



Case Reference: EA-2022-0129

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP
Heard on: 9 November 2022
Decision given on: 30 November 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER ANNE CHAFER

Between

KEITH GORDON

and

(1) THE INFORMATION COMMISSIONER
(2) HM REVENUE & CUSTOMS

Appellant

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Did not appear

For the Second Respondent: Mr Lewin (Counsel)

Decision: The appeal is dismissed. HM Revenue & Customs ('HMRC') were entitled to rely on s 44(1)(a) Freedom of Information Act 2000 (FOIA) to refuse the request.

REASONS

Introduction

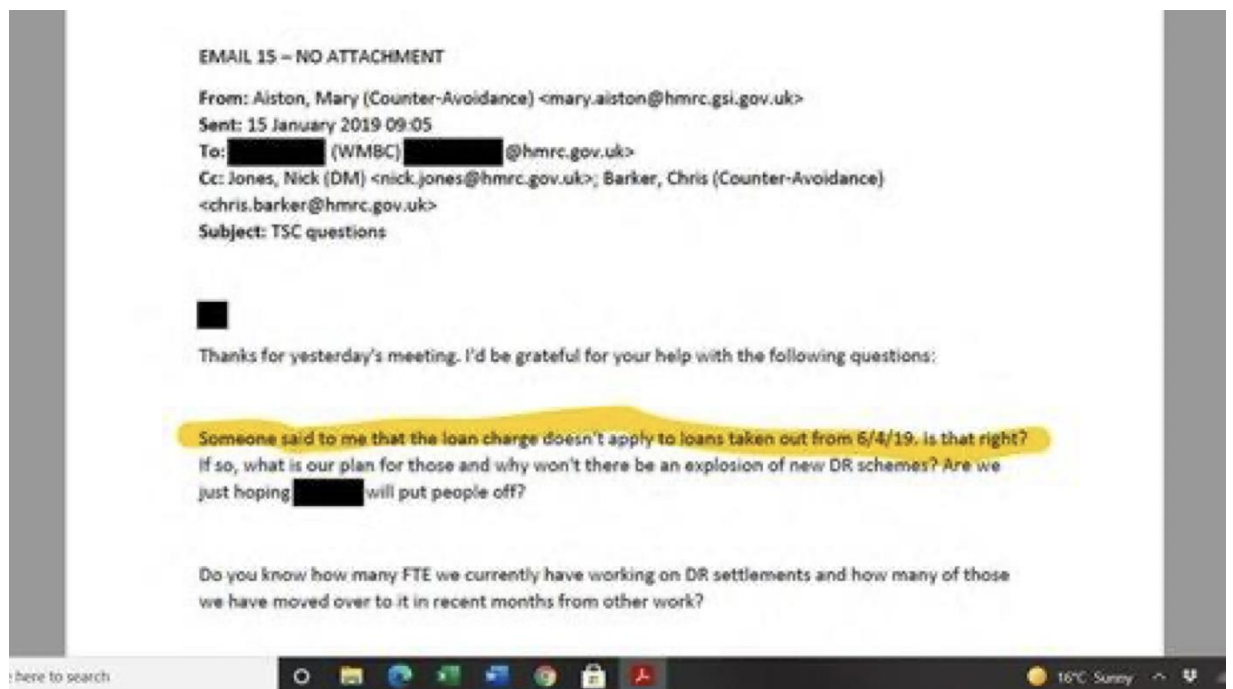
1. This is an appeal against the Commissioner's decision notice IC-125944-L6R0 of 18 May 2022 which held that HMRC was entitled to rely on s 44(1)(a) FOIA (prohibition on disclosure) to refuse the request. The Commissioner did not require the public authority to take any steps.

Requests, Decision Notice and appeal

The Requests and responses

2. This appeal concerns a request made on 21 July 2021 and a supplementary request made on 22 July 2021.
3. Mr. Gordon made the following request to HMRC on 22 July 2021:

Ms Mary Aiston sent an e-mail dated 15 January 2019, timed at 09.05. Its subject was "TSC Questions." A screen shot of that e-mail is shown below.



The second substantive paragraph contains the question "If so, what is our plan for those and why won't there be an explosion of new DR schemes?" Immediately after that question, there is a sentence with word(s) and/or number(s) between "hoping" and "will" redacted.

