



HM Revenue & Customs

Mr Graham Howarth

By email: request-806382-
a9326f78@whatdotheyknow.com

Freedom of Information Team
S1715
6 Floor
Central Mail Unit
Newcastle Upon Tyne
NE98 1ZZ

Email foi.request@hmrc.gov.uk

Web www.gov.uk

Date: 21 June 2022
Our ref: IR2022/01284

Dear Mr Howarth

Freedom of Information Act 2000 (FOIA)

Thank you for your email of 24 January, which seeks a review of our original response to your information request. Please accept my sincere apologies for the time taken to complete this review.

Your representations on this matter focuses upon the application of section 36(2)(b)(i) to information within EMAIL 29. You have also asked for information relating to the opinion received to engage this exemption, this has been provided as an annex to this letter.

Section 36 of FOIA provides that,

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 - would or would be likely to inhibit; (

2)(b)(i) the free and frank provision of advice;

(2)(b)(ii) the free and frank exchange of views for the purpose of deliberation.

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

Section 36 differs from all other prejudice-based exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for the public authority. The qualified person's opinion must also be a "reasonable" opinion.

Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.

Section 36 is qualified by the public interest. This means that even though the exemption is considered to be engaged, it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

If you need extra support, for example if you have a disability, a mental health condition, or do not speak English/Welsh, go to www.gov.uk and search for 'get help from HMRC'.

Text Relay service prefix number – 18001 OFFICIAL

The withheld information within EMAIL 29 comprises free and frank advice on media handling, following the conclusion of the Loan Charge Review. This advice was internal to HM Treasury to which HMRC officials were carbon copied.

Having reviewed the withheld information and the submission upon which the qualified person's opinion was based, I consider that it was reasonable for the qualified person to conclude it was likely that its disclosure would lead to a chilling effect on the free and frank provision of advice in similar circumstances in the future. This is within the meaning of section 36(2)(b)(i) FOIA.

In arriving at this conclusion, I have given weight to the candid nature of the advice, and the sensitivity and seriousness of the issues. I will now go on to consider the balance of the public interest.

To carry out the public interest test it is necessary to understand what 'the public interest' means in the context of FOIA.

The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.

However, these examples of the public interest do not in themselves automatically mean that information should be disclosed or withheld. For example, an informed and involved public helps to promote good decision making by public bodies, but those bodies may also need space and time in which to fully consider their policy options, to enable them to reach an impartial and appropriate decision, away from public interference. Revealing information about wrongdoing may help the course of justice, but investigations into wrongdoing may need confidentiality to be effective. This suggests that in each case, the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption.

Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, I must give weight to that opinion as a valid piece of evidence in the assessment of the balance of the public interest.

In this case I do not consider that the public interest in disclosure is an interest which would counteract the public interest in HMRC's and HM Treasury's ability to conduct its affairs effectively. I conclude that the public interest in avoiding the stated prejudice is a strong factor and consider that the public interest in maintaining the exemption outweighs that in disclosure.

If you are not content with the outcome of this internal review you can [complain to the Information Commissioner's Office](#).

Yours sincerely,

HM Revenue and Customs

From: s40(2) s40(2) (SOLS)
To: Secs, Perm (HMRC)
Subject: RE: Case FOI2021/31641
Date: 05 January 2022 14:35:00

Hi s40(2) I will do,

Thanks



s40(2) s40(2) s40(2)
Solicitor's Office and Legal Services | HM Revenue & Customs
14 Westfield Avenue | Stratford | London E14 1HZ
Tel: s40(2) s40(2)

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From: s40(2) s40(2) (HMRC Perm Secs Office) s40(2) s40(2) @hmrc.gov.uk> **On Behalf Of** Secs, Perm (HMRC)
Sent: 05 January 2022 14:08
To: s40(2) s40(2) (SOLS) s40(2) s40(2) @hmrc.gov.uk>; Secs, Perm (HMRC) <xxxx.xxxx@xxxx.xxx.xx>
Subject: RE: Case FOI2021/31641

Hi s40(2)

Yes, she meant the contact details too. Do you need email confirmation from Angela on that?

Thanks,

s40(2) s40(2)

Private Secretary to Jim Harra and Angela MacDonald | [MS Teams](#) | s40(2) s40(2)

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From: s40(2) s40(2) (SOLS)
Sent: 05 January 2022 13:15
To: Secs, Perm (HMRC) <xxxx.xxxx@xxxx.xxx.xx>; s40(2) s40(2) (HMRC Perm Secs Office) s40(2) s40(2) @hmrc.gov.uk>
Subject: RE: Case FOI2021/31641

Thanks for this s40(2)

Just to confirm, I was seeking the application of section 36 to both EMAIL 29 and some internal contact details from other emails. Angela's email only references EMAIL 29

s40(2)



s40(2) s40(2) s40(2)
Solicitor's Office and Legal Services | HM Revenue & Customs
14 Westfield Avenue | Stratford | London E14 1HZ
Tel: s40(2) s40(2)

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From: s40(2) s40(2) (HMRC Perm Secs Office) s40(2) s40(2) @hmrc.gov.uk> **On Behalf Of** Secs, Perm (HMRC)
Sent: 05 January 2022 11:51
To: s40(2) s40(2) (SOLS) s40(2) s40(2) @hmrc.gov.uk>
Subject: FW: Case FOI2021/31641

Hi s40(2)

See Angela's agreement below.

