



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Information Tribunal Appeal Number: EA/2010/0090

Information Commissioner's Ref: FS50211872

Heard on the papers 9th September 2010

Decision Promulgated

11 October 2010

BEFORE

Fiona Henderson

And

Jenni Thomson

And

Paul Taylor

BETWEEN:

GERALDINE GASKELL

and

Appellant

THE INFORMATION COMMISSIONER

and

Respondent

HM REVENUE AND CUSTOMS

Additional Party

Subject matter:

S44 FOIA – prohibitions on disclosure

S50 FOIA – Application for a decision by Commissioner

S18, s19,s 23 *The Commissioners of Revenue and Customs Act 2005*

Cases

DBERR and Friends of the Earth EA/2007/0072

Office of Government Commerce and Information Commissioner [2008]EWHC 774 (Admin).

Stuart v IC and DWP EA/2008/0040

Allison v IC and HMRC EA 2007/0089

PricewaterhouseCoopers v Information Commissioner and HMRC[2010]UKFTT84(GRC)

Decision Upon Preliminary Issue

As a preliminary issue, the Tribunal finds that the Commissioner does not have a discretion not to enforce compliance with FOIA. And that in the event that we are wrong and the Commissioner does have a discretion not to enforce compliance with FOIA he was wrong to apply his discretion on the facts of this case.

It remains to be decided whether the disputed information should nevertheless be treated as exempt under FOIA s36¹, s40(2)², s41³ and s43⁴ FOIA and, if so, in relation to s36 and s43 whether the public interest in maintaining that exemption outweighs the public interest in disclosure. These issues were not investigated by the Information Commissioner in the course of his investigation into the Appellant's complaint and accordingly the Tribunal has issued directions in order to progress the case.

Reasons

Introduction

1. The Rent Service (TRS) (which became part of the Valuation Office Agency (VOA) an executive agency of HM Revenue and Customs (HMRC) on 1st April 2009) has a

¹ Prejudice to effective conduct of public affairs

² Personal data

³ Information provided in confidence

⁴ Commercial interests

statutory duty to compile a list of rents that are no more than 12 months old in ascending order of value of existing assured tenancies for each category of property within each Broad Rental Market Area (BRMA). They must ensure that sufficient data is collected that accurately reflects the market and fix and publish on a monthly basis to all local authorities with a Housing Benefit function, the applicable Local Housing Allowance (LHA) figures. The data is provided on a voluntary basis by local landlords.

2. The LHA figure is the median quartile figure from the list (e.g. if in any given month the Rent Officer compiles a list of ninety nine rents for self-contained one-bed properties in a particular BRMA, the LHA for that month will correspond to the fiftieth value on the list.⁵)

The request for information

3. Since April 2008 Mrs Gaskell has been in correspondence with TRS and now HMRC because (based on advertised rents and her experience) she does not believe that the list for her local area is accurate. As part of this process on 9th July 2008 Mrs Gaskell asked for :

- The names of the letting agents used by the Rent Service to gather the rental information that is used in the calculation of the local housing allowance rates.
- The name of the letting agent who is alleged to have let two, one bedroomed bungalows in Dawlish for £39.50 per week during January 2008, as advised by the Rent Service.

4. The Rent service refused this request on 6th August 2008 citing s40(2)⁶ , s41⁷ and s43 FOIA⁸ .

The Complaint to the Information Commissioner

⁵ Letter VOA dated 30th April 2009

⁶ Personal data

⁷ Information provided in confidence

⁸ Commercial interests

5. Mrs Gaskell wrote to the Commissioner on 13th August 2008 asking him to investigate. Since Mrs Gaskell had not asked for an internal review the case was not actioned until this had been completed. Mrs Gaskell asked for an internal review on 12th November 2008 and TRS responded in a review dated 12th December 2008 which upheld the refusal on the same grounds and in addition relied upon section 36 FOIA⁹.

6. Mrs Gaskell complained again to the Commissioner on 14th December 2008. She was informed on 10th March 2009 that the case had been allocated for consideration, and on 30th March 2009 the Commissioner wrote to TRS asking for a copy of the disputed information and for further information surrounding the exemptions relied upon.

7. In their letter dated 30th April 2009 the VOA relied upon the exemptions cited in the review and in addition added:

“On 1st April 2009 pursuant to the Rent Officers Transfer of Functions Order 2008, management of Rent Officers transferred to the VOA which in turn is an executive agency of HMRC.”