1. Please confirm that this redaction is still appropriate.
2. If so, please identify the statutory basis for such redaction.
3. If the redaction is no longer considered appropriate, please supply the word(s) and/or number(s) previously redacted.

Please note that I have previously raised this informally with the Press Office but they have not responded to this request. Hence my formal request.

4. HMRC responded on 22 July 2021 refusing to provide the information under s 44(1)(a) FOIA, relying on s 23 of the Commissioners for Revenue and Customs Act 2005 (CRCA) which provides that information relating to a person, the disclosure of which is prohibited by s 18(1) CRCA, is exempt information by virtue of s 44(1)(a) FOIA if its disclosure would enable the identity of such a person to be deduced.
5. Mr. Gordon submitted the following supplemental request on 22 July 2021:

Are you able please to confirm:

1. That the omitted information is the name of a taxpayer
2. If so, that that taxpayer was or had been in the course of litigation with HMRC in relation to related matters.
3. If the answer to 2 is yes, whether there had been any published decisions in the course of that litigation by 15 January 2019
4. If the answer to 2 is yes but the answer to 3 is no, whether there have been any published decisions in the course of that litigation since 15 January 2019?

Any other information you are able to provide that clarifies the nature of the redacted information (for example a description of any words other than the taxpayer's name) would be most appreciated.

6. HMRC replied on 23 July 2021 refusing to provide the information under s 44(1)(a) FOIA on the same grounds.
7. Mr. Gordon requested an internal review on 23 July 2021. HMRC upheld its decision on internal review on 23 August 2021.
8. Mr Gordon referred the matter to the Commissioner on 24 August 2021.

The Decision Notice

9. In a decision notice dated 18 May 2022 the Commissioner decided that HMRC was entitled to rely on s 44(1)(a) FOIA.
10. The Commissioner concluded that the information was held by HMRC in connection with its function of assessing and collecting tax. It therefore fell under section 18(1) CRCA and is prohibited from disclosure.

11. Section 23(1) CRCA designates information as exempt from disclosure under section 44(1)(a) FOIA if its disclosure would identify the person to whom it relates or would enable the identity of such a person to be deduced. The term “person” includes both natural and legal persons and therefore includes entities such as companies, and charities as well as individuals.
12. The Commissioner considered Mr. Gordon’s arguments that there is no duty of confidentiality as it can reasonably be inferred that the redacted information is the name of a case that went to the Supreme Court. The Commissioner was not persuaded that this was a strong enough argument to override the specific sections of the CRCA which clearly state that such information is prohibited from disclosure.

Notice of Appeal

13. The ground of appeal is that the Commissioner was wrong to conclude that s 44(1) applied by virtue of s 23 and 18(1) CRCA where the withheld information is the name of a Supreme Court case and not the name of a taxpayer.

Responses and submissions

14. We took account of oral and written submissions from HMRC and Mr Gordon.

HMRC’s written submissions

15. HMRC submits that the provisions in CRCA put on a statutory footing the longstanding principle of taxpayer confidentiality. HMRC’s position is that section 18(1) prevents disclosure of any information it holds in connection with its functions - meaning all of that information (even information otherwise in the public domain) is subject to the principle of taxpayer confidentiality. Section 23 makes a limited exception to the principle of taxpayer confidentiality for FOIA purposes but deliberately excludes any information relating to an identifiable individual.
16. Without confirming or denying Mr. Gordon’s supposition that the requested information related to a ‘published case’, HMRC submits that:
 - 16.1. disclosure of the name of a published case was information protected by sections 18 and 23 of the CRCA; and
 - 16.2. no allowance is made under section 23 for information that has entered the public domain.
17. The name of a published case (or any information capable of revealing the name of that case) to which HMRC was a party is information ‘about, acquired as a result of, or held in connection with’ HMRC’s tax litigation function. The name of the other party (as it appears in the reported name of the case) is information ‘in respect of’ that person. Therefore the name of a published case is ‘revenue and customs information relating to a person’ within the meaning of section 19(2) of the CRCA.

