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IN THE FIRST-TIER TRIBUNAL
[INFORMATION RIGHTS] **Case No.** EA/2009/0049
GENERAL REGULATORY CHAMBER

Information Commissioner's
Decision Notice No: 50220497

Appellant: PricewaterhouseCoopers

Respondent: Information Commissioner

Additional Party: Her Majesty's Revenue and Customs

HEARD AT THE CARE TRIBUNAL:

DATE OF DECISION: **4th March 2010**

Before

David Marks QC
Judge

and

LAY MEMBERS

Dr Malcolm Clarke
John Randall

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2009/0049
GENERAL REGULATORY CHAMBER

Representation:

For the Appellant	Conrad McDonnell of Counsel
For the Respondent	Holly Stout of Counsel
For the Additional Party	Marie Demetriou of Counsel

Subject matter: **Section 44 Freedom of Information Act 2000: Sections 18 and 23 of the Commissioners of Revenue and Customs Act 2005**

Cases: **Allison v Information Commissioner & HMRC (EA/2007/0089); Guardian & Brooke v Information Commissioner & BBC (EA/2006/0011 and 0013); Cape Brandy Syndicate v IRC [1921] 2KB 407**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal unanimously dismisses the appeal of the Appellant.

REASONS FOR DECISION

Introduction

1. This appeal involves a question of statutory construction. The statute in question is the Commissioners of Revenue and Customs Act 2005 (CRCA). The issues raised are not straightforward and the ramifications are potentially far reaching. It is perhaps regrettable that the matter to be resolved is to be done initially in the Tribunal as distinct from a court of record such as the High Court. To this Tribunal, it appears that this kind of case should, in future, be the type of appeal which will be dealt with by a suitably constituted Tribunal in the newly established Upper Tribunal as set up under the recent Tribunals,

Courts and Enforcement Act 2007. This is principally because the issue of statutory construction is a difficult one.

2. The appeal more particularly concerns the interaction and the relationship between two distinct provisions in the CRCA which both address the critical issue of disclosure insofar as such disclosure relates to a taxpayer's affairs. Both those sections have to be considered in the context of a Freedom of Information request under the Freedom of Information Act 2000 (FOIA) and in particular, the overriding prohibition imposed by section 44 of FOIA which addresses what are called "Prohibitions on disclosure" and which provides in relevant part:

> "(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 …"

The relevant statutory provisions

3. The two critical sections of the CRCA are sections 18 and 23. However, there are related provisions which need not be set out in full but which are also relevant. Both the above-mentioned sections are in a part of the CRCA which is headed with the simple one-word description, namely, "Information". The sections in general covered by this simple and, it may be thought, relatively uninformative title are sections 17 to 23 inclusive. Section 17 addresses what is called "Use of information". In effect, this section allows the Revenue and Customs (hereinafter referred to as the Revenue) to use information required by it, i.e. the Revenue "in connection with a function" so that it can be used by the Revenue "in connection with any other function". Section 18 is headed "Confidentiality" and provides in relevant part as follows, namely:

"(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) But subsection (1) does not apply to a disclosure –

(a) which –

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners;

(b) which is made in accordance with section 20 or 21,

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(e) which is made in pursuance of an order of a court,

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or

(h) which is made with the consent of each person to whom the information relates."

The remaining subsections are not material for present purposes.

4. Section 19 creates an offence of "wrongful disclosure". A party commits this offence if he discloses what is described and defined as "Revenue and Customs information" relating to "a person" in the event that that person's identity either is specified in the disclosure or that such identity can be deduced from the disclosure. Section 20 permits certain types of disclosure under and by virtue of the section's title which is put in almost self-explanatory terms, namely: "Public interest disclosure", e.g. to prevent crime or to comply with international obligations which binds the United Kingdom or the Government. A similar provision as to allowable disclosure can be found at section 21.

