



Case Reference: EA/2022/0274

First-tier Tribunal
General Regulatory Chamber
Information Rights

Determined on the papers
On 07/03/2022

Decision given on: 13/03/2023

Before

TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER DR A GASSTON
TRIBUNAL MEMBER MS K GRIMLEY EVANS

Between

ANTHONY ELBOURN

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decision:

The appeal is Dismissed.

Decision Notice IC-147645-H9L4 is in accordance with the law.

REASONS

Background

1. On 5 November 2021, the Appellant made a request under the Freedom of Information Act 2000 ("FOIA") to His Majesty's Revenue and Customs ("HMRC") as follows:

“Please supply a list of case numbers (and the name of the issuing court) for proceedings issued against HMRC by self-employed people who have been refused payment of the SEISS grant.”

(“the Request”)

2. “SEISS” was the Self-Employment Income Support Scheme, a temporary scheme established by the UK Government in April 2020 to provide financial support to self-employed people whose work was adversely affected by the Coronavirus pandemic and Government lockdown. Five SEISS grants were paid to eligible self-employed people between May 2020 and September 2021.
3. HMRC responded to the Request on 22 November 2021, confirming that it held the requested information. However, HMRC refused to communicate the requested information to the Appellant because it was exempt by virtue of section 44(1)(a) FOIA on the basis that disclosure was prohibited by section 23(1) of the Commissioners for Revenue and Customs Act 2005 (“CRCA”). The relevant sections of CRCA are set out in paragraphs 15 to 21 below.
4. That response was upheld on internal review on 20 December 2021. The Appellant complained to the Commissioner.
5. On 14 September 2022, the Commissioner issued Decision Notice IC-147645-H9L4. The Commissioner decided that HMRC was entitled to rely on section 44(1)(a) to withhold the requested information. No steps were required. The Commissioner found that the HMRC had adequately explained the interaction between the CRCA and FOIA and that it was clear that HMRC could not disclose under FOIA any information which would identify a person or enable the identification of a person. Disclosure of the requested information would identify businesses and/or the individuals who own them.
6. The Appellant appealed to the Tribunal on the following grounds:
 - a. the requested information was already in the public domain as an official public record, and therefore could be released without committing an offence under section 18(1) CRCA;
 - b. section 18(3) CRCA permits disclosure if required by other legislation, such as FOIA, and FOIA takes precedence over CRCA because it is a “constitutional” act;
 - c. section 18(1) CRCA only prohibits non-disclosure of information held in connection with a “function” of HMRC and the defence of Court proceedings is not part of HMRC’s “internal and private functions”; and
 - d. the blanket application of section 18(1) CRCA would render HMRC “completely opaque to public scrutiny”.
7. In its Response, the Commissioner relied on its Decision Notice and set out its response to the Appellant’s grounds of appeal. In Reply, the Appellant submitted

that section 19(3) CRCA exempted the requested information from section 18(1), and it was therefore not covered by section 23(1).

8. All parties consented to this matter being dealt with on the papers. The Tribunal was satisfied that it could properly determine the issues without a hearing and that it was fair and in the interests of justice to do so.
9. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 56 pages and no closed bundle. Our findings were made on the balance of probabilities.

The Law

10. Section 1(1) FOIA provides that:

“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.”

11. Section 2(2) provides that:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

12. Section 21(1) provides that “information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information”.

13. Section 44(1) FOIA provides:

“(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. Section 44(1) is an absolute exemption; the public interest test is not relevant.

15. In refusing to disclose the information, HMRC relied on, and the Commissioner upheld its reliance on, section 23(1) CRCA.

16. Section 23 CRCA (Freedom of Information) 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... 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) FOIA 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."

17. Section 18 CRCA (Confidentiality) provides:

"(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.

...

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section -

...

(c) a reference to a function of the Revenue and Customs is a reference to a function of -

(i) the Commissioners, or

(ii) an officer of Revenue and Customs,..."

18. There are a number of exceptions to section 18(1) set out in section 18(2), none of which apply to this appeal.

19. The definition of the term "revenue and customs information relating to a person", used in section 23(1) CRCA, is set out in section 19 CRCA (Wrongful Disclosure), which provides:

"(1) A person commits an offence if he contravenes section 18(1)... by disclosing revenue and customs information relating to a person whose identity -

(a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) "revenue and customs information relating to a person" means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

(3) It is a defence for a person charged with an offence under this section of disclosing information to prove that he reasonably believed -

- (a) that the disclosure was lawful, or
- (b) that the information had already and lawfully been made available to the public.”

20. Section 9 CRCA (Ancillary powers) 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.”

21. Section 51(2) CRCA provides:

- “(a) “function” means any power or duty (including a power or duty that is ancillary to another power or duty), and
- (b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred -

...

- (iii) by or by virtue of any enactment passed or made after the commencement of this Act.”