18. The name of a published case is 'held by the Revenue and Customs in connection with a function of the Revenue and Customs' as a result of HMRC's assessment and collection of tax from the taxpayer and therefore was information to which s 18 applied. The fact that the name of that taxpayer may have entered the public domain does not mean that s 18 ceases to apply. S 18 applies to any information held by HMRC in connection with its functions.
19. Disclosure of the name of a published case 'would specify the identity of the person to whom it relates'.
20. It follows that section 23 of the CRCA applies to the name of a published case and therefore it would be exempt under section 44(1)(a) of FOIA.

Response of the Commissioner

21. In summary the Commissioner relies on the reasons set out in the Decision Notice.

Mr Gordon's further submissions

22. S 19(2) defines the scope of a criminal offence created by s 19(1). It should therefore be construed narrowly. The position taken by HMRC leads to the inevitable conclusion that senior individuals are precluded from referring to any decided case concerning a taxpayer.
23. In summary Mr. Gordon submits that reference to a decided case will not breach taxpayer confidentiality.
24. Mr. Gordon submits that:
 - 24.1. The information sought does not fall within s 18(1);
 - 24.2. The information sought is not revenue and customs information relating to a person;
 - 24.3. There is no person to whom the email relates whose identity can be specified or can be deduced.
25. The 'information' is the email itself, not the redacted text. The email was not taxpayer specific and not about any person. If the email was about taxpayers who might be deterred by the outcome of an earlier case, their identity was not specified nor could it be deduced.
26. S 18(1) is intended to reflect the ordinary principle of taxpayer confidentiality. It is focused on information connected with HMRC's day to day work which involves it regular interactions with taxpayers. Referring to the name of a decided case cannot breach s 18(1).

27. HMRC must hold the information ‘in connection with the exercise of a function... in respect of the person’. The email is a general email about future strategy. No function has been exercised by HMRC in respect of the persons to whom the email might possibly relate.
28. Even if the email is held in the course of HMRC’s functions, it must be in relation to the taxpayers for whom the case law is a possible deterrent. There is no evidence that the information is held in relation to ongoing work in relation to the decided case. The information must be held in relation to a particular taxpayer and also identify that particular taxpayer or allow that particular taxpayer to be identified. The redacted text refers to a decided case and how its outcome may be useful in **other** cases. Accordingly s 23(1) is not satisfied.

Evidence and submissions

29. We have read and taken account of an open and a closed bundle of documents.
30. It is necessary that the documents in the closed bundle are not revealed to Mr Gordon because to do otherwise would defeat the purpose of the proceedings. The tribunal accepts that in accordance with the guidance given by the Court of Appeal in **Browning** we are required to disclose as much as possible about the closed bundle when writing our decision.
31. In accordance with the guidance in **Browning**, the tribunal records that the closed bundle consists of an unredacted version of the email in issue.

Legal framework

S 44 - Disclosure prohibited by statute

32. Section 44(1)(a) provides that information is exempt information if its disclosure is prohibited by or under any enactment. It is an absolute exemption so the public interest balance does not apply.
33. The prohibition relied on is in the CRCA.
34. Section 18(1) provides:
- 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.
35. The Supreme Court has held that section 18(1) reflects the common law duty of confidentiality:

17. ...The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well established principle of

the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes...

...

23. ... I take section 18(1) to be intended to reflect the ordinary principle of taxpayer confidentiality referred to in para 17, to which section 18(2)(a)(i) creates an exception by permitting disclosure to the extent reasonably necessary for HMRC to fulfil its primary function.

24. It was argued by HMRC that despite being headed "Confidentiality", section 18 is not confined to information which is in any real sense confidential, but is far wider in its scope. Therefore, it was argued, the exception contained in subsection (2)(a)(i) must be given a similarly expansive interpretation in order to avoid absurdity. In support of this argument HMRC relied on the wording of section 19, which makes it a criminal offence for an official to disclose revenue or customs information relating to an identifiable person, but provides a defence if the person charged proves that he reasonably believed that "the information had already and lawfully been made available to the public". The creation of this defence showed, in HMRC's submission, that section 18 was not essentially or only about protecting confidentiality, because it self-evidently extended to the disclosure of information which was already in the public domain.