Section 18(1) of *Commissioners for Revenue and Customs Act 2005*¹⁰ (CRCA) now prohibited disclosure of this information and they therefore now relied upon s 44 FOIA¹¹. In light of this the VOA did not supply the Commissioner with a copy of the disputed information.

8. In his Decision Notice FS50211872 dated 23rd March 2010 the Commissioner found that he had a discretion not order disclosure in this case:

“The Commissioner finds that the section 44 exemption cannot be applied retrospectively in this case but that because the statutory prohibition does now apply to the information it would not be appropriate for him to consider any steps to order

⁹ Prejudice to conduct of public affairs

¹⁰ See para 10 below

¹¹ Disclosure prohibited under any enactment

disclosure of the withheld information. Therefore the decision notice does not consider any of the exemptions originally claimed.”¹²

The appeal to the Tribunal

9. Mrs Gaskell appealed on 7th May 2010 and her grounds of appeal were clarified at the telephone directions hearing dated 5th July 2010 where the following issues were identified:

- i) The Commissioner erred in finding that he has a discretion not to enforce compliance with FOIA.
- ii) In the event that the Commissioner does have a discretion not to enforce compliance with FOIA he was wrong to apply his discretion on the facts of this case.

The Law

10. Section 18 CRCA 2005 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 Customs¹³.

...

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

11. Section 19 CRCA creates an offence of “wrongful disclosure” for disclosure of Revenue and Customs’ information wherein a person can be identified from the disclosure. Sections 18(2), 20 and 21 CRCA permit certain types of disclosure in prescribed circumstances e.g. to prevent crime. It is not argued (and the Tribunal does not find) that any of these caveats apply on the facts of this case.

12. Section 44 FOIA provides:

¹² Decision Notice “Summary”, Page 2

¹³ It is not disputed that the information since April 1 2009 has been held by HMRC and that this is in connection with a function of HMRC (Evidence of John Swinerton)

(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...

13. At the Telephone directions on 5th July 2010 the issues in dispute were clarified:

- It was accepted by the Commissioner and the Additional Party that at the relevant time in 2008 when the information request was being considered section 44 FOIA was not applicable¹⁴.
- It is not argued by any party that section 44 FOIA should be applied retrospectively (although it will be HMRC's case that section 44 is relevant to the exercise of any discretion by the Commissioner).

Ground 1: Does the Commissioner have discretion to choose whether to order compliance with part I?

10. The Tribunal notes that within section 1 FOIA disclosure is mandatory unless certain prescribed exemptions apply¹⁵:

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9¹⁶, 12¹⁷ and 14¹⁸.

¹⁴ Commissioner relies upon *DBERR and Friends of the Earth EA/2007/0072* as authority for fact that the Commissioner has to consider the facts as they existed at the relevant time (i.e. when the request was being considered by the public authority). This Tribunal agrees with this approach.

¹⁵ All emphasis is that of the Tribunal

¹⁶ Payment provisions

¹⁷ Cost provisions

¹⁸ Vexatious and repeated requests

11. Section 2(2) FOIA states in respect of any information which is exempt information by virtue of any provision of Part II, that 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.

Therefore the only mechanism for applying s18 CMCA in the context of s2 FOIA is via s44 FOIA which as stated above did not apply at the relevant time.

13. The Commissioner's duty to make a decision and issue steps to comply with Part I FOIA are set out in s50 FOIA which provides inter alia:

*(2) On receiving an application under this section, the Commissioner **shall** make a decision [unless various exceptions apply none of which are relied on in this case]...*

(4) Where the Commissioner decides that a public authority—

*(a) **has** failed to communicate information, or to provide confirmation or denial, in a case where **it is required** to do so by section 1(1), or*

(b) has failed to comply with any of the requirements of sections 11 and 17,

*the decision notice **must** specify the steps which **must be taken by the authority for complying with that requirement and the period** within which they must be taken.*

...

14. The HMRC argue that the fact that section 50(4) FOIA refers to circumstances where it "is" required to, is indicative of the fact that account can be taken of a change of circumstances applicable at the time of the decision notice. This argument was raised but not determined in Office of Government Commerce and Information Commissioner [2008] EWHC 774 (Admin). This case is also relied upon by the Commissioner in support of his contention that he does have a discretion whether to enforce the duty to disclose.

