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Date 17 January 2014
Our Ref FOI 2548/13

www.hmrc.gov.uk

Dear Sirs

Freedom of Information Act 2000 - Internal Review

Thank you for your letter dated 30 October 2013 received on 4 November 2013, seeking an internal review on behalf of your client Ms Strickland. Please accept my apologies for the delay in sending you this reply.

The request

Your client wrote by email dated 20 September 2013:

- 1. Please provide details of your investigation (if any) into Tianjin Myway International Trading Co. and Magforce International for breaches of the Export Control Order 2008 at the DSEI exhibition 2013.*
- 2. Please provide a copy of any reports concerning enforcement action against these companies and any provide recommendations made to the police or the government (including by email or other correspondence) as to possible enforcement action.*
- 3. Please confirm how many investigations HMRC have undertaken in relation to companies or individuals suspected of breaching any law applicable in the UK at any DSEI exhibition (including previous DSEI exhibitions).*
- 4. Please supply any document setting out what equipment Tianjin Myway International Trading Co. or Magforce International was promoting and whether it constituted an offence including legal advice.*
- 5. Please provide any documentation between HMRC and the Met police discussing possible offences by/ or enforcement action against Tianjin Myway International Trading Co. or Magforce International, or any other exhibitor, attendee or stakeholder of the DSEI exhibition.*

7. Please provide any documents sent by HMRC to Tianjin Myway International Trading Co. or Magforce International (or their representatives or agents) relating to possible offences at the DSEI exhibition 2013

Our response

On 18 October 2013 HMRC turned down the request under sections 44 and 31 of the Act. You wrote on 30 October 2013 seeking a review on behalf of your client. I have attached the text of your grounds for appeal at annex A.

Internal review

I have been asked to look again into your FOI request and its handling, and this review is restricted to those matters. The purpose of the internal review is to provide a fair and thorough reconsideration of decisions made pursuant to the FOIA. I have carefully considered the request, our response and the issues raised in your request for a review.

The Act gives applicants two rights in respect of information held by a public authority:

- (1) a right to be told if the information is held (known as the duty to confirm or deny); and
- (2) a right to have that information communicated subject to any exemption or exemptions that might apply.

The response letter from HMRC was issued within the statutory 20 working day time limit for compliance as required by section 10(1) FOIA. The letter also explained your rights to a review by HMRC, and also to apply to the Information Commissioner for a decision if not content with the internal review in accordance with section 17(7) FOIA.

Your appeal in respect of the first ground is that HMRC has not considered the possibility of simply redacting the names of the subjects within the scope of the information request. I can assure you that this would have been taken into consideration. However If HMRC were to redact names of subjects involved the applicant would still be aware of the identities as they form part of the request made by that applicant.

Firstly, the Act is both purpose and applicant blind. It does not take into account the status of the individual or their motives. A request therefore has to be considered on the basis that it could have been made by any person – the identity of that person is not a material consideration when deciding whether or not to release information. This means that if HMRC was willing to disclose information to you under the Act, it would also have to be prepared to make it available to the public at large. Since the Act is concerned with making information accessible to the public at large, it is not appropriate to use this regime to access information relating to identifiable persons.

Secondly, it has always been HMRC's position that, in looking at the interaction between section 18(1) and section 23 CRCA, which engages the section 44 FOIA exemptions, you must disregard any of the relaxations in section 18(2) which set aside section 18(1). To put the matter beyond doubt, section 19(4) Borders, Citizenship and Immigration Act 2009 amended section 23 CRCA as follows:-

*In section 23 of the Commissioners for Revenue and Customs Act 2005 (c. 11) (freedom of information), after subsection (1) insert—
“(1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.”*

For this reason we will always cite section 44 in respect of information covered by our duty of confidentiality. This is the case even where the information is in the public domain by way of a news release or any other source.

The following link to our information disclosure guidance explains how and when we are able to release certain confidential information. None of the methods described involve release under the Freedom of Information Act.

