

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2019

Public Authority: HM Revenue & Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information on the disclosure of British taxpayer information provided to the US Internal Revenue Service ('IRS') in accordance with the Foreign Account Tax Compliance Act ('FATCA').
2. The Commissioner's decision is that HM Revenue and Customs ('HMRC') has appropriately relied on section 27(1)(a) of the FOIA to refuse the request.
3. The Commissioner does not require HMRC to take any steps to ensure compliance with the legislation.

Request and response

4. On 11 April 2018 the complainant requested information in the following terms:

"Under the Freedom of Information Act 2000, I am seeking information on the transfer of individual citizens' data from Britain to the United States arising from the US Foreign Account Tax Compliance Act (FATCA). I initially sent this request to HM Treasury (ref FOI2018/05112), and they advised me to contact HMRC.

Please send me any available documents summarising the extent of, or providing statistics or estimates on, the annual disclosure of British taxpayer information provided to the US Internal Revenue Service (IRS) as per FATCA's requirements.

This includes non-identifying information, by year, such as the number

of taxpayers reported on, number of accounts, aggregate amounts, average / range of values, and country of residence. More specifically, for each year during which FATCA has been in force in the UK, I would like any available information on:

- The number of bank accounts forwarded to the IRS.
- The number of account holders whose information was transmitted to the IRS.
- The sum of the balances of all accounts reported to the IRS.
- Any other information reported to the IRS about the above accounts and account holders, such as income.
- Amongst the account holders whose information was forwarded to the IRS -

How many are British citizens, including British citizens who hold another citizenship?

How many are resident in Britain?

How many are both British citizens and British residents?

How many were informed by HMRC that the information was forwarded to the IRS?

How can account holders residing in Britain have the opportunity to consult the information about them and correct it if necessary?"

5. HMRC responded on 26 April 2018 with a refusal notice in reliance on section 27(1)(a) of the FOIA (International relations).
6. Following an internal review HMRC wrote to the complainant on 25 May 2018 upholding its initial response.
7. Following the Commissioner's investigation HMRC wrote to the complainant again on 1 November 2018 clarifying the information it holds in the scope of the request and providing further reasoning for its reliance on the section 27 exemption.

Background

8. Automatic Exchange of Information agreements are made between the UK and other countries. These agreements provide for the automatic exchange of information between tax authorities of different countries about financial accounts and investments to help stop tax evasion. Financial Institutions provide information on non-UK residents with financial accounts and investments in the UK to HMRC.

This information will be shared by HMRC with the relevant countries. In return HMRC will receive information from other countries about UK residents with financial accounts and investments overseas.

FATCA is US legislation which broadly requires 'foreign Financial Institutions' to provide the US tax authority (the 'IRS') with certain information on any of their accounts held by US persons. The process is designed to determine that US persons are paying the correct amount of tax and are not, for example, concealing assets offshore and evading taxes.

The UK government, along with others and with European Commission support engaged in joint discussions with the US government to explore an intergovernmental approach to the FATCA and the aim to combat tax evasion.

A model intergovernmental agreement ('IGA') was developed and published in July 2012. The UK and US signed the UK-US IGA in September 2012. Information exchanged under this agreement is subject to the confidentiality and other protections provided for in the UK-US Double Taxation Convention.

Scope of the case

9. The complainant contacted the Commissioner on 2 June 2018 to complain about the way her request for information had been handled. She explained to the Commissioner her view that HMRC had misinterpreted the confidentiality provisions of the UK-US Intergovernmental Agreement ('IGA') which she advised applies to individual data, not aggregate data. She advised:

"On 14 May, the European Parliament released a comprehensive report entitled 'FATCA Legislation and its Application at International and EU Level'

([http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604967](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604967))

which explains how FATCA data transfer violates the GDPR, and why no GDPR exception applies for FATCA data transfer, especially in the case of European citizen residents who were born in the USA but otherwise have no connection to the USA and have never lived there as adults (i.e. so-called 'accidental Americans')....

1. Why is US law being applied in the UK to restrict and violate the rights of British citizen residents? (It is my understanding that foreign countries' laws can only be applied in the UK via treaties, which are by nature reciprocal; however, the FATCA IGA is not reciprocal.)
2. Why would such a detrimental impact only affect the UK and not, for example, Australia, whose government has also has an IGA with the

United States and who has released the same kind of broad aggregate data being requested from HMRC?"