15. The Tribunal makes no apology for quoting at length from this case since this is the authority relied upon by both parties for the contention that such a discretion exists. In this case Mr Justice Stanley Burnton expressed his views after some discussion but did not determine the issue. In this respect the Commissioner's Decision Notice is confusing in that whilst at paragraph 16 the Commissioner acknowledges that Burnton J is "commenting", it appears to accord these remarks the status of decided law omitting from the quotation the fact that what was being posited was what was "arguable".

16. In that case Burnton J said at paragraph 97:

"There was in this context discussion as to whether subsequent changes in circumstances... could be taken into account by the Commissioner. [The Commissioner] submitted that the Act required questions of disclosure to be determined on the basis of the facts at the date of the request...He submitted that "the circumstances" referred to in section 2 [FOIA] are the circumstances as at that date, and that this is made clear by section 50, which requires the Commissioner to decide whether a request for information made to a public authority "has been dealt with in accordance with the requirements of Part I": the tense clearly refers back to the date of the request. He submitted, cogently, that any other interpretation would enable public authorities to benefit by refusing a request and thereby at least postponing disclosure

98 It is unnecessary for me to decide whether [the Commissioner's] submissions on this point are correct, since no point has been taken... but I am not sure that they are. Take a case in which the information requested is relevant to criminal proceedings that are begun after the date of the request, and the disclosure of that information would prejudice the fairness of the trial. In that case the information was not exempt when requested but became so under section 31 subsequently. It would be undesirable for the Commissioner to be obliged to require disclosure in such a case. Conversely, if the change of circumstances favours disclosure, the complainant can make a new request.

Section 50 is not entirely clear in this respect, in that the past tense of subsection (1) is not repeated in subsection (4) in the phrase “in a case where it is required to do so by section 1(1)”, or in the requirement that the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken”. ...

17. The Tribunal does not consider this determinative of the proposition that the Commissioner has discretion. We note that these remarks are obiter, there was some discussion but not full argument, and no decision was made on this point. The Tribunal observes that there is sufficient flexibility to cover that scenario posited (of subsequent criminal proceedings) within the Act already without the need for discretion because there is no prescribed timescale applicable to s50(4) in that the “*period within which they must be taken*” does not require a calendar date but would allow for disclosure e.g “after the conclusion of the Trial proceedings”.

18. Most importantly Section 50(4) refers back to section 1(1) FOIA. In section 50(4) FOIA the failure to communicate information is material where the public authority “*is required to do so by section 1(1)*,”. As set out above section 1(1) is mandatory and it is not in dispute that the relevant time for consideration of section 1(1) is when the original request was being considered. Consequently the requirement to disclose is being referred back in time to the circumstances which applied at the time of the original request by virtue of the operation of section 1(1) FOIA.

19. Additionally the Tribunal does not consider the use of “*is*” to be significant in this context. The requirement to disclose dates back to the request and remains a requirement. “*Is*” is compatible with the fact that the obligation remains current in that it has been in existence since the original refusal and has not expired.

20. To adopt the HMRC reading of the text would be to require the Commissioner in every case to consider:

- first of all whether there was a breach of FOIA at the date of the request and

- then to reconsider whether there would be a breach if the request were to be submitted now (i.e. have the circumstances changed so that a new exemption would apply or has the balance of public interest changed?)

This would undermine the purpose of the Act and enable an authority who was reluctant to disclose “2 bites at the Cherry” in every case.

21. In concluding that the Commissioner does not have discretion whether to enforce the Act under s50 the Tribunal considers it important to look at other provisions within FOIA. Whilst it is acknowledged that s58 refers to:

*(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.*

22. This Tribunal adopts the approach set out in Stuart v IC and DWP EA/2008/0040 at paragraph 12 where the Tribunal refers to its own ruling in which it found that:

“discretion is referring to the Commissioner’s role as a “decision maker” whilst exercising his functions under the Act... and is applicable to circumstances where the statute is permissive but not mandatory, for example the Commissioner “may” choose to issue an information notice under section 51 FOIA or an enforcement notice under section 52 FOIA .”

23. As set out above the Tribunal considers the terms of s50 FOIA to be mandatory and does not accept that there is any significance to any change in tense.