5. Section 22 addresses: "Data Protection, etc" and provides as follows, namely:

"Nothing in sections 17 to 21 authorises the making of a disclosure which –

(a) contravenes the Data Protection Act 1998 …"

The 1998 Act will be referred to in this judgment as the DPA.

6. Section 23 bears the title: “Freedom of information” and provides as follows, namely:

> “(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 [FOIA] (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.”

7. As will be seen in much further detail below, the words “the disclosure of which is prohibited by section 18(1)” lie at the heart of this appeal. The critical issue is whether those words in the context of the group of sections which have been referred to apply the prohibition imposed by section 44 of FOIA to all taxpayer-related information, irrespective of whether any of the exceptions set out in section 18(2) of CRCA apply. This issue has prompted a deep divergence of views between the Information Commissioner (the Commissioner) on the one hand, joined in this respect by the Appellant, and on the other, the Revenue as the Additional Party. The Commissioner contends that section 18(1) must be made subject to the terms and effect of section 18(2) so that disclosure can occur whenever one of the occurrences or situations specified and triggered by section 18(2)(a) and (h) are in play. The Revenue contends that no such allowance for the operation of section 18(2) is permissible under a proper reading of both sections 23 and 18. Both those parties, i.e. the Revenue and the Commissioner, however, agree that the appeal in this case should be dismissed.

8. The Tribunal is unanimous in reaching the view that supports the latter joint submission on the part of the Commissioner and of the Revenue to the effect that the appeal should be dismissed. However, given the importance of the issue which divides those parties as set out in the preceding paragraph, it feels bound to address and determine that issue. The Commissioner founded his opposition of the appeal on another alternative ground. Whilst the Tribunal is content to base its decision on the primary ground which otherwise divides the Commissioner and the Revenue, in the light of the extensive argument which has been canvassed by all parties in relation to this secondary issue relating to the fact and nature of the consent to the request of disclosure, it will address that secondary issue in the latter part of this judgment.

The request

9. In a letter dated 22 September 2008 the Appellant, which is a very well known worldwide firm of accountants, made a request under FOIA in the words of the letter: "…to make a formal access request for information and material" relating to a person who is called "one of this firm's clients for whom this firm is mandated to act as tax adviser". The client in question can be referred to, for the purposes of this judgment, as Mr H. In particular, the request related to Mr H's tax affairs. The specific categories of information required comprised the following, namely:

- Copies of all internal HMRC communications, whether in the form of a letter or a memorandum or report or submission or "Opinion" or whether transmitted by post, internal circulation, fax or email between Mr H's tax office (the address being given as an address in Salford), and any other part of the Revenue including but not restricted to:

- all technical specialists, including technical specialists dealing with questions of trading/mutuality/employment related securities and what was called Case VI

- any other Head Office or Policy Division within the Revenue, e.g. International

- any Appeals Unit

- the tax office of a certain specific limited partnership with which Mr H was associated

- Copies of all notes of meetings and all notes of telephone conversations between persons working with any of the above part of the Revenue together with

- Copies of any briefing papers prepared for such meetings or telephone conversations.

10. The Tribunal does not feel it necessary to recite the terms of the request any further, or indeed in express terms. On any view, it related to Mr H's tax affairs. On the Appellant's own admission, the request was made in order to elicit an insight into how the Revenue addressed the taxation related aspects of limited partnerships such as the one referred to above. The other observation which can be made at this point is that, again, on any view, the request was being made on behalf of Mr H given the specific reference to the Appellant's role as the "mandated" tax adviser.

11. The Revenue responded by letter dated 17 October 2008. It stated that it neither confirmed nor denied it held the information requested for reasons that are set out in an appendix to that letter. In that respect, it

relied on section 44(2) of FOIA which though not recited above provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of the subparagraphs of section 23(1). The letter went on to maintain that section 23 CRCA applied as did section 18. This meant that the two important questions were, first – was the information held for one of the Revenue's functions, and second, did it relate to an identifiable person? If the answer to both questions was yes, then the information sought was exempt and the Revenue so maintained.

