

Information notices – safeguards (Lecture P1465 – 13.25 minutes)

This article considers the general safeguards contained within Part 4, Schedule 36, Finance Act 2008 relating to information notices issued by HMRC under the provisions of Schedule 36. Unless stated otherwise, all statutory references are to Schedule 36, Finance Act 2008. Restrictions that apply where a taxpayer has submitted a tax return, under Paragraph 21, were covered in a previous session on taxpayer notices, and are not duplicated in this session. Where you consider that the relevant safeguard has been breached, you should consider appealing the information notice.

Power or possession

A person who receives an information notice is only required to produce a document if it is within that person's "possession or power" (Paragraph 18). This means that the person either has physical control over the document, or they have the ability, including through a legal entitlement, to get the document, or a copy of it, from whoever holds it.

There will not have been a failure to produce the document if the person can satisfactorily show that it is not in their possession or within their power to produce, or why they are unable to produce a document that is within their power.

In relation to partnerships, the position may be different for each partner. Although partners may, generally, have access to certain documents, other documents, such as personal bank statements, will only be in the possession or power of a single partner.

Although there will be many circumstances where it is clear whether a document meets the statutory requirement, as above, there will be other times where it is less so. One such situation is where a taxpayer has the right to receive documents from trustees. Where the position is not clear, it may be appropriate for a client to seek to obtain documents requested by HMRC under an information notice, even if they are not in the possession of the client, and they have no legal right to the documents. If the request is refused, the client will be able to demonstrate to the tribunal, if necessary, that the requested documents are not in their power or possession.

Types of information

A person is not required to provide information or produce documents that fall into certain categories, specified at Paragraph 19. These include items relating to the conduct of a pending tax appeal. In this context, this means a document that has been brought into existence as part of the preparation for the presentation of a tax appeal.

The provision does not cover information or documents which may be used in presenting the appeal, including as evidence, but which existed before the appeal process began. To illustrate the point, HMRC, at CH22160, give the following example:

"In an appeal where the allowable cost of an asset is in dispute, you would not be able to require production of documents drawn up to analyse the legal arguments about what sort of costs can be claimed. However, you could require production of the invoices as evidence of the asset's cost."

"Journalistic material", or information in such material, is also covered by the exemption at Paragraph 19. "Journalistic material" is defined in Section 13, Police and Criminal Evidence Act 1984, and means material acquired or created for the purposes of journalism. The exemption would, for

example, mean that an investigative journalist does not have to disclose source material. It is important to note that material is only journalistic material if it is in the possession of a person who acquired or created it for the purposes of journalism, or unsolicited material sent to a person with the intention of it being used for journalism. It is also important to note that material is either “journalistic material” or it is not. There cannot be partial access to journalistic material, as there is with “personal records” (see below).

A person cannot be required to produce “personal records”, or to provide information from “personal records”. This term is defined in Section 12, Police and Criminal Evidence Act 1984, and is limited in what it covers. “Personal records” means records concerning an individual’s physical, mental, spiritual or personal welfare. Such information is not usually needed to check a person’s tax position. However, medical professionals may keep mixed medical and financial records. In such cases, the person can be required to provide the information that does not relate to the taxpayer’s welfare. HMRC’s guidance, at CH22180, acknowledges that any document that contains welfare information is “very sensitive”. Officers must obtain advice from within HMRC before using formal powers to obtain documents or information that may be contained in personal records. Where “personal records” contain mixed information, the person can be required to provide the information that does not related to the individual’s welfare.

Old documents

A person is not required to produce a document if the whole of the document originates more than six years before the date of the information notice (Paragraph 20).

However, this provision does not apply where the notice is given by, or with the agreement of, an authorised officer. Where a document originating more than six years before the date of the information notice has been requested, and it is not clear whether the notice has been given by, or with the agreement of, an authorised officer, HMRC should be asked to clarify the position.

HMRC will not, normally, need to see a document that was created more than six years ago, as such a document typically relates to a period that cannot be assessed. However, there may be circumstances where HMRC want to obtain such a document. Typical circumstances can include where HMRC want to check the tax position of a later period, including to check a chargeable gain computation. Also, where HMRC suspect that there may have been a deliberate error in a tax return, where HMRC can consider the last 20 years for assessing purposes. Another scenario is where HMRC have been asked to obtain information from another tax authority.