10. The Commissioner considers the scope of her investigation to be HMRC's application of section 27(1)(a) to the first four bullet points of the complainant's request. The Commissioner notes that the individual elements comprising the fifth bullet point are not withheld as HMRC determined after further consideration that this information is not held. Notwithstanding this, the Commissioner has gone on to consider this 'not held' determination.
11. The Commissioner acknowledges the complainant's points raised above in paragraph 9, however, she must remind the complainant of her role is as regulator of the access to information legislation and she is therefore unable to address the questions posed regarding the application of US law or the actions of the Australian government. At the time of the request the GDPR had not been introduced into the UK, HMRC could not consider any impact of GDPR at that time nor was it asked to do so by the complainant.

Reasons for decision

12. Section 1 of FOIA states:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

13. When a public authority claims (as is the case in relation to point five of the request) that it does not hold the requested information, the Commissioner will apply the normal civil standard of proof in determining whether this is the case, ie she will decide on the balance of probabilities whether the information is held.
14. HMRC amended its position in respect of bullet point five of the complainant's request to confirm that it does not hold the specified information on the account holders whose information was forwarded to the IRS. It explained to both the complainant and the Commissioner that this requested information is not held because the Financial Institutions which submit information to HMRC are not required to

identify which account holders are British citizens and /or are resident in the UK. It referred the Commissioner to online guidance¹ which outlines the information required from Financial Institutions.

15. HMRC also confirmed that it does not notify persons of the information provided under the UK-US IGA. It went on to explain that UK law requires Financial Institutions to notify their customers before the first disclosure is made, in accordance with regulation 10 of the International Tax Compliance Regulations 2015. The Financial Institutions' customers are consequently made aware of the processing of their personal data.
16. HMRC noted that prior to the Commissioner's investigation it had not addressed the complainant's question regarding account holders' opportunity to consult or correct information. In its further response HMRC explained to the complainant that as the information is provided by the Financial Institutions and that legally customers must be notified of such disclosure, if account holders wished to consult or correct information about themselves it would be appropriate for those customers to contact their Financial Institution in this respect.
17. Following HMRC's further response the complainant provided the Commissioner with her detailed consideration of the response. She did not challenge HMRC's confirmation that it does not hold the information requested in point five of her request. Notwithstanding this, but as a result of this, she has a further concern which is provided in paragraph 33 below.
18. Although HMRC did not provide the details of any searches conducted the Commissioner is satisfied with HMRC's explanation in regard to its confirmation that this information is not held. She accepts that there is no requirement for the Financial Institutions to provide HMRC with the requested citizenship and residency identification and therefore there is no reason to hold the information further to FATCA.
19. The Commissioner has concluded that, on the balance of probabilities, the public authority does not hold this element of the information requested by the complainant.

Section 27 – International relations

20. Section 27(1)(a) provides:
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¹ <https://www.gov.uk/government/publications/foreign-account-tax-compliance-act-registration-guidance-fatca/automatic-exchange-of-information-registration-guidance>

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

(a) relations between the United Kingdom and any other State,

21. In order for a prejudice based exemption, such as section 27(1)(a), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

22. The Commissioner is satisfied that the information identified falls to be considered within the section 27 exemption. She accepts that the information relates to an international agreement.

23. The Commissioner notes that this exemption does not necessarily focus on the importance, subject or content of the requested information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information. The timing of the request will also affect the sensitivity of that information. Thus section 27(1) focusses on the effects of the disclosure.

24. The UK has long-standing ties with the US which, at the time of the request, remained one of the UK's closest allies on the international stage. In assessing the prejudice that would be caused to the UK's relations with another state, the Commissioner is also required to consider the wider context and long-term consequences in which the disclosure of the requested information would result.

The public authority's position

25. HMRC explained to the Commissioner that exchanges of information under the UK-US IGA are confidential. Article 3(7) of the UK-US IGA states:

"all information exchanged shall be subject to the confidentiality and other protections provided for in the Convention, including provisions limiting the use of information exchanged".

26. It went on to explain that the confidentiality of data exchanged is not limited to that which is taxpayer specific. Commentary on Paragraph 2 of Article 26 states:

*"2. Furthermore, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, **regardless of domestic information disclosure laws such as freedom of information** or other legislation that allows greater access to governmental documents."*

27. HMRC advised the Commissioner:

"As other states consider such statistics confidential, there is a risk that by disclosing the statistical data pertaining to exchanges with the US it would signal to other States that the UK has failed in its confidentiality obligations under a treaty."

28. HMRC discussed at length with the Commissioner the nature of international tax agreements and specifically Article 27 of the UK's Double Taxation Convention with the USA ("the Convention"). These agreements, including the Convention have strict and prescriptive confidentiality provisions and are incorporated into UK law.

