



Neutral citation number: [2023] UKFTT 00309 (GRC)

Case Reference: EA-2022-0361

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard in GRC Remote Hearing Rooms, Leicester: on the papers

Heard on: 3 March 2023

Decision given on: 23 March 2023

Before

**TRIBUNAL JUDGE A. MARKS CBE
TRIBUNAL MEMBER R. TATAM
TRIBUNAL MEMBER P. DE WAAL**

Between

RICHARD THOMAS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant: appeared in person

The Respondent: did not appear at the hearing

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

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-170139-R5Z0 dated 19 October 2022 [A3-8] which held that HMRC was entitled to rely on s. 44(1)(a) FOIA (prohibitions on disclosure) to refuse the Appellant's request for information. References to the Open Bundle are referred to in emboldened text by page number e.g. [A3-8]; the Authorities Bundle by the prefix 'AB' e.g. [AB A3]; and Mr Thomas' skeleton argument by the prefix 'SA' e.g. [SA para. 10]. There is no Closed Bundle in this case.

The requests for information, internal review and responses

2. On 16 February 2022, the Appellant (Mr Thomas) wrote to HMRC as follows [B43]:

'I am writing to request a copy of a witness statement produced by [name redacted], an officer of HMRC, for the case of The Queen (on the application of Derry) v. HMRC. This case was heard at first instance by the Upper Tribunal (Tax & Chancery Chamber) on 30 March to 1 April 2015. It was case number TCC/JR/08/14, reported as [2015] UKUT 416(TC) (Morgan J).

The statement was referred to by Morgan J at [46] of his decision and elsewhere. It was also referred to by Lord Carnwath in the Supreme Court decision in this case.

...

To assist, I should say that there are two places within HMRC where this document may be found. One is in the Solicitors' Office as that office would have had conduct of the proceedings. The other is the Anti-Avoidance section of HMRC as [name redacted] was working in that section at the time and the case is about tax avoidance.'

3. HMRC responded on 24 February 2022 [B44-45] confirming that it holds the information requested but that it is exempt under s.44(1)(a) FOIA. HMRC relied on s. 23 Commissioners for Revenue and Customs Act 2005 ('CRCA').

4. On 3 March 2020 [B46-48], Mr Thomas asked HMRC to carry out an internal review. His letter included a paragraph which said:

'...it seems to me that the text of the witness statement could safely be disclosed to me if it omitted the name of the taxpayer, firstly by not sending to me any cover pages that revealed it and second by redacting the name in the text of the statement. I am willing to discuss any further concerns if you feel that this is not enough to make my request not subject to the exemption in s. 44 FOIA.'

5. HMRC replied on 24 March 2022 [B49-53] that HMRC is legally required to keep taxpayer information confidential and that information already in the public domain about a person does not affect how HMRC addresses a request for information under FOIA. HMRC's letter went on to say:

'...We must only consider the CRCA section that instructs us how to treat freedom of information requests – section 23...[Here,] the requested witness statement exists only due to

a case involving a specific taxpayer. It therefore cannot be separated and treated as information that does not relate to an identifiable person...'

6. On 7 April 2022 [B54-55], Mr Thomas asked for clarification whether HMRC had:
- (a) in accordance with the ICO's Guide to Freedom of Information ('FoI Guide'), made a fresh decision based on all the available evidence, not just reviewed the first decision?
 - (b) in accordance with FOIA, had regard to its duty to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it?
 - (c) considered whether, if Mr Thomas made another request for information specifically asking only for that part of the information which does not disclose the identity of the taxpayer, would HMRC provide the information?
 - (d) considered that part of the FoI Guide '*What if we are withholding only parts of a document?*'

7. HMRC responded on 26 April 2022 [B56-57] saying:

'The witness statement you require exists only because of a taxpayer case. It is therefore inherently linked to that taxpayer even if some content was redacted. Had the statement been produced as a general aide memoir or guidance to staff, so that it was a standalone piece of information, it would be treated as its own entity. In that scenario we would indeed consider whether content required redaction, then release the information. However, this information is a witness statement in relation to a specific case and cannot be treated as separate from that case...'

Information already in the public domain about a case does not affect how we answer a freedom of information request.

Our conclusion is releasing the information would specify the identity of the person to whom it relates – the tribunal case involving a taxpayer...

