



HM Revenue & Customs

Dr Colin Iain Campbell

By email:

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Dear Dr Campbell

Freedom of Information Act 2000 (FOIA)

Thank you for your email of 24 August, which seeks an internal review of our response to your original information request

Request

On 7 August 2018 you asked for the following information:

"1) All communications/emails/documentation of discussion between the VAT team handling IHPA's request and the IR35 team related to the handling of IHPA's letter about Direct Engagement of 1st May 2018, and referred to in this newspaper article:

<https://www.thetimes.co.uk/article/nhs-hands-over-millions-to-tax-avoidance-firms-kfqmn87fp>

and this press briefing:

<https://ihpa.org.uk/press-release/nhs-bosses-unlawful-multi-million-pound-tax-dodge/>"

Our response

We replied on 24 August explaining that due to the nature of the request, we were unable to confirm or deny HMRC held such information. We refused your request under section 44(2) of the FOIA.

Internal review

On 24 August you stated:

"I am writing to request an internal review of HM Revenue and Customs handling of my FOI request 'Communication between VAT litigation team and IR35 team when handling IHPA's letter on Direct Engagement'.

Thank you for confirming HMRC does hold evidence that the IR35 team seeking to insert unrelated content into our correspondence. We are also concerned this may have interfered with the VAT team's processes with respect to the handling of this letter.

We would refute that this deals to identifiable persons as:

1. Many people operate such schemes and the correspondence relates to all such operators



2. Thus anonymising the identity of any scheme provider referenced by way of example will be more than adequate to avoid the person's being directly identifiable. (Thus the claimed exemption is inapplicable).

3. We are concerned about potential links with some of the scheme operators and conflicts of interest within the IR35 team and thus we wish to see exactly what representations have been made.

4. Whilst it may be that junior team members from the IR35 team should be anonymised leaving only their job title in the disclosure of this discussion it will be recognised that senior civil servants have no reasonable expectation of privacy in engaging in such functions and we would expect this information to be disclosed.

Kindly conduct an internal review on this basis. I believe this exemption is inappropriate and, as such, if HMRC still refuse to disclose the information I will immediately refer you to the Information Commissioner's Office who will see the information and make an impartial decision. This will be the second time I have had to refer you to the information commissioner in the space of a month."

Considerations

You have queried our original decision to refuse the request, suggesting you do not seek information relating to an identifiable person. As stated in our original response the term 'person' includes legal entities, so in this case you seek information relating to the Independent Health Professionals Association.

When reviewing an FOIA request, we are required to be applicant and purpose blind. The fact that an individual has a direct connection to a company has no bearing on our consideration. A response under the Act is effectively being released to the world, not just the person making the request. We look at a request and say - would we tell the world something about an entity if we answered it? So ignore who is making the request and why, just think am I releasing confidential information; am I telling the world something about a 'person' if I answer the request? In this instance the answer would be "Yes" so we have to neither confirm nor deny whether the information is held. It is important to note that this does not in any way confirm we hold that information. I therefore hope the following explanation will clarify our approach when responding to requests under the Act for information that could be linked to an identifiable person, be that an individual, company or any other entity.

Taxpayer confidentiality

During the passage of the Bill which created HMRC (the Commissioners for Revenue and Customs Act 2005), Parliament made clear its intention that information about our customers would be removed from the right of access under the FOIA. For this reason, a clause was inserted to ensure that information connected with a taxpayer could not be disclosed under the FOIA. This clause is at section 23(1) of the CRCA. It explicitly states that if information falls within the provision of section 18(1) of CRCA, it is exempt under section 44 of the FOIA.

Section 44 of the FOIA prevents the disclosure of information where it is prohibited by other legislation. This is an absolute exemption and there is no public interest test. To determine whether information would be covered by section 23(1) CRCA, HMRC are required to consider two questions:

- Would the requested information be held in connection with a function of HMRC?
- Would the information relate to a "person" who could be identified from the information requested?

If the answers to both questions is "Yes", then the section 44(1)(a) FOIA exemption applies and we cannot release information because of our statutory duty of confidentiality. Section 18(1) of the CRCA also removes any possibility of disclosure under the FOIA on a discretionary basis.

As the original response set out, the term "person" includes legal entities such as companies, trusts and charities, as well as living individuals. (See Schedule 1 of the Interpretation Act 1978.)

When it has been established that an exemption applies, confirming whether we hold the information or not could in itself disclose something about this person. Section 44(2) of the FOIA therefore removes the obligation at section 1(1)(a) of the FOIA to provide this confirmation.

The definition of information relating to a person is set out in section 19(2) of the CRCA:

“... revenue and customs information relating to a person means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs but it does not include information about internal administrative arrangements of Her Majesty’s Revenue and Customs (whether relating to Commissioners, officers or others)”

In this case, the information you have requested, if held by HMRC, would be held for our function relating to the general management and collection of tax.

There are exceptions to our statutory duty of confidentiality, permitting discretionary disclosure if one of the conditions set out in section 18(2) or (3) of the CRCA applies. However, this does not affect the interaction between CRCA sections 18(1) and 23(1) so the disclosure is not made under the FOIA. The absolute prohibition against disclosure contained in section 18(1) is the only relevant provision when considering disclosure under the FOIA.

Additional points raised

In respect of your numbered items the first one appears to be a statement of fact so I have no comment to make.

Item 2. It is not possible to provide anonymised or redacted information as by doing so would breach our duty of confidentiality by indirectly confirming information was held.

Item 3. The purpose of an internal review is to consider the handling of a request for information under FOIA. There is no requirement for me to consider other matters such as conflicts of interest under this activity so I am unable to comment on this. You may however wish to pursue this matter with the appropriate team.

Item 4. HMRC does release information about senior leaders but as your request for information is about identifiable persons it is not possible to provide this detail.

Conclusion

I have carefully considered the way we dealt with your original request, our response and the points raised in your email of 24 August 2018. While we aim to release information requested under the Freedom of Information Act, this is limited by our duty of confidentiality set out in the Commissioners for Revenue and Customs Act.

Since we are relying on the absolute exemption under section 44(2) of the FOIA, we are not required to take into account the balance of the public interest. The fact that section 44 is an absolute exemption demonstrates that, whilst recognising that the public interest will generally be best served by openness, there is an overriding public interest in deferring to any existing statutory prohibitions against disclosure.

Having considered your request in the context of the two Acts, I am satisfied that we dealt with your request correctly and I uphold the decision to refuse your request under section 44(2) of the FOIA.

Appeal process

If you are not content with the outcome of this internal review, you can complain to the Information Commissioner’s Office. The following link explains how to do this:

<https://ico.org.uk/concerns/>

Yours sincerely,

WMBC Freedom of Information team