12. However, the letter went on to say that on what the Additional Party itself called a "discretionary" basis and outside the terms of FOIA it may disclose the requested information if it received "the necessary consent of a customer because of the exception to the duty of confidentiality contained in s.18(2) of [the CRCA]". However, disclosure would be made only in favour of the client and/or a person holding and enjoying the client's authority.

13. The Revenue also maintains that if a request was made in accordance with those requirements, it would "deal with disclosure of personal data" under the provisions of the DPA, subject to any exemptions that applied and for personal data held in connection with Mr H's tax affairs.

14. The Revenue would therefore consider the exercise of its discretion effectively on a case-by-case basis.

15. The Appellant responded by letter dated 23 October 2008 requesting a review. Reliance was again placed on section 18 and on the Appellant's contention, that section 18(1) could be "over-ridden" by one of the various subsections in section 18(2), in particular section 18(2)(h) which addressed the possibility of consent.

16. The Appellant contended that consent had already been given. However the Appellant also acknowledged that it understood that a standard form bearing the description "64-8" was not considered by the Revenue to constitute sufficient evidence of consent. It therefore asked the Revenue to provide a template declaration in a format that would meet the Revenue's requirement. The Appellant stressed that the request it had made for the information referred to above was being made by the Appellant itself, and not on behalf of Mr H. As already indicated above, however, the Tribunal finds it impossible in all the circumstances to characterise the request as anything other than a request made on behalf of Mr H, albeit by his duly authorised agent and tax adviser. The strict consequences of such a characterisation will be revisited below (see in particular paragraph 33). It is enough to say that, viewed in this light, the analysis required would involve a consideration of whether and to what extent section 40 of FOIA (which deals with personal information) was engaged, without the further need to consider the interplay between sections 18 and 23 of the CRCA.

17. In due course, by letter dated 29 October 2008, the Revenue observed that there was no prescribed template for the specified form of consent. Indeed, it added that a letter from Mr H authorising the making of the request and the receipt of the information "on [Mr H's] behalf" would be "sufficient". Mr H duly supplied and signed what was called on its face an FOI Consent Form dated 13 November 2008.

18. On 19 November 2008, the Revenue wrote again to the Appellant stating as follows, namely:

"To avoid any misunderstanding on either side I refer you back to the content of [the] letter to you dated 17 October 2008. The letter explains that written authority from your client will enable HMRC to consider dealing with the request under the auspices of section 7 Data Protection Act 1998 for any personal data about your client, and on a

discretionary basis ***outside*** of FOI for any other information falling within the scope of the request." (emphasis in original).

19. The Revenue followed the above letter with a further letter of 25 November 2008 which confirmed that the internal review that had been requested had upheld the original decision and neither confirmed nor denied as whether the requested information was held. The Revenue added that it could see no evidence that consent had been "in place" when the original request was made.

20. For the sake of completeness, it should perhaps be noted at this point that on 17 November 2008, the Appellant had submitted a signed so-called "letter of consent" from Mr H dated 13 November which read:

"FOI Consent Form

I [Mr H] of … am aware that [the Appellant] has made an application to HMRC under [FOIA] for information relating to me and I consent to disclosure of this information to [the Appellant]."

21. By a further letter dated 5 December 2008, the Appellant claimed that the Revenue's response of 25 November 2008 failed to address the main issue relating to the request, namely, the proper interpretation of section 23(1) CRCA. It also pointed out that consent "was in place" when the original request was made.

22. By letter dated 24 December 2008, the Revenue said it had carried out a review for the information within the scope of the request which it regarded as disclosable on a discretionary basis and under the DPA. In consequence, some of the information requested was disclosed under the DPA. The Revenue also confirmed, however, that no further information would be disclosed.

Investigation by the Commissioner

23. In late October 2008, the Appellant complained to the Commissioner as to the manner in which the original request had been dealt with. As perhaps is clear from what has already been set out above, the Appellant was concerned principally with two matters, namely, first, the stance taken by the Revenue with regard to the manner in which section 23 had led it to "override" section 18 of the CRCA and, second, the apparent failure by the Revenue to accept the fact and form of consent provided by and on behalf of Mr H.