25. This argument found favour with the Court of Appeal, but I do not consider that it bears the weight which HMRC seeks to put on it. The argument is too subtle, and it is open to other objections. It is well settled that information may be available to the public and yet not sufficiently widely known for all confidentiality in it to be destroyed. As Eady J put it in McKennitt v Ash [2006] EMLR 10, para 81, where information has been obtained in circumstances giving rise to a duty of confidentiality, "the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected". Whether that stage has been reached may be a hard question on which reasonable people may disagree. It is a fallacy to suppose that because a defence to a criminal charge under section 19 is available to a person who reasonably believed the information to be available to the public, it must follow that Parliament intended section 18 to prohibit the disclosure of information of the most ordinary kind about which there could be no possible confidentiality. Moreover, even if section 18(1) has the wide scope suggested by HMRC (which it is not necessary to decide in this case), it does not follow that Parliament must be taken to have intended by subsection (2)(a)(i) to confer on officials a wide ranging discretion to disclose confidential information about the affairs of individual taxpayers.

(R (on the application of Ingenious Media Holdings plc and another) v Commissioner for Her Majesty's Revenue and Customs [2016] UKSC 54).

36. Section 5 is headed "Commissioners' initial functions". It provides:

- (1) The Commissioners shall be responsible for –
 - (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section, [and]
 - (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, ...

37. Section 9 is headed "Ancillary powers". It provides:

- (1) The Commissioners may do anything which they think – (a) necessary or expedient in connection with the exercise of their functions, or (b) incidental or conducive to the exercise of their functions.

38. Section 51 (headed 'Interpretation') defines 'function' as meaning 'any power or duty (including a power or duty that is ancillary to another power or duty)'.

39. Section 23 of the CRCA provides:

(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 (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.

(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

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.

(3) In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19.

40. Subsections 18(2) and (3) are exemptions to the general rule provided by s 18(1). The effect of s 23(1A) is that those exemptions are disregarded for the purposes of s 44(1)(a) FOIA.

41. S 19(2) CRCA defines "revenue and customs information relating to a person" as:

information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs ... in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs ...

42. Section 19 makes it a criminal offence for a person to contravene section 18(1) by disclosing revenue and customs information relating to a person whose identity is specified in or can be deduced from the disclosure, subject to a statutory defence if the defendant shows that he reasonably believed that the disclosure was lawful or that the information had already been lawfully made available to the public.

43. The Upper Tribunal in **Gordon v Information Commissioner and HMRC** [2020] UKUT 92 (AAC), accepted at para 14 that the phrase 'in respect of a person' qualified 'the exercise of a function' rather than information', so that the correct approach to interpreting section 19(2) was:

(1) Does the information requested consist of or include information that

(a) is about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs in respect of a person

(b) but not about internal administrative arrangements

(2) and specifies the person's identity or allows it to be deduced?

The role of the tribunal

44. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

45. The issues for the tribunal to determine are:

45.1. What is 'the information'?

45.2. Is the requested information 'revenue and customs information relating to a person' as defined in s 19(2) CRCA, i.e. is the requested information

45.2.1. about, acquired as a result of, or held in connection with the exercise of a function of HMRC in respect of a person

45.2.2. but not about internal administrative arrangements?

45.3. Is disclosure of the information prohibited by s 18(1) i.e. is the information held by HMRC in connection with a function of HMRC?

45.4. Would disclosure specify the identity of the person to whom the information relates or enable the identity of that person to be deduced?

Discussion and conclusions

Working assumption as to the nature of the redacted information

46. Both parties agreed that it was helpful to consider Mr Gordon's arguments on the basis of an assumption as to the nature of the redacted information. We proceed on the basis of an assumption that the redacted section of the email dated 15 January 2019 is the name of a legal case, in which both HMRC and the taxpayer were parties, that had been heard in the Supreme Court and reported.

Interpreting the CRCA

47. We consider that the following broad points apply when interpreting the CRCA in the context of s 44 FOIA.

48. First, the exemptions in s 18(2) and (3) to the general rule provided by s 18(1) are disregarded for the purposes of s 44(1)(a) FOIA. These provide for broad circumstances in which it is lawful for HMRC to disclose revenue and customs

information. Further, the fact that HMRC is not required to disclose certain information under FOIA does not mean that it cannot otherwise disclose that information. This means that it is not logical to take account of the potential consequences of our decision on what HMRC would or would not lawfully be able to disclose in the future. There are no such consequences of our decision.