24. Whilst the Tribunal accepts that s 51¹⁹, 52²⁰ and 54²¹ FOIA use permissive language the Tribunal is satisfied that this signifies that the Commissioner has discretion as to how he chooses to enforce FOIA. He has been provided with a range of tools and measures with which to investigate complaints and enforce breaches but it is up to him whether he uses a particular sanction in a particular case, or an alternative less formal approach to ensure compliance. It does not mean that he has a discretion not to enforce FOIA (see sec 47 FOIA below) but enables him to use more informal methods.

25. The Tribunal is satisfied that this reading is consistent with the Commissioner's duty as set out in s47 FOIA which provides:

(1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, ...

26. Subsection (1) places a "duty" on the Commissioner to promote observance with the requirements of the Act, this does not leave room for discretion. Section 50 is clearly one of his functions under the Act and consequently this duty would be inconsistent with a subsequent examination of exemptions/the public interest test and the general circumstances applicable at the time of the Commissioner's investigation, if the information should have been disclosed when the request was made.

Ground ii

27. In the event that we are wrong and the Commissioner does have discretion not to enforce compliance with FOIA the Tribunal goes on to consider whether he was wrong to apply his discretion on the facts of this case.

¹⁹ Information notices

²⁰ Enforcement notices

²¹ Contempt proceedings

28. The Commissioner argues that it is undesirable to have a situation where a public authority is required to break the law in order to comply with his order. However, the Tribunal is satisfied that this argument is based on a misconstruction of the relevant laws and that ordering disclosure on the facts of this case would not break the law.

29. *The Commissioners of Revenue and Customs Act 2005* provides at section 18:

(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.

*(2)...*²²

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

30. The fact that a breach of section 18(1) CRCA constitutes an offence is set out in section 19 CRCA which provides:

(1) A person commits an offence if he contravenes section 18(1) ... by disclosing revenue and customs information relating to a person²³ 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 Customs²⁴ (within the meaning given by section 18(4)(c)) 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).

Therefore the Tribunal accepts that an offence is committed **if** the disclosure of the disputed information in the facts of this case would contravene section 18(1).

²² exceptions to disclosure not material to the facts of this case

²³ Definition of person as per 2005 Act “persons both natural and legal persons (Explanatory Notes to 2005 Act) adopted in *EA 2007/0089 Allison v IC and HMRC*

²⁴ There is no dispute that HMRC hold the information in connection with a function of HMRC. From statement of John Swinnerton, (team Leader Housing Allowances Group and formerly Director and Main Board Member of TRS). The Housing Allowances Group is that part of the Valuation Office Agency that is directly concerned with Rent Officer functions. The VOA is an executive agency of HM Revenue and Customs.

31. HMRC Rely upon section 23 (CRCA) which 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 (c. 36) (prohibitions on disclosure) if its disclosure—*

(a) would specify the identity of the person to whom the information relates²⁵, 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.

32. They argue section 18(3) should be disregarded in light of section 23(1A)²⁶.

However, the Tribunal observes that section 23(1A) is interpretive of Section 23 (1) and as such it only applies if section 44 FOIA is being relied upon. Since section 44 **cannot** be relied upon as an exemption in this case (because CRCA did not apply at the time of the request), section 18(3) CRCA remains applicable on the facts of this case, thus permitting disclosure now if so ordered by the Commissioner.²⁷

33. FOIA permits (in fact it requires) disclosure if no exemption applies. S44 is not free floating and can only be relied upon within the structure of FOIA. It is an exemption to section 1 FOIA and that limits its use in time to “the relevant time”²⁸.

²⁵ A redacted version of the disputed information has already been provided to Mrs Gaskell

²⁶ s23(1A) came into force on 21st July 2009

²⁷ The relationship between s18(2) and s23 CRCA was discussed in *PricewaterhouseCoopers v Information Commissioner and HMRC [2010]UKFTT84(GRC)* however, the Tribunal does not consider that case of assistance since in that case s44 FOIA was being relied upon.

²⁸ *DBERR and Friends of the Earth EA/2007/0072* see footnote 14 above.

Since s44 is not relied upon (unless one of the other exemptions applies which the Commissioner has not determined²⁹) the information **must** be disclosed pursuant to s1 FOIA. Therefore no offence is committed under s19 because there is no contravention of s18(1), this is because pursuant to s18(3) CRCA, FOIA requires disclosure (in the absence of any other applicable exemptions) at the relevant date.