Thanks,

§40(2) §40(2)

Private Secretary to Jim Harra and Angela MacDonald | [MS Teams](#) | §40(2) | §40(2)

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From: MacDonald, Angela (HMRC Deputy CEO, Second Permanent Secretary)

Sent: 05 January 2022 11:40

To: Secs, Perm (HMRC) <xxxx.xxxx@xxxx.xxx.xx>

Subject: RE: Case FOI2021/31641

Yes, I am content to agree the exemption for email 29.

Angela

Angela MacDonald

Deputy CEO and Second Permanent Secretary, HM Revenue & Customs | §40(2) | email

:xxxxxx.xxxxxxxxxx@xxxx.xxx.xx

(HMRC Chief of Staff: Ian Allen | tel: §40(2); mob: §40(2); email: xxx.xxxxx@xxxx.xxx.xx)



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From: §40(2) §40(2) (HMRC Perm Secs Office) <[§40\(2\)@hmrc.gov.uk](mailto:§40(2)@hmrc.gov.uk)> **On Behalf Of** Secs, Perm (HMRC)

Sent: 05 January 2022 10:23

To: MacDonald, Angela (HMRC Deputy CEO, Second Permanent Secretary) <xxxxxx.xxxxxxxxxx@xxxx.xxx.xx>

Subject: FW: Case FOI2021/31641

Hi Angela,

Would you be happy to take a look at this S36 exemption request? It relates to email 29 in the PDF attachment.

Let me know if you want to apply the exemption.

Thanks,

§40(2) §40(2)

Private Secretary to Jim Harra and Angela MacDonald | [MS Teams](#) | §40(2) | §40(2)

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From: §40(2) §40(2) (SOLS)

Sent: 04 January 2022 13:12

To: Secs, Perm (HMRC) <xxxx.xxxx@xxxx.xxx.xx>; §40(2) §40(2) (HMRC Perm Secs Office) <[§40\(2\)@hmrc.gov.uk](mailto:§40(2)@hmrc.gov.uk)>

Cc: FOI2021/xxxxx@xxxx.xxxxxx.xx.xx

Subject: Case FOI2021/31641

Good afternoon,

I would appreciate if a Commissioner could review the attached information in conjunction with the reasons proposed to engage section 36(2)(b)(i) and (c) FOIA and provide their qualified opinion on the application of this exemption.

Happy to discuss

§40(2)



§40(2) §40(2) | §40(2)
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14 Westfield Avenue | Stratford | London E14 1HZ
Tel: §40(2) §40(2)

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Record of the qualified person's opinion

Freedom of Information Act 2000 Section 36

When dealing with a complaint regarding section 36 of the Freedom of Information Act 2000, the ICO will expect to see evidence of the qualified person's opinion and how it was reached. We require this evidence in order to decide whether the opinion was a reasonable one. The following form sets out the minimum information that we expect public authorities to provide to us about the qualified person's opinion, in the event of a complaint.

Completing this form is a convenient way for public authorities to give us the information we need. It is intended as a tool to assist public authorities, but there is no statutory requirement for them to use it; if instead they are able to send us other documents that record the same information about the qualified person's opinion, we will accept those.

While the purpose of the form is to help in providing information to us when we are investigating a complaint, public authorities may also wish to use it when they are considering applying section 36, as part of the internal process of obtaining and recording the qualified person's opinion.

Please see the notes at the end for help in completing this form. For further information on section 36 of the Freedom of Information Act 2000, please see our [guidance document on Prejudice to effective conduct of public affairs \(section 36\)](#).

This form only records the qualified person's opinion under section 36(2) of the Freedom of Information Act. If the qualified person's opinion is that section 36(2) is engaged (ie that disclosure of the information would or would be likely to cause prejudice or inhibition), the public authority must then carry out the public interest test. As a matter of good practice, public authorities should also keep a record of the factors considered in the public interest test and the outcome of that test.

