



HM Revenue
& Customs

David Chaplin
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Date: 23 February 2018
Our ref: FOI2018/00261

Dear Mr Chaplin

Freedom of Information Act 2000 (FOIA)

Thank you for your request, which was received on 2nd February, for the following information:

"Please can you:

- (1) Provide a copy (draft or otherwise) of the document that was intended for publication in January as per item 11.
- (2) Provide copies of any correspondence HMRC has had with external advisors (legal or otherwise) who have advised HMRC on this specific aspect of MOO relating to IR35 and its absence from the CEST tool.
- (3) Explain HMRC's interpretation of the relevant case law surrounding MOO and employment status, clarifying how much MOO (or level of MOO) is necessary to exist in order for someone to be considered a deemed employee."

I can confirm that HMRC holds the information you have requested. The information is exempt from disclosure under s22, s44(1)(a) and s35 of the FOIA.

Question 1

The information is exempt from disclosure under section 22(1) of the FOIA as the information will be published with the next set of IR35 Forum minutes.

Section 22(1) of the FOIA applies if 3 conditions are met:-

- a) there was an intention to publish at the time the request was received; and
- b) it is reasonable to withhold the information until the planned publication date and
- c) it is not in the public interest to disclose the information.

This is a qualified exemption which means that the decision to disclose the information is subject to the public interest test. When assessing whether or not it is in the public interest to disclose the information to you, we took into account the following factors:

It is reasonable and in the public interest that HMRC should publish this information as it supports the decisions made by the CEST digital service. But I take account of the fact that that interest will be met by our planned publication through the minutes of the IR35 Forum meetings.

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. On the other hand, there is a public interest in allowing public authorities, within reason, to determine their own

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publication timetable so as to deal with the necessary preparation and administration involved in publication. It is also in the public interest that public authorities can plan publication activity so as to ensure the best use of public resources. Premature disclosure could undermine any relevant pre-publication procedures, such as consultation with or pre-disclosure to particular bodies.

Taking these factors in to account I consider that, on balance, the public interest in withholding the information within scope of your request until publication, outweighs the public interest in disclosure at this time.

Question 2

The information you have requested is exempt from disclosure under section 44(1)(a) of the FOIA, which applies when the information is prohibited from disclosure under any enactment.

To determine whether information is covered by section 23(1) of the CRCA, we are required to consider two questions:

- is the requested information held in connection with a function of HMRC? and
- does the information relate to a "person" who is identified, or who could be identified from the information requested?

If, as in this case, the answers to both questions is "Yes", then the section 44(1)(a) FOIA exemption is engaged and our statutory duty of confidentiality (at section 18(1) of the CRCA) removes any possibility of disclosure under the FOIA on a discretionary basis.

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

The release of the correspondence between HMRC and external advisors is exempt under S35 of the FOIA, which allows government departments to withhold information relating to the formulation or development of government policy.

Section 35 is a qualified exemption which means that I must consider whether the balance of the public interest favours withholding or disclosing the information.

I accept that there is strong public interest in ensuring that HMRC is accountable for its activities and is as transparent as possible about the way policies are developed. Publishing the information requested would, on the face of it reassure the public, that our policy development and advice activities are fair and robust and take account of legal and technical advice. Against that, I have taken into account that HMRC is subject to review by external bodies such as the National Audit Office, the Adjudicators Office and the Public Accounts Committee, so the public interest in our accountability is met by the oversight of those bodies.

It is important that government ministers and officials have a safe space for policy formulation to take place whilst development is live. Disclosing information could have a detrimental impact on how policy options are discussed and explored, so on balance I conclude it is not in the public interest to set aside the exemption.

Question 3

Information you have requested is exempt from disclosure under s21 of the FOIA because it is easily accessible to you. This information is available in the guidance published here: <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm0543>. This guidance is being further improved, and planned revisions will be in line with the paper referred to in part (1) of the request, to be published in the near future.

If you are not satisfied with this reply you may request a review within 2 months by emailing foi.review@hmrc.gsi.gov.uk, or by writing to the address at the top right side of this letter.

If you are not content with the outcome of an internal review, you can complain to the Information Commissioner's Office. Their contact details are available at their website: www.ico.org.uk.

Yours sincerely,

Freedom of Information Team