34. HMRC accept that s44 was not applicable at the relevant time but argue that it would be applicable if the request were now made, and that is why the Commissioner should apply his discretion not to order disclosure because it is information which is now subject to a statutory prohibition on disclosure. It is desirable that there is consistency.
35. The Tribunal notes that but for the application of other exemptions, the information would have been disclosed already. The prohibition constitutes a blanket administrative change rather than one related to the content of the information, founded in specific public interest/ or factual reasons. The situation is therefore different from Mr Justice Burnton's example of subsequent criminal proceedings and the desirability of a fair trial, which he posited in the *OGC* case. This is not information that of itself (absent the other exemptions) is considered undesirable to disclose. Neither is the Tribunal impressed with the consistency argument because, if none of the other exemptions are found to apply, withholding it would be inconsistent (compared to other information requests to TRS made prior to 1st April 2009 where no other exemptions were relied upon).
36. Mrs Gaskell raises delay in terms of why, if there is a discretion, it is desirable that disclosure **should** take place. She argues that the case was processed so slowly by TRS that it was inevitable that the law would have changed by the time it was considered by the Commissioner and that they have benefitted from their delay and that this is to her detriment. The Tribunal accepts that if there were evidence of such delay on the part of the public authority that would be a factor to take into consideration in favour of disclosure.

²⁹ i.e. sec 36, 40,41 and 43 FOIA

37. However, whilst it is regrettable how long the case took to reach a decision (the initial request was made on 9th July 08), the Tribunal is satisfied that there is no evidence of delay by TRS between the date of the request and 1st April 2009 when TRS became part of HMRC³⁰. The Commissioner did not find that the TRS had breached any time requirements. Their initial response was dated 6th August 2008 and notified Mrs Gaskell of her right to an internal review, this right was repeated in correspondence on at least 3 further occasions. She complained to the Commissioner on 13th August. In their letter to her dated 4th September 2008 TRS stated:

“All our letters have explained that you have the right to request a formal Internal Review of the way in which we have responded to your FOIA requests... Beyond that you have the right to complain to the Information Commissioner but my understanding is that the Commissioner would not entertain a complaint unless the complainant had requested an Internal Review first.

Should the Information Commissioner contact us about a complaint submitted by you we would point out that you have not asked for an internal review and we would defend our actions and decisions robustly”.

Mrs Gaskell was informed by the Commissioner on 26th September 2008 that he could not investigate because she had not had internal review.

38. There was some debate surrounding whether Mrs Gaskell’s complaint to the Commissioner constituted a request to TRS for an internal review and unfortunately Mrs Gaskell was not copied in to a letter from TRS dated 15th October setting out their position (although she was on notice as to their position as they had advanced the same arguments to Mrs Gaskell in their letter of 4th September). The situation was not helped by the Commissioner apparently failing to log the receipt of that letter. Mrs Gaskell requested the internal review on 12th November 2008, the results of review were communicated on 12th December 2008. On 30th March the Commissioner wrote to TRS asking for details of their objections and a copy of the disputed information. On 1st April 2009 TRS became part of HMRC.

39. The Tribunal notes that whilst the case could have progressed more swiftly that is not the same as delay:

³⁰ The Tribunal has only considered the chronology up until 1st April 2009 which is when TRS became part of HMRC

- Mrs Gaskell could have heeded the explanations she was given that she had omitted a step (the internal review) in complaining directly to the Commissioner,
- TRS could have copied their letter of 15th October to the Commissioner to Mrs Gaskell,
- The case could have been processed more efficiently by the Commissioner. However, the Commissioner has many cases to deal with and when considering the chronology to 1st April 2009, this case was dealt with in a reasonable time. Additionally as the Tribunal has noted in e.g. *Stuart v IC and DWP EA/2008/0040* delay before the Commissioner is not a matter for the Tribunal's jurisdiction.

Having considered the chronology the Tribunal is satisfied that delay was not a factor in this case.

Conclusion

40. As a preliminary issue the Tribunal finds that the Commissioner does not have a discretion whether to enforce the disclosure provisions of Part I. Additionally in light of the Tribunal's finding that disclosure in the circumstances of the case would not constitute an offence, and that it would not be inconsistent to disclose this information in light of the current application of CRCA, the Tribunal is satisfied that in the event that the Commissioner has a discretion, he was wrong to exercise his discretion in favour of withholding the information.

41. Our decision is unanimous.

Signed

Fiona Henderson

Tribunal Judge

Dated this 11th day of October 2010