29. Furthermore HMRC explained that it considers maintenance of good international relations is essential in order for it to continue to receive reciprocated information from other jurisdictions. HMRC advised that it uses the information it receives to address international tax avoidance and evasion and its ability to do so would be "greatly hindered" if other States decided to end such exchanges.

30. HMRC therefore considers that the disclosure of the requested information *would* prejudice relations between the UK and the other States with whom it has tax treaties, including the USA, because such a disclosure would be perceived as a breach of the confidentiality afforded by an international tax treaty.

The complainant's position

31. Following HMRC's further response to the Commissioner, the complainant provided a detailed submission on 12 November 2018 covering three main topics.
32. Her first concern is regarding confidentiality and reciprocity. The Commissioner notes the complainant's concerns. Although the Commissioner is unable to answer the specific questions raised, for example, regarding the UK government's decision to make no provision in the implementing legislation for reporting the aggregate FATCA data to UK Parliament, she will set out the complainant's views. For example:

"it does not make sense to argue for confidentiality on the basis of reciprocity, because many aspects of FATCA are not reciprocal. This is noted in a resolution passed by an overwhelming majority in the EU Parliament in July 2018:

<http://www.europarl.europa.eu/news/en/pressroom/20180628IPR06837/meps-want-to-open-negotiations-on-an-eu-usfatca-agreement>)."

33. The complainant's second concern is regarding individuals' right to information under the General Data Protection Regulation (GDPR). She asks many questions in this regard:

"HMRC's response states that the financial institution must notify a customer **before** the first disclosure is made; what are the financial institution's duties subsequent to that? What GDPR guidance does HMRC provide about individuals' rights to know what FATCA data is being held about them by HMRC and by their financial institutions, and what data is being transferred outside the UK and how often? If a bank closes an individual's account and the individual suspects that it was because they asked the bank about their FATCA data, what recourse does the individual have? What guarantee does an individual have that the data held by HMRC and sent to a foreign government is exactly the same as that held by the financial institution, i.e. that it has not been subject to any errors in the transfer process? Does HMRC inform the financial institution about what data has been sent to the IRS under FATCA?"

34. The Commissioner understands that the complainant has many concerns regarding the implementation of FATCA and the impact on individuals. At the time of her request the GDPR had not been introduced into the UK, HMRC could not consider any impact of GDPR at that time nor was it asked to do so by the complainant. The Commissioner's duty is to determine whether HMRC appropriately relied on section 27(1)(a) to withhold the requested information. She cannot comment on HMRC's preparation for the GDPR in respect of FATCA.
35. She would also remind the complainant that the FOIA provides for access to recorded information. Public authorities have no obligation to answer questions, unless recorded information which answers those

questions is held. It is possible that HMRC holds information which may allow for a response to the complainant's questions following on from its further response, some of which are contained in paragraph 30.

However, the Commissioner cannot include her consideration of these questions in this decision notice which concerns the complaint made on 2 June 2018 regarding the initial request.

36. The complainant's third point relates to 'protecting the UK tax base'. The complainant raises further questions concerning the identification of account holders who are British citizens resident in Britain:

"Why are financial institutions not required to identify which account holders are British citizens resident in Britain? Does this mean that the data from financial institutions is being sent by HMRC to the IRS in bulk, with no distinction between US residents (who FATCA was supposedly intended to target) and British citizens resident in Britain? If so, does this mean that HMRC is actively facilitating the application of foreign filing burdens, foreign penalties and fines, and foreign double taxation to British tax residents, including thousands of 'accidental Americans' who have lived their entire lives exclusively in the UK?

Does HMRC accept that in doing so, it is helping a foreign government to reach into the UK tax base and take the British earnings and retirement savings of British taxpayers resident in Britain, and thus is in breach of its duty to protect the UK tax base and UK taxpayers, a duty that HMRC refers to on page 4 of their revised response of 1 November as 'protecting the public purse'? How does allowing the US government to enforce its tax code on the tax residents of the UK accord with HMRC's duty to 'protect the public purse'?"

37. Again, the Commissioner is unable to comment on the complainant's specific questions listed above for the reasons explained in paragraph 11. She has, nevertheless, included the detail of the complainant's serious concerns in order to present a complete representation of the complainant's view.

The Commissioner's position

38. With regard to the first criterion of the three limb test described above in paragraph 21, the Commissioner accepts that the potential prejudice described by HMRC clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
39. With regard to the second criterion, the Commissioner is satisfied that there is a causal link between disclosure of the withheld information to prejudice the relations between HMRC (UK) and the tax authorities of

other States including its US counterpart the IRS. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. The Commissioner has reached this finding because she accepts HMRC's detailed explanations regarding the nature of the Agreement in place and is convinced by the arguments presented which demonstrate that without proper confidence and assurance that HMRC will maintain the required standard of confidentiality, provided for in the Convention, continued cooperation and exchange of tax information will be adversely affected. In addition, any detriment to the UK's standing as a trusted and respected tax treaty party in global terms risks an adverse impact on the agreement of future international treaties.