In terms of providing advice and assistance...your request cannot be revised to achieve a positive result as the information requested specifies the identity of the person to whom it relates, and that outcome cannot be avoided.'

8. On 11 May 2022 [C58-59], Mr Thomas wrote to the Information Commissioner ('the Commissioner') complaining about HMRC's refusal to provide the information he requested and saying his complaint could be resolved in the following way: '*I require disclosure of the parts of the witness statement that do not name the data subject or disclose his specific information.'*

The Commissioner's investigation and Decision Notice

9. On 24 May 2022 [C60-61], the Commissioner notified HMRC that a complaint had been received from Mr Thomas about the handling of his request for information.
10. On 19 October 2022 [A3-8], the Commissioner issued Decision Notice IC-170139-R5Z0 which in summary concluded that:

(a) the CRCA prohibits the disclosure of the information and that '*this prohibition is not subject to the availability of any additional information which may enable identification*'. The panel takes this to mean that the existence of other information in the public domain

which assists identification of the taxpayer in question makes no difference to the way in which the prohibition in s. 23 CRCA applies.

(b) HMRC's initial response to Mr Thomas' request adequately explains the interaction between CRCA and FOIA. HMRC cannot disclose any information which would identify a person or enable identification of a person.

(c) disclosing the witness statement would specify the identity of the person to whom it relates;

(d) s. 44 FOIA is an absolute exemption so there is no requirement to consider whether the public interest in withholding the information outweighs the public interest in disclosing it; and

(e) HMRC satisfactorily established the criteria set out in ss. 18 and 23 CRCA and is entitled to rely on s. 44(1)(a) FOIA to withhold the requested information.

Appeal to the Tribunal

11. On 10 November 2022, the Appellant sent a Notice of Appeal to the Tribunal [A9-A15] challenging the Commissioner's Decision Notice [A3-A8].

12. The papers available to panel and the parties are set out in paragraph 24 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

13. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'Any person making a request 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 this is the case, to have that information communicated to him.'

Section 44 FOIA: disclosure prohibited by statute

14. Section 44(1) FOIA provides:

'...information is exempt information if its disclosure ... (a) is prohibited by or under any enactment.'

15. This is an absolute exemption, so the public interest test does not apply.

16. The statutory prohibition relied on in this case is contained in CRCA.

Section 23 CRCA: Freedom of Information

17. Section 23 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.

Section 18 CRCA: Confidentiality

18. Section 18(1) CRCA 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.

Section 51 CRCA: Interpretation

19. Section 51 CRCA defines ‘*function*’ as meaning any power or duty, and including any power or duty that is ancillary to another power or duty.

Section 19 CRCA: Wrongful disclosure

20. Section 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 (whether relating to Commissioners, officers or others).

Gordon v Information Commissioner and HMRC [2020] UKUT 92 (AAC)

21. The Upper Tribunal in *Gordon v the Commissioner and HMRC* accepted at para 14 that the phrase ‘*in respect of a person*’ qualifies ‘*the exercise of a function*’ rather than ‘*information*’, so that the correct approach to interpreting s.19(2) is:

- (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

22. The powers of the Tribunal in determining appeals against the Commissioner’s decisions for the purposes of EIR are set out in FOIA, as follows:

s.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.58 Determination of appeals

(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.

The burden of proof

23. The burden of proof rests with the Appellant, Mr Thomas, in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

24. Before the hearing, the parties had submitted written evidence. This comprised an Open Bundle of 61 pages (including an Index). Mr Thomas later submitted a Skeleton Argument dated 17 February 2023 comprising 50 paragraphs on 11 pages (part of which he invited the panel to serve as witness evidence, and we took this into account).

Submissions

Mr Thomas' submissions in his Appeal Notice dated 10 November 2022

25. In summary, Mr Thomas' ground of appeal is the assumption that, because the witness statement as a whole is prevented by s. 44 FOIA from being disclosed, it is not possible to separate out part(s) of the document from the whole, or to redact the document. The Commissioner did not engage properly with the question of redaction of, or extraction from, the document so as to avoid revealing the name or tax details of the person in question from the information disclosed.

Submissions on behalf of the Commissioner dated 6 December 2022

26. The Commissioner considers that the question is whether a redacted version of the witness statement, or provision of extracts from it – with all names and personal tax information withheld – would still identify, or enable the identity to be deduced, of the person to whom the disclosed information relates. The Commissioner submits the answer to this question is 'yes' and therefore the information is exempt from disclosure because:

(a) any response to a FOIA request must be read in the context of the original request rather than read in isolation.