The public authority	
1. Name of the authority	HMRC
The qualified person	
2. Name (<i>see Notes below</i>)	Angela MacDonald
3. Job title	Deputy Chief Executive and Second Permanent Secretary
4. Subsection of s36(5) under which qualified person is authorised (<i>see Notes below</i>)	S36(5)(c)
Information on which opinion was sought	
5. Brief description of the information requested	<p>The request seeks emails received by Jim Harra referencing the Loan Charge and suicide.</p> <p>In all but one case (EMAIL 29), the emails originate from Comms and are circular emails summarising media issues.</p> <p>EMAIL 29 constitutes frank advice to the FST on the possible Comms response to the Independent Loan Charge Review. It is this information for which we seek an opinion on the application of section 36(2)(b)(i) FOIA.</p> <p>A copy of the information has been provided as an annex to this form</p> <p>In addition to this, the emails contain internal contact details which do not constitute personal data.</p> <p>These include various out of hours phone numbers for HMRC, HMT and No.10 as well as mailboxes for the FST and CHX. We seek an opinion on the application of section 36(2)(c) to withhold this information.</p>
6. Information was	<input checked="" type="checkbox"/> shown to qualified person <input checked="" type="checkbox"/> described to qualified person
Submission to the qualified person	
7. Date opinion sought	04/01/2022 (DD/MM/YYYY)

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<p>8. Subsection(s) of s36(2) on which opinion was sought (see Notes below)</p>	<p> <input type="checkbox"/> 36(2)(a)(i) <input type="checkbox"/> 36(2)(a)(ii) <input type="checkbox"/> 36(2)(a)(iii) <input checked="" type="checkbox"/> 36(2)(b)(i) <input type="checkbox"/> 36(2)(b)(ii) <input checked="" type="checkbox"/> 36(2)(c) </p>
<p>9. Arguments put forward as to why prejudice/ inhibition would/ would be likely to occur</p>	<p>Whilst the content of the withheld information is important for considering where the balance of the public interest lies, the primary reason for the HMRC's application of section 36 is the 'processes that may be inhibited, rather than what is in the information'.</p> <p>With regards to the first category of information, HMRC considers that release of this would be likely to inhibit the free and frank provision of advice and might inhibit and undermine the need for a private space for the purpose of advice.</p> <p>Officials expressing candid views on the issue assumed that they were doing so in a confidential safe space.</p> <p>HMRC considers that disclosure of the withheld information is likely to undermine the confidence of civil servants in this "safe space", with future discussions on equally sensitive topics being damaged through the inhibition of free and frank sharing of opinions/advice. HMRC believes that staff would be less forthcoming, and their opinions and advice would be tempered or withheld due to a fear of future release.</p> <p>With regards to the internal contact details, the IRU consider that to disclose this information to the world at large would likely lead to abuse by those so minded.</p> <p>Disclosure would inevitably lead to unsolicited contact from members of the public and would lead to these details having to be changed.</p> <p>On this basis, the IRU considers that</p>

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	disclose would be prejudicial to the effective conduct of public affairs
10. Counter arguments put forward	<p>There is a clear public interest in government departments being as open and transparent as possible, so as to increase accountability and inform public debate</p> <p>HMRC accepts that its officials are expected to act with high levels of integrity, impartiality and objectivity and as such should not be affected by disclosure of such material.</p>
11. Any other factors taken into account	

The qualified person's opinion

12. *(see Notes below)*

The qualified person's opinion is that, if the information requested were disclosed, the prejudice/ inhibition specified in the following section(s) of the Freedom of Information Act 2000

☐ 36(2)(a)(i)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....
.....

☐ 36(2)(a)(ii)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....
.....

☐ 36(2)(a)(iii)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....
.....

☐ 36(2)(b)(i)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....

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<p>.....</p> <p><input type="checkbox"/> 36(2)(b)(ii)</p> <p><input type="checkbox"/> would occur <input type="checkbox"/> would be likely to occur</p> <p>for the following reasons(s):</p> <p>.....</p> <p>.....</p> <p><input type="checkbox"/> 36(2)(c)</p> <p><input type="checkbox"/> would occur <input type="checkbox"/> would be likely to occur</p> <p>for the following reasons(s):</p> <p>.....</p> <p>.....</p>	
13. Date opinion was given (see Notes below)	___ / ___ / ____ (DD/MM/YYYY)
14. Qualified person's signature (see Notes below)	

Notes for completing this form

2. Where the public authority itself, rather than an individual, has been authorised as the qualified person, the name will be that of the highest decision making body of the authority.

4. Please refer to section 36(5) of the Freedom of Information Act 2000 for the list of qualified persons.

8. This lists the subsections of section 36 which the qualified person was asked to consider.

The full text of section 36(2) is as follows:

(2) 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—

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the Cabinet of the Welsh Assembly Government.

(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 otherwise to prejudice, the effective conduct of public affairs.

12. This lists the subsections of section 36 which the qualified person decided were engaged. Please tick the relevant subsection(s), and in each case indicate whether the prejudice or inhibition would or would be likely to occur and the reasons for this.

13. This is the date on which the qualified person's opinion was given. If the form is completed after that, the date entered here must still be the date on which the opinion was given.

14. Where the public authority itself, rather than an individual, has been authorised as the qualified person, the form should be signed on behalf of the highest decision making body of the authority. In that case, please also print the name of the person signing on behalf of that body.

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