First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50895430

Appeal Reference: EA/2020/0109

Considered on the papers
On 19 April 2021

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MIKE JONES & PAUL TAYLOR

Between

MICHEAL BENTLEY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Second Respondent

DECISION

The appeal is dismissed.

REASONS

1. Mr Bentley was part of a tax avoidance scheme which was found to be ineffective and accordingly he faced the prospect of paying a penalty in respect of payments which should have been made to HMRC. He was concerned that

he might be treated less favourably than others in his position and sought information under the Freedom of Information Act (FOIA) from the Second Respondent (HMRC) on 8 September 2019:-

"My request is to be advised of the exact number of corrective action extensions given in the IOM tax avoidance case HMRC refer to as the Huitson scheme or case. I attach a redacted example of such an extension which clearly states in the penultimate paragraph on page 2 and I quote "in the present circumstances if you now take corrective action by 22 March 2019 you will not have to pay a penalty for not taking corrective action on time".

To be more specific, in my redacted example letter the original deadline for taking correct action was 17 November 2017, the example letter dated 22 February 2019, this has the effect of an extension or a revised deadline amendment to 22 March 2019.

To summarise, I would like to know how many members of the Huitson scheme were given that offer of a later date to take corrective action. The answer is obviously at least one member because I have attached an example of that letter. I confirm I am not asking for personal information with regards to who was offered that extension, just the numbers."

2. HMRC replied on 24 September explaining that the Commissioners for Revenue and Customs Act 2005 (CRCA) applied specific duties to HMRC requiring them to keep certain information confidential and that the provisions of FOIA recognised that where there was a statutory duty of confidentiality then FOIA did not require disclosure.

"In this instance, section 18(1) of the CRCA gives HMRC a duty of confidentiality which applies to all information it holds in connection with its functions. The prime examples of a function are the assessment and collection of tax; and the payment and management of tax credits. This is to make sure that information held on people and businesses would be protected and released only in controlled and limited circumstances.

When deciding whether we are prohibited from releasing information under FOIA by our duty of confidentiality, CRCA section 23(1) sets the following two questions:

- *Would the requested information be held in connection with a function of HMRC?*

- *Would the information relate to a "person" who could be identified from the information requested?*

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

In this case, the answers to both questions is "Yes". Our duty of confidentiality therefore applies under CRCA section 18(1) and we are exempt from releasing the information under FOIA section 44(1)(a). "

3. Mr Bentley was dissatisfied and complained to the Information Commissioner who upheld the refusal explaining in her decision notice:-

"16 The Commissioner has already held that this definition of the word "person" will stretch beyond a "natural" person and will include "legal" persons such as companies, charities and trusts. She has also previously ruled that a scheme itself will be a "person" for the purposes of CRCA.

17. The request itself names the Scheme. In confirming or denying that it held information within the scope of the request, HMRC would be disclosing information about the Scheme – namely that members of the scheme had been subject to corrective action extensions. This information will clearly "relate to" the Scheme and the Scheme will be identifiable from the information – when read with the request.

18. By confirming or denying it held information within the scope of the request, HMRC would be disclosing whether corrective action extensions had been offered in the course of collecting taxes. Any such information would thus clearly relate to a "function" of HMRC: its function in relation to the general management and collection of taxes."

4. In his appeal Mr Bentley argued that it was unacceptable that a tax avoidance scheme can be treated as an unincorporated body of people and therefore as a person, it was too loose and could be applied to anything where people were gathered such as a football stadium; he argued that HMRC were using this to hide that they had favoured one scheme member above another.

5. In resisting the appeal the Information Commissioner noted that s44FOIA was an absolute exemption and therefore questions of public interest in disclosure of the information did not arise. She maintained the position set out in her decision notice and explained that *"… Subsection (1) makes it an offence for any person to contravene the non-disclosure provisions of section 18(1), or of section 20(9), in relation to "revenue and customs information relating to a person" whose identity is revealed by the disclosure. The term "person" includes both natural and legal persons, and, for example, the tax affairs of a limited company are also protected by the provisions of the subsection"* she concluded on the basis of this that the Huitson scheme itself was a person.