(b) anonymisation of the response therefore does not assist where the request itself names any person, because – whether anonymised or not – the response inherently discloses the information contained in the request.

(c) in this case, the request names the case concerning the individual taxpayer (which case is in the public domain).

(d) even if the requested witness statement was redacted to remove the name and personal tax details of the taxpayer (and thus not ‘*specify the identity of the person to whom the information relates*’ contrary to s.23(1)(a) CRCA), disclosure of any part of the witness statement in response to the FOIA request would still ‘*enable the identity of such a person to be deduced*’ contrary to s.23(1)(b) CRCA;

(e) whatever the information disclosed in response to this request would therefore engage s.23(1) CRCA and thus be prohibited from disclosure under s.18(1) CRCA and exempt under s.44(1)(a) FOIA.

Mr Thomas’ submissions at the hearing

27. In summary, Mr Thomas made the following submissions (references to his skeleton argument are marked [SA para. x]):

(a) his request is neither frivolous nor mischievous because he wants the information for research purposes and writing for academic tax journals. He is particularly interested in the automation of and use of electronic communication between taxpayers and HMRC [SA paras. 3, 4 and 7].

(b) one Supreme Court Justice in the case cited in the FOIA request quotes from the witness statement Mr Thomas now seeks [SA para. 8]. From that Justice’s judgment, Mr Thomas infers that the witness statement’s general remarks (which he seeks) are not intermingled with remarks specific to the individual taxpayer’s affairs (which he does not seek) [SA para. 9].

(c) the Commissioner apparently accepted without enquiry or further consideration that HMRC is justified in law in not supplying even those parts of the witness statement which do not reveal the name of the individual or enable that information to be deduced [SA para. 14];

(d) however, HMRC was misconstruing FOIA in refusing to provide the information [SA para. 15] and the Commissioner’s decision notice was wrong not to issue an enforcement notice under section 52 FOIA [SA para. 16] at least as regards his refined request which he later indicated (see paragraph 4 above) would satisfy his request [SA para. 17];

(e) even if Mr Thomas is ‘*stuck with*’ his original request [SA para. 18]:

(i) he is seeking ‘*information*’ included in a document, not the document itself.

(ii) HMRC did not take this point.

(iii) HMRC has not acted in accordance with the Cabinet Office’s Freedom of Information Code of Practice (4 July 2018) [AB E125-130] which at paragraph 1.6 states that ‘*...it may be appropriate to extract the relevant information for disclosure and put it in a single document...*’; and

(iv) it is contrary to the philosophy of FOIA to refuse to supply information on the basis of a minor irregularity in the way the request was phrased. Nor

was HMRC's approach consistent with s.11 FOIA (Means by which communication to be made) which provides that public authorities should not be too formal about the way in which information is provided.

(f) Mr Thomas had not grasped that HMRC's reason for their refusal to redact or supply information from part only of the witness statement [SA para. 20] was that *'The requested witness statement exists only due to a case involving a specific taxpayer. It therefore cannot be separated and treated as information that does not relate to an identifiable person'* [SA para. 19] so he sought clarification [B54-55];

(g) HMRC's clarification [B56-57] stated that because the requested witness statement exists only because of a taxpayer case *'it is therefore inherently linked to that taxpayer even if some content was redacted.'* Mr Thomas does not understand what is meant by *'inherently linked'* nor why it would still be inherently linked to the taxpayer if redacted [SA para. 21];

(h) if by *'inherently linked'*, HMRC means it would necessarily *'specify the identity of the person to whom the information relates'* under s.23(1)(a) CRCA, this seems self-contradictory assuming the redaction were thorough [SA para. 23];

(i) even if HMRC means that *'the identity of such a person [could] be deduced'* under s. 23(1)(b) CRCA, he is at a loss to see how a properly redacted witness statement would enable this [SA para. 24];

(j) HMRC's suggestion that a statement produced as an aide-memoire or guidance to staff indicates that had general matters about HMRC's administrative arrangements for tax returns stood alone, it would not be exempt even if there had to be some redaction [SA para. 26]. Mr Thomas does not understand this: in what circumstances would a witness statement, a document intended for use in specific cases, be created as an aide-memoire or guidance to staff? [SA para. 27];

(k) what is the difference between such a disclosable witness statement with the taxpayer's name and other identifying details removed, and the witness statement that Mr Thomas has requested? [SA para. 30];

(l) HMRC seem not to have found out whether the general material in the witness statement Mr Thomas has requested exists by itself in any form: he is interested only in that general information contained in the witness statement, not the witness statement itself [SA paras. 32 and 33]. If that general material was provided to the witness by a colleague – in an email, or Word document, say – which stood alone and avoided any *'inherent link'* to the named taxpayer – HMRC could have provided that information.