22. The Commissioner drew the Tribunal’s attention to the Upper Tribunal decision in *Gordon v Information Commissioner & HMRC* [2020] UKUT 92 (AAC) which is binding upon this Tribunal. At paragraph 14 of that decision, Upper Tribunal Judge Jacobs decided that the phrase “in respect of a person” in section 19(2) CRCA qualified “the exercise of a function” and not “information”. He set out at paragraphs 15-19 a helpful explanation of how section 18 works, and concluded at paragraph 19 that there was no conflict between FOIA and CRCA, saying: “each regime deals with different information in a different way”. Judge Jacobs also decided that HMRC decisions and actions made in connection with taxpayer litigation were not “internal administrative arrangements” for the purposes of section 23(2) CRCA [paragraph 30].

23. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

- “(1) If on an appeal under section 57 the Tribunal considers -
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

24. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

Discussion

25. The Tribunal applied the law as set out in paragraphs 10 to 22 above to the Request.
26. The requested information is exempt under Section 44(1)(a) FOIA if its disclosure by HMRC is prohibited by or under section 23(1) CRCA.

Section 23(1) CRCA

27. Section 23(1) CRCA provides that the requested information is exempt for the purposes of section 44(1)(a) FOIA if:
- a. it is "revenue and customs information relating to a person" as defined in section 19(2) CRCA; and
 - b. its disclosure would enable the identity of the person to whom the information relates to be deducted.

Is the requested information "revenue and customs information relating to a person"?

28. The requested information comprises case numbers and the names of the issuing Courts for legal proceedings brought by self-employed people against HMRC in relation to refusals of SEISS grants.
29. The Tribunal accepted that the payment (or non-payment) and management of SEISS grants are powers or duties conferred on HMRC by the Coronavirus Act 2020 and the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme) Directions 2020.
30. Applying the definition of "functions" in Section 51(2)(b) CRCA, the payment (or non-payment) and management of SEISS grants is therefore a "function" of HMRC for the purposes of section 19(2).
31. The defence of proceedings brought by self-employed people for non-payment of SEISS grants is either part of that function, or, applying section 9(1) CRCA, an ancillary power, necessary or expedient in connection with the exercise of that function, or incidental to it. Therefore applying section 51(2)(a), the defence of such proceedings also falls within the definition of a "function" for the purposes of section 19(2) CRCA.
32. The Tribunal was satisfied that the requested information is "about, acquired as a result of, or held in connection with" the exercise of the function of paying and managing SEISS grants, in respect of those self-employed people who have brought legal proceedings for non-payment. The case numbers and Court details have been provided to HMRC because they are the defendant in those proceedings.
33. Judge Jacob confirmed in *Gordon* that decisions and actions relating to tax payer litigation are not "internal administrative arrangements" of HMRC, and therefore the requested information does not fall within the exception at the end of paragraph 19(2), as had been implied by the Appellant.

34. The requested information is therefore “revenue and customs information relating to a person” as defined in section 19(2) CRCA. The first part of the test for section 23(1) CRCA is satisfied.

Would its disclosure enable the identity of the person to whom the information relates to be deducted?

35. The disclosure of case numbers and issuing Courts would enable the self-employed people who have brought legal proceedings against HMRC to be identified. The names of litigants are, as the Appellant recognises, a matter of public record and can be obtained from the relevant Court by providing the case number.

36. The second part of the test for section 23(1) CRCA is satisfied.

Conclusion

37. The requested information is therefore covered by section 23(1) CRCA and is exempt for the purposes of section 44(1)(a) FOIA. The Decision Notice is in accordance with the law and therefore the appeal is refused.

Other points raised by the Appellant

38. FOIA does not “take precedence” over the CRCA as submitted by the Appellant by virtue of section 18(3). Section 23(1A), which was inserted into the CRCA in 2009, confirms that section 18(3) is to be disregarded for the purposes of section 23(1).

39. Section 19(1) and 19(3) CRCA which concern criminal offences also have no bearing on this appeal. The Tribunal noted that the Appellant may have been confused in this regard because the Commissioner drew attention to those criminal offences at paragraph 22 of the Decision Notice.

40. It is also not relevant to this appeal whether or not the requested information is already in the public domain, for example in Court records about the proceedings brought by self-employed people against HMRC. There is no exception to the legal provisions which we are applying in this appeal for information which is already in the public domain. This may seem “bizarre” or “obtuse” to the Appellant, but it is therefore not a factor which the Tribunal can take into account.

41. However, the Tribunal notes that to the extent the requested information is in the public domain and therefore reasonably accessible to the Appellant by other means, it would be exempt from disclosure under FOIA pursuant to section 21(1).

42. It is also not relevant that the Appellant regards the application of section 23(1) CRCA and section 44(1)(a) as rendering HMRC “completely opaque to public scrutiny”. The role of the Tribunal in this appeal is only to decide whether or not the Decision Notice is legally correct, applying the relevant law.

Signed Judge CL Goodman

Date: 10/03/2023

Promulgated

Date: 13/03/2023