<http://home.inrev.gov.uk/idgmanual/IDG40300.htm>

The ICO has supported our position on the application of this absolute exemption in a number of decisions. Here are the ICO Decision notice references to a selection for your information:

FS50470320
FS50238448
FS50501024
FS50208593
FS50202967

In relation to your second ground of appeal on the applicability of section 31, having consulted with relevant business team I am content that the exemption was cited correctly for the reasons already given.

I have reviewed the original decision and can confirm that I consider the decision to cite 44(2) and 31(1) (a) & (b) of the Act to be appropriate.

Appeal Process

If you are not content with the outcome of this review or any decisions made by HMRC under the FOIA, you may apply directly to the Information Commissioner, who can be contacted at:

The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

Yours sincerely

Margaret Earing

Annex A
FOI requests 2548 & 2529/13 M Strickland

Appeal in respect of first ground of refusal

Firstly, we aver that answering questions 1-2 of the letter dated 21 September 2013 would not “*necessarily tell you something about the persons involved.*” This is because the questions are not worded in a way that requires the identity of the persons involved to necessarily be disclosed. Moreover, it appears that HMRC have not considered the possibility of simply redacting the names of the subjects of this information. Therefore, we do not consider that HMRC have properly considered this request in the first instance, or considered methods short of full disclosure in the second instance.

Secondly, we note that HMRC purport to rely upon a statutory duty of confidentiality contained within Sections 18 (1) and 23 of the Commissions for Revenue and Customs Act 2005 (CRCA) and the exemption contained within Section 44 (2) FoIA.

For completeness, Section 18 (1) of CRCA reads as follows:

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

However, Section 18 (2) provides that Section 18 (1) (d) does not apply to a disclosure:

“which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions.”

In addition, so far as it may be relevant, Section 23 of the CRCA reads as follows:

“(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure—

(a) would specify the identity of the person to whom the information relates, or

(b) would enable the identity of such a person to be deduced.”

Therefore, it is contended that in this case, Section 18 (1) (d) is relevant to this request for disclosure, as it is clear that this case involves the potential of a criminal investigation or criminal proceedings. As a consequence, we would submit that the general presumption against disclosure contained within Section 18 (1) does not apply to this case.

Furthermore, we note that HMRC’s letter states:

“..under FoIA, HMRC will always neither confirm nor deny whether information is held. HMRC may lawfully disclose information if one of the conditions in Section 18 (2) CRCA applies, but, just because that may have

happened, it does not mean that the information can be disclosed for any other purpose.”

We are concerned that this appears to be a fettering of HMRC’s discretion of disclosure of evidence which may be material for a criminal investigation. We submit that it would be arbitrary and irrational to adopt a position to always neither confirm nor deny whether information is held, as there is no statutory basis for such a decision.

Appeal in respect of second ground of refusal

We submit that by disclosing this information, HMRC would not prejudice the prevention or detection of crime, nor the apprehension or prosecution of offenders.

As such, it would be a fallacy for HMRC to argue that by disclosing details of an alleged offence that may have already been committed, this would jeopardise future cases. If this really was the case then criminal trials would never be reported in the press, nor would press releases be made by prosecutorial bodies such as the CPS or HMRC when Defendants are convicted. This is particularly the case in regard to Question 3 of Ms Strickland’s email dated 20 September 2013, as this includes previous DSEI exhibitions.

Indeed, HMRC does appear to recognise that there is a potential public interest in the disclosure of such information as it is important to be transparent and accountable about such operations. We submit that failing to confirm or deny whether there is an investigation (when some of the information is already in the public domain: see for example, <http://www.bbc.co.uk/news/uk-24058609>) runs contrary to any notion of transparency or accountability. As a consequence, it is in fact the case that the public may lose confidence in the ability of an investigative body to conduct cases in an open and transparent manner. This is particularly the case when HMRC is refusing to disclose details of past investigations.

Given that the public has an interest in whether alleged offences are investigated and whether the investigations give rise to prosecutions or convictions, we submit that the disclosure of this information is prima facie in the public interest.