(m) HMRC's apparent view is that information which, were it to stand alone would not be exempt, **is** exempt because it is included in a document which taken **as a whole is** exempt from disclosure and not redactable because of the circumstances in which it was created, namely in the course of litigation involving a particular taxpayer. That is not supported by anything in FOIA and the Code of Practice [SA paras. 34 and 35];

(n) in the case of *Gordon v. ICO & HMRC [2022] UKFTT 00437 [A29-42]*, HMRC had disclosed a redacted email and claimed that s. 44 FOIA prevented them from disclosing the redacted name. HMRC did not argue about the email being *'inherently linked'* or non-redactable: they redacted it and disclosed the rest [SA para. 37];

(o) as a secondary submission, HMRC has not complied with its s.16 FOIA duty to provide reasonable advice and assistance to people who have made to it requests for information. It would have been reasonable for HMRC to engage with Mr Thomas to

establish whether there were ways of disclosing the general parts of the witness statement he had asked for, either suitably redacted or by extracting the information he seeks, or by discussing with him the ‘*disclosability of the material used to create the general parts*’ of the witness statement [SA para. 41]. HMRC did not do so; and

(p) his desired outcome is disclosure of the information requested in a form which does not disclose the identity of any taxpayer or make it possible for a third party to discover that taxpayer’s identity [SA para. 49].

Discussion

28. Turning first to the facts of this case.

The facts

29. The facts are not disputed:

(a) on 16 February 2022, Mr Thomas requested information from HMRC. This request is set out in paragraph 2 above.

(b) the request cited a Supreme Court case which includes the name of an individual taxpayer.

(c) in response to Mr Thomas’ request, HMRC confirmed that it holds the requested information, namely a witness statement referred to in the Supreme Court judgment.

(d) the witness statement had been produced for the purpose of litigation between HMRC and a named taxpayer.

(e) bringing or defending proceedings against taxpayers is a power of HMRC and therefore falls within the exercise by HMRC of its functions.

(f) HMRC refused to disclose the witness statement in response to Mr Thomas’ request on the basis that to do so would identify the taxpayer and such disclosure is prohibited by s. 23 CRCA and consequently exempt from disclosure under s. 44 FOIA.

(g) on 3 March 2022, Mr Thomas asked HMRC to review its decision: he suggested that HMRC could remove the cover page of the witness statement, redact the name of the taxpayer elsewhere in the document and then disclose to him the remainder of it;

(h) HMRC informed Mr Thomas on 24 March 2022 of the outcome of its review, namely that the identity of the taxpayer could not be separated from the information requested, and that HMRC therefore maintained its refusal to disclose; and

(i) in its response on 26 April 2022 to Mr Thomas’ request for clarification, HMRC explained that the witness statement exists only because of a taxpayer case, so it is inherently linked to that taxpayer, even if some content were redacted. In whatever way the request were to be revised, the person to whom the information relates would be identifiable so cannot be disclosed. Further, the fact that some information about a case is already in the public domain does not affect the way HMRC responds to a FOIA request.

Error of law?

30. As the facts of this matter are undisputed, the only issue for the panel in this case is whether the Commissioner made any error of law in his Decision Notice.

31. Because s. 44(1)(a) FOIA (disclosure prohibited by any enactment) is an absolute exemption, the public interest test (whereby the Commissioner is required to exercise discretion to determine whether the public interest in withholding the information outweighs the public interest in disclosing it) does not apply. Hence there is no issue here of wrongful exercise of the Commissioner's discretion.

32. There is no dispute that the enactment relied on for the purposes of s. 44 FOIA in this case is CRCA.

33. S.23 CRCA is set out in paragraph 17 above. This section in turn refers to s.19 CRCA, the relevant parts of which are set out and summarised in paragraphs 20 and 21 above. S.19 CRCA includes the meaning of '*revenue and customs information relating to a person*'.