24. Given the manner in which the appeal has unfolded, the Tribunal finds its unnecessary to revisit the entire contents of any and all of the formal exchanges between the Appellant and the Commissioner prior to the issuance of the Decision Notice. This is because all the material contentions canvassed between the parties at that stage have found reflection in the formal contentions put forward on the appeal, both during the appeal and pursuant to the Tribunal's own directions subsequently.

25. It is, however, important to note that as part of the Commissioner's investigation, he wrote to the Appellant indicating that his, i.e. the Commissioner's stance, contrary to that of the Revenue, as indicated above, was that if consent was properly given by the individual under section 18(2) of the CRCA, then section 44 of FOIA would not apply. However, such consent had to have been properly applied for and granted in order to be valid, such as to constitute proper consent for disclosure of information under FOIA and therefore to the public. This relates to the secondary issue to which reference has been made. In particular, the Commissioner indicated that to his understanding the only consent in place at the time of the request was the Form 64-8 which merely authorised the Revenue to deal with the Appellant as Mr H's agent. The Commissioner maintained that such a form did not

constitute sufficient consent to disclosure under FOIA. What was required, as it was put both then and since, was that that consent should be clear and unambiguous, freely given and formal.

26. The Appellant responded reiterating that not only did it have sufficient consent by virtue of the letter dated 17 November 2008 referred to above, but that it also had received oral consent from Mr H on or about 19 September 2008.

The Decision Notice

27. The Decision Notice is dated 20 May 2009 and bears the reference FS50220497. In summary, it makes the following determinations, namely:

(1) The Commissioner was satisfied, as was the Appellant, that the requested information fell within the definitions of section 18(1) and 23 of the CRCA, by which the Tribunal presumes it was meant that the information was "held" in connection with "a function of the Revenue and Customs" under section 18 as well as constituting "Revenue and customs information relating to a person" under section 23;

(2) The Commissioner however disagreed with the Revenue and disputed the contention that section 18(2) did not affect the "interaction" of section 18(1) and section 23 of CRCA;

(3) It therefore followed from (2) that it first had to be determined:

(a) whether the requirements of section 18(1) were met;

(b) if yes to (a), whether any of the exceptions under section 18(2) were met; and

(c) then and only then, whether the information requested related to an identifiable person thereby meeting the requirements of section 23(1);

(4) In the present case as indicated above the Appellant had contended that the requisite consent was in place for the purposes of section 18(2)(h) both at the time of the request and also by virtue of the letter of 17 November 2008;

(5) In the present type of case, again as indicated above, the type and nature of the consent which was required was consent to disclosure of the information under FOIA and thus disclosure to the public which on the facts of the present case had not been provided; and

(6) In the absence of any such requisite consent section 18(2)(h) could therefore not apply and the Revenue as the Additional Party had therefore dealt with the request correctly neither confirming nor denying whether the requested information was held.

The Notice of Appeal

28. The Notice of Appeal is dated 19 June 2009. After reciting the background being the exchanges and other matters which led to the Decision Notice, the Grounds of Appeal were set out as follows:

"GROUNDS OF APPEAL

The [Commissioner] erred in deciding:

(a) that for the purposes of an application under the Act consent under section 18(2)(h) must specify disclosure to the public or general public rather than a specified person; and

(b) that HMRC were, by virtue of section 44(2) of the Act, correct neither to confirm nor deny if the requested information is held by HMRC."

The Tribunal does not find it necessary to revisit any further terms of the Grounds of Appeal. In effect, as indicated above, they were revisited at length during the course of the appeal and subsequently.

The Commissioner's Reply

29. The Commissioner's Reply is dated 10 July 2009. It is a reasonably lengthy document, although most of it is taken up with a recital of the factual background. The relevant parts have been set out in this judgment. There appear to be four principal points addressed by the Reply.