6. The tribunal joined HMRC to the appeal and directed that it address the question of whether or not the tax avoidance scheme met the definition of a body of persons incorporate or unincorporate and so was a person within the Interpretation Act definition.

7. HMRC in its response shifted its position arguing that Huitson was not a specific tax avoidance scheme but a number of schemes which had adopted the same pattern relying on arrangements which sought to use the UK-Isle of Man Double Taxation Arrangement 1954. Accordingly HMRC no longer argued that the information related to a person falling within s18(1) CRCA. It changed its refusal to one based on the costs of retrieving the information requested which it argued exceeded the statutory limit.

8. In further exchanges of pleadings it became clear that there was not a shared understanding between Mr Bentley and HMRC as to the boundaries of the request for information. Mr Bentley argued that what he was seeking related to only one scheme:-

   13. I apologise for being vague in my initial request by calling this the Huitson scheme, I have had a meeting with HMRC staff where those staff referred to this scheme as the Huitson scheme, hence my initial request referred to this in the same way.

   14. Within the considerable correspondence with reference to this scheme, HMRC have referred to the scheme with a number of different descriptions, ranging from IR35 arrangement to IOM double taxation scheme. Therefore, it would be difficult to ever have a consistent narrative since HMRC have called the scheme several different names during the timescales of my case. HMRC knew full well which tax avoidance scheme I was referring to in my request, this is just another underhand tactic which HMRC utilise to attempt to muddy the waters, instead of providing a good service underlined by good business practices.

   15. As an example of such poor business practices, a proper cost benefit analysis on this FOI request would have ascertained that delaying, avoiding, constantly defending and involving both the Information Commissionaire and the Judiciary will have cost more than actually granting the request in the first place.

9. HMRC explained the scale of the work involved on the basis that several schemes were involved.

   In this matter, follower notices were issued to those who participated in the same scheme as Mr Huitson or that were of a similar nature. In total, 4922 follower notices were issued to 1700 users of schemes operated by 6 separate promoters. Therefore, information gathering for the request would be based on reviewing the cases operated by all 6 promoters. As this information could no longer be attributed to an identified person and related to a number of persons, section 23(1) CRCA is not satisfied and therefore section 44 is not engaged.

10. HMRC explained that the work of dealing with these cases was spread across different teams in several centres and the relevant information was contained in spreadsheets, an electronic diary and electronic files. There had been stops and starts on the handling of the fallout from the decision in Huitson as views of the correct Limitation Act period changed. The sending of follower notices

by caseworkers was triggered by the electronic diary which established that 730 follower notices were confirmed after 17 August 2017. Each case file would need to be examined to see whether a similar letter was sent after May 2018. In order to determine whether the information could be found easily a search for the information which ran overnight was timed out and accordingly to find the information would require a manual search. It provided an estimate of the time needed to carry out the search which within the cost limit:-

"To be able to provide the information as requested by the appellant, HMRC would need to search through approximately 730 cases to locate, retrieve and determine whether it has sent correspondence which are the same or similar to that in the letter quoted by the appellant. It would then need to record and provide the number of letters sent. Reg 4(4) states that £25 per hour may be attributed to the activities as described above which would be 24 hours to reach the £600 time limit. 24 hours is 1,440 minutes, to undertake a search of 730 cases within 1,440 minutes would equate to 1.97 minutes being spent on each case. A 2-minute search of each case will not be sufficient to extract and provide the information."

11. Mr Bentley responded to this analysis:-

"12. I do not agree that HMRC can rely on the cost of the exercise to be a factor in providing this information. It is obvious from the second respondent's submission that HMRC have implemented woefully inadequate and poorly managed systems to administer follower notices and their progress.

13. Manual systems and a series of inconsistently named excel spreadsheets are not processes that should be used by a large government agency. A document management system combined with a large database would be a normal method that a responsible, well organised company would employ.