Deceased persons

Where HMRC is checking the tax position of a deceased person, Paragraph 22 provides that an information notice may not be given more than four years after the person’s death. This applies to a notice issued to the taxpayer’s personal representatives or to third parties. Advisers should note that the restriction does not apply in relation to the collecting of a tax debt of the deceased.

Legal professional privilege

A person cannot be required to provide privileged information, or to produce any part of a document that is privileged (Paragraph 23). In this context, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege (or, in Scotland, confidentiality of communications) could be maintained in legal proceedings. Legal professional privilege is a complex subject, the detail of which is outside the scope of this session. It

is a common law rule that protects from disclosure certain communications between a legal professional and the person who is their client.

Advisers should note that the privilege belongs to the client, and not their representative. Advisers should also note that only the client has the right to waive the privilege. This means that the client can choose to waive their right to privilege and provide the information to HMRC. The legal professional, or representative, can only waive their client's right to privilege with that client's express consent.

If advisers, or their client, considers that an information notice contains a request for information or a document that is, or may be, privileged, legal advice should be sought.

Auditors

Paragraph 24 provides that, generally, an auditor cannot be required to provide information or produce documents that belong to the auditor, where they were created for the purpose of carrying out the audit. HMRC's guidance, at CH22280, notes that an officer should not require audit information or papers from a person who was appointed to carry out a non-statutory, independent audit to standards similar to those required for a Companies Act audit provided that the work on the audit is kept separate from any work on the preparation of the client's accounts.

An auditor can be required to provide information or produce documents that would otherwise be protected, in certain circumstances (Paragraphs 26 and 27). Advisers should note that these exceptions also apply to tax advisers (see below). The protection afforded by Paragraph 24 (and Paragraph 25 for tax advisers) does not apply where the auditor (or tax adviser) has helped the person in the preparation or delivery of accounts, returns or other information or documents sent to HMRC, and the papers explain the accounts, return or other information or documents sent to HMRC. HMRC are, in these circumstances, entitled to have access to the protected information.

Although the exception allows the HMRC officer to obtain information showing how a particular entry was arrived at, it does not permit the officer to obtain information showing why the entry was arrived at in a particular way. The protection still applies if the explanatory information has previously been provided to HMRC. Where a document contains a mixture of information, some of which HMRC are entitled to, the auditor or tax adviser can redact the document.

Tax advisers

Paragraph 25 provides a similar protection for tax advisers as auditors receive under Paragraph 24. A tax adviser cannot, generally, be required to provide information or produce documents that belong to the adviser if the purpose of the information or documents was to give or get advice about another person's tax affairs. The tax adviser can be appointed by that other person, or by another tax adviser of that person.

Paragraph 25 refers to the protected information or documents as "relevant communications". The protection only applies when the information notice is given to a tax adviser – it does not apply when the notice is given to the person whose tax position is being checked.

The adviser's automatic response may be to refuse to comply with a notice, on the basis that it would breach client confidentiality. However, there is not an exemption from an information notice solely on the grounds of confidentiality. However, there may be considerations under the Human Rights Act, and suitable representations should be made. The adviser may want to take advice before responding to an information notice regarding one of their clients.

Please refer to the comments, above, about exceptions that apply to the protection afforded to tax advisers.

Practical considerations

When you receive an information notice, whether for you or in relation to one of your clients, it is important to carefully review the document, and to consider what information and documents are being requested. Where any of the statutory safeguards have been breached, it is important to:

- Take advice from a specialist, including where legal professional privilege may be an issue;
- Submit any appeal within the statutory deadline;
- Try to reach agreement with HMRC on the contentious point, ideally without recourse to the tribunal, which adds costs and time to the enquiry process;
- Make sure that you update the client where there are contentious matters, and continue to update them on the progress made;
- Where it is considered appropriate to provide information where one of the safeguards has been breached, obtain the client's instructions to do so.

Contributed by Phil Berwick, Director at Berwick Tax Limited