49. Second, s 19 CRCA makes it a criminal offence for a person to contravene section 18(1) by disclosing revenue and customs information relating to a person whose identity is specified in or can be deduced from the disclosure, subject to a statutory defence if the defendant shows that he reasonably believed that the disclosure was lawful or that the information had already been lawfully made available to the public. This does not mean that we should apply, for example, the presumption against doubtful penalisation (as Mr Gordon argued, unsuccessfully, in **Gordon v Information Commissioner and HMRC** [2020] UKUT 92 (AAC)) or, as Mr Gordon argued in this appeal, that we should apply any rule of statutory construction that penal provisions should be construed narrowly or strictly.

50. We reject that argument for the same reasons that the application of the presumption of doubtful penalisation was rejected by the Upper Tribunal in **Gordon v Information Commissioner and HMRC** [2020] UKUT 92 (AAC):

25. ... Mr Gordon relied on the presumption against doubtful penalisation, as discussed in *R v Dowds* [2012] 1 WLR 2576. I do not accept that argument, for two reasons. The first reason is that, whatever may be the case when section 19 is used in a criminal context, it is not so used in relation to FOIA. It is relevant to FOIA only because section 23 adopts the definition from section 19(2); FOIA does not involve any penal element. And, having adopted the definition, it applies it only to section 18(1) without the restrictions in sections 18(2) and (3), which are part of the definition of the criminal offence. The use of a criminal definition is purely for convenience. I consider that there is no scope for the presumption to arise.

51. Third, both parties accept that s 18(1) CRCA is intended to reflect the ordinary principle of tax payer confidentiality. Further the title of s 18 is 'Confidentiality'.

52. The Supreme Court in (**R (on the application of Ingenious Media Holdings plc and another) v Commissioner for Her Majesty's Revenue and Customs** [2016] UKSC 54) at paras 24 and 25 considered a submission by HMRC that section 18 is not confined to information which is in any real sense confidential, but is far wider in its scope. It was not necessary for the Supreme Court to decide whether s 18 was limited to 'confidential information'. The Supreme Court did reject HMRC's submission that this interpretation was supported by the inclusion of a defence in s 19 if the person charged proves that he reasonably believed that 'the information had already and lawfully been made available to the public':

25. ...It is a fallacy to suppose that because a defence to a criminal charge under section 19 is available to a person who reasonably believed the information to be available to the public, it must follow that Parliament intended section 18 to prohibit the disclosure of information of the most ordinary kind about which there could be no possible confidentiality.

53. In interpreting s 18 we take account of the fact that the Supreme Court held that s 18(1) was intended to reflect the ordinary principle of taxpayer confidentiality, that the section is headed 'Confidentiality' and that the Supreme Court's decision, whilst not deciding the point, can perhaps be seen as approaching with some scepticism a submission in that case that s 18 was not intended to be confined to information which was in any real sense confidential.

What is 'the information'?

54. Mr Gordon submitted that 'the information' for the purposes of the CRCA was the email dated 15 January 2019 rather than the redacted section.

55. Under s 84 FOIA 'information' means information recorded in any form.

56. FOIA provides a general right of access to information held by public authorities. Section 1 provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and, if that is the case to have that information communicated to him.

57. Under s 50(1) FOIA any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information has been dealt with in accordance with part 1 of FOIA. An appeal from the Commissioner's decision may be made to the Tribunal.

58. If there is no request for information, there is no right to complain to the Commissioner and no appeal to the tribunal. Our jurisdiction rests on there being a request for information.

59. At that time that Mr Gordon made the request, he already had the rest of the email. His request was purely for the redacted words or numbers. The redacted words or numbers must then be the requested information under FOIA. We do not accept Mr Gordon's argument that the name of a reported case cannot, in itself, be 'information'. In any event, if that was the case we would have no jurisdiction to deal with this request, because there it would not be a request for information.

60. The 'information' under FOIA, must therefore be the redacted words or numbers, rather than the email itself. HMRC relies on s 44 FOIA in relation to those redacted words. Section 44 provides that information is exempt information if its disclosure is prohibited by or under any enactment. The focus is on whether 'its' disclosure, i.e. the information's disclosure is prohibited under any enactment. Our question therefore is whether disclosure of the requested information is prohibited under CRCA. We find that this means for the purposes of this appeal that the 'information' under CRCA must also be the redacted words or numbers, not the entire email.