14. HMRC should not be allowed to use these excuses as excessive cost and a reason for not supplying the information. If a decent robust and fit for purpose system was initially put in place, the cost of this request would not be that large."

12. In a response of 22 January 2021 the Information Commissioner analysed the request for information in its context and in the light of the obligations of the public authority. She noted that that requests must be interpreted objectively and that public authorities are not *"…normally obliged to look beyond the wording of the request itself when interpreting its meaning. However, if the requester refers to other correspondence, or provides additional context when making the request, the authority should take this into account if it impacts on the interpretation…"* She noted that the request referred to the Huitson arrangement and that it was recognised that HMRC referred to the Huitson scheme in different ways. She drew attention to Mr Bentley's 12 January 2021 submission where he stated that *"…ideally…"* the information request would cover the number of extensions to follower notices issued as a result of the Huitson judgment. She submitted that the inclusion of the word "…ideally…" indicates going beyond

the scope of the original request since otherwise that information would fall within scope of the request; ie that Mr Bentley thought that only one scheme was intended by his original request and that was the interpretation adopted by HMRC in responding to the request. She concluded that the analysis in the decision notice was correct and s44 applied but in any event the work involved exceeded the cost limit.

Consideration

13. S44 FOIA provides:-

Prohibitions on disclosure.

(1)Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a)is prohibited by or under any enactment,

14. S 18 of the Commissioners for Revenue and Customs Act 2005 provides for the confidentiality of HMRC functions:-

Confidentiality

(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.

15. S19 CRCA makes provision for offences from the breach of s18

Wrongful disclosure

(1)A person commits an offence if he contravenes section 18(1) or 20(9) by disclosing revenue and customs information relating to a person whose identity –

(a)is specified in the disclosure,

16. S23 CRCA provides:-

Freedom of information

(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.

17. The definition of person for these purposes is from the Interpretation Act (s5/Schedule 1) and is exceptionally wide:-

"Person" includes a body of persons corporate or unincorporate.

18. S44 FOIA prevents the right of access to information under FOIA from over-riding statutory prohibitions on disclosure

"Prohibitions on disclosure.

(1)Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a)is prohibited by or under any enactment,"

19. S12 FOIA provides:-

Exemption where cost of compliance exceeds appropriate limit.

(1) Section 1(1) [the right of access to information] *does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

20. The appropriate limit is laid down by statutory instrument and is currently £600.

21. If the request relates solely to the Huitson scheme, then it is for the number of clients of the scheme who have been given an offer of a later date to take corrective action. This is information about the scheme which meets the definition of a person. As such disclosure is prohibited under s18 CRCA and so not within FOIA by reason of s44.

22. If however the request does not fall within that prohibition, then the evidence provided by HMRC shows that the scale of the request and the time it would take to carry out the searching and examination of files in order to count the numbers involved would exceed the cost limit provided by s12 FOIA.

23. While Mr Bentley impugns HMRC's motives and argues that HMRC's systems should be better and able to provide the information he requested swiftly and easily, neither of these arguments help him. If the request is for information about a person then disclosure is prohibited. The costs of complying with a request have to be calculated on the basis of the information systems in place.

24. Mr Bentley has stated at paragraph 16 of his response to HMRC (at page A31): *I do not accept HMRC's summary that this request is not relating to a specific tax*

avoidance scheme. It is now clear to me that the follower notice letters that HMRC actually refer to the Huitson case, also the notices have relied on the Huitson case and therefore this is a specific tax avoidance scheme.

25. The tribunal is therefore satisfied that the request falls within the s44 FOIA prohibition on disclosure by reason of s18 CRCA. If the tribunal's application of s18 is incorrect and s44 FOIA does not apply, then the amount of time spent gathering the information required by the request means that the cost limit is exceeded and the request fails by reason of s12.

Signed Hughes

Judge of the First-tier Tribunal
Date: 22 April 2021
Promulgated: 22 April 2021