



HM Revenue & Customs

Ms Siliang Tian

By email: request-517326-
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Dear Ms Tian

Freedom of Information Act 2000 (FOIA)

Thank you for your request, which was received on 1 September, for the following information:

"I am writing to request information under the Freedom of Information Act 2000. I would be interested in any information held by your organisation regarding my request. Over the period 1st March 2017 through to 31st July 2018:

1) Please disclose all emails or other communications between HMRC's Mark Frampton and Martin Innes of NHS Improvement.

I can confirm that HMRC holds some information within the scope of your request.

I can advise you that when customers call our various helplines, HMRC does aim to record the majority of calls. However, there are certain circumstances where HMRC would not; for example, when a customer has provided their bank details. This is why the HMRC 'greeting' message specifically states that calls 'may' be recorded.

Not all Teams within HMRC deal with external telephone calls and those that do, have different policies on recording calls depending on the nature of the HMRC related area they deal with.

In this instance the only communications held by HMRC relevant to your request are by email.

The attached annexe provides the 31 emails identified within the scope of your request.

Some information held by HMRC is exempt from release under FOIA. For ease of reference, redactions in the attached annexe are colour coded with the legal positions for each exemption provided below:

Section 41(1) FOIA – black

Section 40(2) FOIA – red

Section 35(1)(a) FOIA – yellow

Legal positions

Section 40(2) FOIA:

The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any individual should a request be received. As an exemption, section 40 therefore operates to protect the rights of individuals in respect of their personal data.

Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual and disclosure would be in breach of any of the data protection principles.

In order to rely on section 40(2) the requested information must constitute personal data as defined by section 1(1) of the Data Protection Act ("DPA").

For information to constitute personal data, it must relate to an individual, and that individual must be identifiable from that information.

Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, and has them as its main focus or impacts on them in any way.

The information redacted in each email relates to the named official who is identifiable from the data. I am therefore satisfied that the information requested is the personal data of a third party.

The data protection principles regulate the way in which a data controller (in this instance HMRC) must process personal data. The relevant Data Protection Act principle that applies in this case is principle 1 which requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in schedule 2 is met.

When considering whether it is fair to disclose personal data to a member of the public, HMRC takes into account a number of factors and in this matter these included: a) How the information was obtained; b) The likely expectations of the data subject regarding the disclosure of the information; c) The effect the disclosure would have on the data subject; d) Whether the data subject expressly refused consent to disclosure of the information; e) The content of the information; and f) The legitimate public interest in disclosure of the information.

Having considered all relevant factors in this case, I have concluded that it would not be fair to disclose this information.

Individuals have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA.

Disclosure of the information requested will breach the first data protection principle as the named officials would not have expected this information to be disclosed and have not consented to its disclosure.

In the circumstances, there is no need to consider whether any of the conditions in Schedule 2 of the DPA are met. You may argue that public officials have a lower expectation of privacy in relation to data about their public function than employees of private organisation.

However, officials below the grade of Senior Civil Servant have a stronger expectation of privacy because they are accountable to their employer rather than directly to the public.

I find that the general public interest in the disclosure of information requested is greatly outweighed by the expectations of the named Officials in respect of personal data which is not in the public domain, and which is information they would reasonable expect to remain private.

Section 41(1) FOIA:

Section 41(1) of the FOIA says that information is exempt information if;

- (a) it was obtained from any other person and
- (b) disclosing the information to the public (otherwise than under the Act) would constitute a breach of confidence actionable by that or any other person

The information within EMAIL 7 and the four associated attachments was provided to NHSI in confidence by a third party for further disclosure to HMRC.

Information within EMAIL 30 was provided directly to HMRC by a customer.

It is imperative that HMRC maintains the confidence and trust of third parties which provide information in such circumstances. Disclosure of such material would also damage our standing in dealing with individuals who would not have confidence to engage with us in future, and may decide to take action against us.

In this instance, the information provided purported to suspected non-compliance; if it were disclosed, it would not only amount to an unauthorised use of the information by NHS but would also detriment those individuals named.

For the reasons detailed above, I consider that section 41 applies and as it is an absolute exemption, the application of the public interest test under section 2(2) of The FOI Act is not required.

However, in considering whether, in an action for breach of confidence, a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. I have therefore considered the public interest in disclosing this information but consider that, in the present circumstances, it does not favour disclosure of the information withheld.

Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. The public's trust in HMRC would weaken if information provided to it in confidence was disclosed.

HMRC's duty of confidentiality is outlined at section 18 of the [Commissioners for Revenue and Customs Act 2005](#). The consequences for wrongful disclosure are provided at section 19.

Section 35(1)(a) FOIA:

Section 35(1)(a) provides that:

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to:

(a) the formulation or development of government policy.”

The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.

The Information Commissioner’s Office takes the view that for the purposes of this exemption the ‘formulation’ of government policy means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. ‘Development’ may go beyond this stage. It may refer to the processes involved in improving on or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least, ‘formulation or development’ suggests something dynamic that is, something must be happening to the policy.

HMRC has considered how disclosure of the withheld information would give the public an insight into the thinking process within government on how it makes decisions that impact on the compliance issues with UK tax obligations and how this process happens.

This would allow the public to review the quality of advice being provided as well as leading to more informed public debate.

However, it may be argued that it is in the public interest for government to have a private “safe space” away from public scrutiny to carry out the policy making process effectively. This includes protecting the government’s ability to gather free and frank input from others to inform its decisions. HMRC considers it is in the public interest that options are fully considered and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.

Therefore, on balance I find the public interest favours maintaining the exemption at section 35(1)(a) FOIA.

If you are not satisfied with this reply you may request a review within two months by emailing foi.review@hmrc.gsi.gov.uk, or by writing to the address at the top right-hand side of this letter.

If you are not content with the outcome of an internal review, you can make a complaint to the Information Commissioner’s Office (ICO). Instructions about this process are available at the following link: <https://ico.org.uk/concerns/>

Yours sincerely,

Freedom of Information Team