged.

Public interest test

26. The exemptions at section 36(2)(b) and (c) are subject to a public interest test. Accordingly, the Commissioner has to consider whether in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
27. HMRC has set out that it accepts that disclosing the requested information would offer transparency as to how the department is managed and how issues raised internally by staff are being addressed by senior officials. This of course can help inform the public debate about performance and accountability of HMRC and reassure the public that issues are being identified and tackled.
28. In contrast, HMRC has asserted that the balance of the public interest lies in maintaining the exemption at section 36. This will allow for the continued free and frank exchange of views and will ensure that its staff do not feel inhibited by the prospect of disclosure of the information to the world at large.
29. The Commissioner has viewed a sample of the material which has been on HMRC's internal forum and does not consider that he needs to view the withheld material in its entirety. The Commissioner's position is that it is quite clear that the posts are written for that particular forum and that it is highly unlikely that any of the authors would have envisaged that their posts might be viewed by anyone other than members the forum. It is clearly viewed as a 'safe space' where post authors can be open and honest about HMRC and about personal issues.
30. The Commissioner considers that whilst there is a public interest in the performance and accountability of HMRC, performance and

accountability can be enhanced by using the forum to listen to free and frank staff views and suggestions, taking action as appropriate. He accepts therefore that disclosure of the requested information to the world at large would be highly likely to impact on that free and frank exchange of views, in turn impacting on HMRC's ability to operate effectively. It would also be likely to impact on the use of an internal tool which allows people to share personal thoughts, concerns and questions and in turn potentially receive appropriate advice, help and support. The Commissioner's position is that it is not in the public interest to stifle that, particularly in this case where the Commissioner does not consider the public interest arguments in favour of disclosing the information to be sufficiently strong as to justify those likely consequences.

31. In all of the circumstances therefore, the Commissioner finds that the public interest lies in maintaining the exemption.

Scope and focus of information request

32. The request in this case, the Commissioner notes, is extremely broad. Although he accepts as reasonable the qualified person's opinion in relation to all of the information within the scope of this particular request – and that the public interest favours the maintenance of the exemption, he wishes to make clear that this does not mean this decision notice sets any precedent in respect of other individual requests for information regarding the forum's contents. These will fall to be considered in the particular circumstances of each request.

Right of appeal

33. 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

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

34. 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.
35. 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

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