30. First, the Commissioner contended in line with the Appellant that section 18(1) CRCA does not apply to disclosure which engages section 18(2) and that once section 18(2) is engaged, section 18(1) cannot be said to continue to apply. This in turn meant that section 44 of FOIA would not be engaged since there would be no applicable condition such as would prohibit disclosure. Reference was made to the Tribunal's decision in Allison v Information Commissioner and HMRC (EA/2007/0089). Reference will be made to that decision in further detail below.

31. Secondly, the Commissioner contended that section 18(2)(h) required that consent under that sub-sub-section required that the disclosure be to the general public as distinct from a specified person. Reliance was placed in this regard on the Tribunal's decision in Guardian & Brooke v Information Commissioner and BBC (EA/2006/0011 and EA/2006/0013) especially at para 52 which confirmed that disclosure under FOIA "is effectively an unlimited disclosure to the public as a whole, without conditions …". By way of a subsidiary point the Commissioner added that the Revenue, prior to agreeing to the requested disclosure on the basis of any alleged consent, would have had to ensure that for data protection purposes under the DPA such consent was clear, unambiguous, freely given and informed. Then and only then, the Commissioner claimed, would the Revenue have been disabled from relying upon the exemption in section 44. There had been no evidence in the Commissioner's view that suggested that Mr H had been advised of the ramifications of giving consent including any advice relating to the fact that were release to be made of the data to the Appellant neither the Revenue nor the data subject could impose any restrictions upon what use the Appellant made of the information.

32. Thirdly, the Commissioner reiterated his finding made in the Decision Notice in the light of the application of section 18(1), that section 44(2) of FOIA was thereby engaged with the result that the duty to confirm or deny that the information was held under section (1)(a) of FOIA did not apply.

33. Finally, the email of 22 September 2008 apparently referred to as being dated 19 September in the Reply "clearly" suggested that the Appellant was not requesting the information for itself but rather was requesting information as agent on behalf of its client, ie Mr H. If such was the case then section 40(1) of FOIA would be engaged. That sub-section is well known and provides in general terms that any information to which a request for information relates is exempt information as it

constitutes personal data of which the applicant is the data subject. In the alternative the Commissioner contended that even if the Appellant was the sole requester on its own account the principle contained in section 40(5)(b)(i) of FOIA would be engaged such that the Revenue would not be obliged to confirm or deny as to whether it held the requested information. As a corollary to this last contention, the Commissioner submitted that it would have been more appropriate for Mr H to have made a subject access request for the information requested under section 7 of the DPA. As will be seen below, the Tribunal respectfully agrees.

The Appellant's Response

34. The first part of the Appellant's Response addresses the question what kind of consent needed to be in play before the requirements of section 18(2)(h) were met. In this respect two points were made. First, the Appellant did not accept that the form of consent wording recommended by the Revenue was not "intended" by the Revenue to constitute sufficient consent for the purpose of the sub-sub-section. Secondly, the Appellant disputed the contention that the type of consent required under that sub-sub-section had "necessarily" to "contain any of the special features" that the Commissioner had proposed.

35. In short, consent which took the form of the consent expressed and/or contained in Form 64-8 was "likely to be sufficient evidence of consent" under the relevant provisions not least because the Revenue published instructions to its staff suggesting that it was sufficient in that regard. The Appellant also claimed that the Revenue by its own published guidance on the issue of taxpayer consent to disclosure supported its claims with reference being made to para 43000 of the Revenue's Information Disclosure Guidance Manual which stated that for most

direct taxes the "standard way" for a customer to provide such consent was by completing and returning the above mentioned Form.

36. The Appellant went on to contend that where a professional adviser made a third party request under FOIA, that request covered "taxpayer-specific" information about a client who signed a Form 64-8 authority in favour of the particular professional. There was therefore "no obvious reason" why such a signed Form was not sufficient evidence of consent and/or was not otherwise considered adequate in the circumstances.