40. The Commissioner is satisfied that HMRC has provided her with sufficient evidence such that she accepts its reliance on the higher level of likelihood of prejudice, that being, disclosure *would* have a prejudicial effect. Therefore the third criteria is met and thus the requested information is exempt from disclosure on the basis of section 27(1)(a) of FOIA.

Public interest test

41. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
42. HMRC acknowledged that disclosure would support the wider Government commitment to transparency and may encourage greater understanding amongst the general public of HMRC's policies, activities and agreements with other nations. It would also aid scrutiny of HMRC's use of the tools available to it and how it deals with international tax matters.
43. In favour of maintaining the exemption HMRC considers that there is a strong public interest in not releasing the requested information as it could lead to other tax authorities failing to share information with the UK and also withholding information from the UK in other areas of international relations.
44. HMRC advised the Commissioner that:

"..the risk that the UK's international relations would be negatively affected by disclosure of information about cooperation under tax instruments is very high, evidenced by the fact that a jurisdiction has told the department this would be the result."
45. HMRC also considers that there is a strong public interest in maintaining the exemption as it is "imperative" that the UK maintains its reputation

as a trusted international partner, protecting the public purse by being best able to assess tax avoidance and securing favourable outcomes for the UK in, for example, trade agreements.

46. HMRC indicated that there is a global consensus towards increased exchange of information as a key tool for tax administrations to tackle tax avoidance and evasion. The public interest in HMRC continuing to be able to receive information from other jurisdictions is consequently high.

47. The complainant explained that, as a UK citizen, she wholeheartedly appreciates the importance of safeguarding the UK's international relations. However, she is unsure how it is:

"..necessary or proportionate for that safeguarding to require the enforcement of national origin discrimination on a subset of British resident citizens, and complete secrecy as to the results of the legislation that is enforcing that discrimination."

48. The complainant also explained:

"Given the harms and costs of FATCA, it is very much in the public interest for people to know its outcomes in terms of how much data is being transferred.....It is vital for the UK to be able to tackle international tax avoidance, but poorly-directed policies such as FATCA make a mockery of the fight against tax evasion, as they treat normal British citizens living in the UK as tax evading criminals by virtue of their national origin, while allowing the actual tax evaders (who can afford complex compliance and exotic financial instruments) to hide.... Disclosure would strengthen cooperation in the fight against tax evasion because it would bring attention to wasteful, hypocritical, harmful and misdirected policies and encourage governments to correct the problems and devote their resources toward more properly targeted and effective means of reducing tax evasion."

49. The Commissioner has given much consideration to the points raised by both the complainant and HMRC. She understands the complainant's concerns and her altruistic arguments. The topic of the implementation of the FATCA policy appears to be controversial and has been raised at the European Parliament as referenced by the complainant. However, the Commissioner must limit herself to her regulation of the FOIA and focus on whether the broad public interest favours disclosure of the requested information. She is not able to assess the merits or otherwise of FATCA or other tax treaties nor can she answer the many questions that the complainant would wish to be answered. She has therefore restricted her consideration to the application of the section 27 exemption.

50. The Commissioner accepts that disclosure of the withheld information would provide the public with information on data provided to the IRS.

However, she accepts that the specific citizenship and residency questions detailed in the fifth element of the request is not information held by HMRC for the reasons explained earlier. The remaining points of the request would provide total number of accounts, account holders and total sum of those accounts along with 'other' information. The Commissioner does not consider that this information would serve the public interest in the way described by the complainant. Notwithstanding her deliberations on the principle of FATCA, she does not consider that there is a weighty public interest in the disclosure of this specific information when measured against the factors in favour of maintaining the exemption.

51. The Commissioner fully accepts that the risks which disclosure would pose to the UK, in the circumstances of this case, would not be in the public interest. She is satisfied that these risks are not fanciful or remote. She considers that it would not be in the public interest to prejudice relations between the UK and other States with whom the UK has tax treaties. It is the significance of this wider application, not only in respect of arrangements with the USA that adds further weight to maintaining the exemption.
52. In the Commissioner's opinion the public interest in disclosure is outweighed by the public interest in maintaining the exemption. She has reached this conclusion given the importance of protecting the UK's ability to receive confidential information from other States and to uphold the UK's confidentiality obligations in respect of the international treaties. Therefore, in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Right of appeal

53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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