34. The Upper Tribunal interpreted the meaning of s. 19 CRCA in *Gordon v. Commissioner and HMRC* as summarised in paragraph 22 above. This Tribunal, and therefore the panel, is bound by the Upper Tribunal's decision.

35. In the panel's judgment, the answers in this case to each of the questions posed by the Upper Tribunal in paragraph 22 above is yes. The panel therefore finds that the exemption in s. 44 FOIA does apply in this case and that the Commissioner made no error of law in the Decision Notice which reached the same conclusion.

36. The panel's reasons are:

(a) the information requested in this case consists of information (namely a witness statement) that is held in connection with the exercise of a function of HMRC (namely legal proceedings) in respect of a person (namely an individual taxpayer);

(b) the information requested is not about internal administrative arrangements of HMRC. In the panel's judgment, this phrase – followed in the statute by the words '*whether relating to Commissioners, officers or others*' – refers to information relating to a person, such as human resources matter, staff numbers and the like. It does not, in the panel's view, mean HMRC automation and electronic systems as Mr Thomas appears to suggest.

(c) not only does the witness statement as a whole specify the person's identity, but also every part of it – each page, paragraph and sentence whether or not it names the person or contains any personal information – enables the identity of that person to be deduced. This is because any information provided in response to any FOIA request is inextricably linked with that request. This arises because every Decision Notice, and every decision of this Tribunal – both of which are published on the internet - set out the request in full. Consequently, any information disclosed as a result of those decisions would be available to the public at large, and thus in this case enable the identity of the person to whom that information relates to be deduced.

(d) it makes no difference to the above analysis if (i) the name of the individual and other identifying features were to be redacted from the information provided or (ii) only entirely impersonal and unidentifiable general information were to be extracted from the witness statement and provided to the requester;

(e) nor does it make any difference to the legal analysis that the name of the individual taxpayer is already available to the public: neither s.23 nor s.19(2) CRCA qualify the

prohibition on disclosure of information held by HMRC if the person's identity is already in the public domain.

37. The panel senses Mr Thomas' frustration that the information he seeks – for the benign and public-serving purpose of academic study and publication – has not been provided in response to his FOIA request. We accept that the information he wants is impersonal in the sense that it relates to HMRC procedure and practice rather than any individual taxpayer. We understand too that the name of the taxpayer is already in the public domain and thus disclosing the information he seeks would not breach taxpayer confidentiality. Moreover, we are aware that the witness statement that Mr Thomas seeks is publicly available, albeit at a price. We appreciate that HMRC's refusal to provide such information, and the Commissioner's upholding of such refusal, may appear to be illogical and contrary to the spirit of FOIA.

38. However, the Tribunal's task is not to critique the law as laid down by FOIA or indeed CRCA but to apply it as we have done in paragraph 36 above.

Failure to advise and assist?

39. We turn to Mr Thomas' final point that HMRC should be criticised for failing in its duty to advise and assist him in making (or refining) his request for information under s.16 FOIA or the Code of Practice. We decline to do so. Our reasoning is that no refinement, narrowing or reframing of the request would overcome the issue that the original request – and therefore the source of the information Mr Thomas seeks – was a witness statement in litigation which named the taxpayer as one of the parties.

40. It is difficult to conceive of any framing of the request which would avoid mentioning the name or citation of the specific Supreme Court case, and therefore enabling the identity of the taxpayer to be deduced. Accordingly, we do not criticise HMRC for failing to attempt any such reframing.

41. Mr Thomas' suggestion that the general paragraphs in the witness statement which he seeks would have originated from someone other than the witness-maker and must therefore exist somewhere in an email or memorandum of some kind we reject as speculation. Even if such an email or memorandum does exist – which it may not – that is not what Mr Thomas requested. Moreover, it is difficult to imagine how it could be found within HMRC without mentioning the witness statement referred to in Mr Thomas' original request. In any event, we consider any attempt to seek the original source of such information in the witness statement would extend beyond the 'reasonable' advice and assistance required by s. 16 FOIA or the recommendation in the Code of Practice that it may be appropriate to extract relevant information for disclosure.

Conclusion

42. For the above reasons, the panel finds that Mr Thomas, the appellant, has not discharged the burden of satisfying the Tribunal that the Commissioner's decision was wrong in law. Accordingly, the Commissioner's Decision Notice is confirmed.

43. The appeal is dismissed.

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)

Date: 23 March 2023