Is the requested information 'revenue and customs information relating to a person' as defined in s 19(2) CRCA?

61. We have found above that the information in question is the requested information, i.e. the redacted names or numbers assumed for present purposes to be the name of a reported Supreme Court case in which HMRC and a taxpayer were parties.
62. The requested information is not information about internal administrative arrangements. The question for the tribunal is therefore whether the information is about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs in respect of a person.
63. Although the name of a Supreme Court case is in the public domain, a case in which HMRC and the taxpayer are parties has worked its way up to the Supreme Court via the lower courts and is based on an initial decision by HMRC itself. How would HMRC have acquired the name of that case? In our view it would have been acquired as a result of the exercise of HMRC's litigation functions in respect of the taxpayer in question. HMRC's litigation functions fall within its statutory powers, in particular its statutory ancillary powers provided by s 9. The litigation functions are necessary or incidental to the collection and management of revenue.
64. Accordingly we find that the requested information is 'revenue and customs information relating to a person' as defined in s 19(2).
65. Many of Mr Gordon's arguments on s 19(2) have been dealt with under our initial findings above. We have not accepted his definition of 'information' and we do not accept that we are required to adopt a restrictive interpretation of s 19(2).

Is disclosure of the information prohibited by s 18(1) i.e. is the information held by HMRC in connection with a function of HMRC?

66. We have set out above that, in interpreting s 18, we take account of the fact that the Supreme Court held that s 18(1) was intended to reflect the ordinary principle of taxpayer confidentiality and that the section is headed 'Confidentiality'. Further we note that the Supreme Court can perhaps be seen as approaching with some scepticism a submission in that case that s 18 was not intended to be confined to information which was in any real sense confidential.
67. Section 18(1) contains no reference to confidential information. Nor does any other subsection of s 18. Section 18(1) contains no express limitation on the type of information that falls within its scope. It is, as Mr Gordon acknowledged, very widely drafted.
68. Mr Gordon's submits that disclosing the name of a reported case would not breach the principle of taxpayer confidentiality and therefore this information cannot be covered by s 18(1). We have some sympathy for this argument particularly in the

light of the intention behind the section, the heading 'Confidentiality' and the views of the Supreme Court.

69. However, the statutory test that the drafters have decided that we must apply under s 18(1) is whether the information is held in connection with a function of HMRC. It is not whether the information would be covered by the ordinary principle of taxpayer confidentiality.
70. The aids to interpretation we have highlighted above do not allow us to rewrite section 18 to better reflect what, in our view, the drafters intended. Nor, in our view, do they allow us to import into s 18(1) implied limitations on its scope from the principle of taxpayer confidentiality, where none have been included.
71. In our view, the requested information was held by HMRC in connection with a function of HMRC. The name of a decided Supreme Court case in which HMRC and a taxpayer were parties would be held in connection with HMRC's litigation function.

Would disclosure specify the identity of the person to whom the information relates or enable the identity of that person to be deduced?

72. We accept Mr Gordon's submission that the person whose identity is specified must be the same as the person in relation to whom the function was exercised under s 19. The function that we have identified is HMRC's litigation function which would have been exercised in relation to the taxpayer party. On the basis of the assumption under which we are operating, that is the person whose identity is specified.

Conclusions

73. We accept that under our approach the information within scope of s 23 is wider than if the test was whether disclosure of the information would breach the ordinary principle of taxpayer confidentiality. We have concluded that the clear words of s 18 and s 19 do not allow us to read in such a limitation. For example, in our view it is not possible to read in an exemption or a limitation to exclude information that is so widely known to the that public that all confidentiality in it has been destroyed. It is, we accept, possible that the Supreme Court in **Ingenious** may have taken a different approach if it had had to decide the issue. In our view, that is not a position open to us in view of the clear wording of the statute, however unlikely it seems that Parliament intended the names of reported tax cases to be exempt from FOIA under s 44.
74. In those circumstances, and having considered the actual rather than the assumed content of the disputed information, we find that the disclosure of the information is prohibited under an enactment and s 44 is engaged. This is an absolute exemption. Accordingly we find that HMRC was entitled to withhold the information under s 44 and the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 29 November 2022