The evidence

37. In the Tribunal's view, the critical evidence in this case was effectively contained in witness statements provided by two officials and representatives of the Revenue.

38. The first was Michael Davidge who since 2005 has been a Policy Adviser working in the Information Strategy Team within the Central Policy Directorate of the Revenue. That Team is responsible for the policy dealing with information confidentiality and information disclosure as dealt with by the Revenue and in particular with FOIA and DPA matters.

39. Mr Davidge stressed the fundamental importance of taxpayer confidentiality which for a long time has been enshrined in statutory form, most recently in the CRCA. The CRCA also reflected the merging of the Commissioners of Revenue with the Commissioners for Customs. He pointed out that the various exceptions in section 18(2) were "permissive" in that none compulsorily required Revenue officials to make a decision. In each case a judgment had to be made as to whether disclosure was appropriate. Given the impact of data protection and human rights considerations, any information supplied

under the exceptions had to be necessary and relevant for the purposes of the disclosure. Each disclosure was made on a case by case basis.

40. Breaches of the duty which were serious led to criminal penalties under section 19. Equally the DPA carried sanctions for wrongful disclosure of personal data. Consent would usually be given where a taxpayer instructed a third party who would normally be an agent to deal with the individual's tax affairs. In considering whether it should accede to a request, the Revenue relied on the Commissioner's Legal Guidance on the DPA. Reference will be made to the said Guidance with regard to the secondary issue below. Mr Davidge said that the following features had to be taken into account, namely first the fact that the consent was freely given with the taxpayer enjoying the right or option to refuse consent, secondly, the fact that consent had to be obtained from all those to whom the information related, thirdly the fact that the consent needed to be a fully informed consent in the sense that the taxpayer needed to be aware or made aware of the consequences of providing or refusing consent, fourthly the fact that the consent had to be consent to the information that was necessary to support a particular operation coupled with a clear understanding of what the information would be used for and how and why, fifthly the fact that consent would usually be time limited in some way and not open ended and sixthly and finally, the fact that the customer should be at liberty to withdraw his consent at any time. Mr Davidge stated that if these factors were respected the Revenue itself had certain guidelines which in effect reinforced these considerations and which it sought to respect.

41. Turning to section 18(2)(h) Mr Davidge pointed out that, in his words, the CRCA did not provide for "a statutory restriction on onward disclosure" in respect of disclosure made under section 18(2)(h). As will be seen the Appellant took issue with that formulation and further observations will be made on it below. The Revenue, he confirmed,

was simply not in any position directly to limit the use of the information once it had been disclosed to a third party. There was, he stated, "an understanding" that information disclosed under section 18(2) would be used only for that purpose.

42. This led him further to observe that it was "fair" to say that the Revenue never envisaged the situation in which it would make a disclosure with the consent of the taxpayer under FOIA. The assumption was that individuals or businesses would not need to use FOIA to obtain information about their own tax affairs. In his words (see paragraph 22):

> "*The introduction of section 23 into the CRCA was made to ensure that customer information could not be routinely obtained under [FOIA].*"

As will be seen below the Tribunal has great sympathy with this view. It is equally fair to say that in the submissions as they developed during and after the hearing the Commissioner in effect agreed that in reality only personal data would be in play thus attracting the relevant data protection principles when considering the ambit and scope of section 23. This reflects the observations already made above in paragraphs 16 and 33. Mr Davidge went on to say that the Revenue would therefore be in breach of its obligations under CRCA, DPA and the human rights legislation if it failed to ensure that the person to whom the information related was aware of the full implications of consenting to the releasing of information under FOIA. In other words, even if consent to disclosure under FOIA were feasible, the consent given in the present case did not constitute a sufficient manifestation of such consent.

43. Mr Davidge was cross examined by the Appellant but the Tribunal does not find that any responses he gave were relevant to the issues in the Appeal insofar as not already canvassed in the documentation.

44. The second material witness was Margaret Earing, a case worker in the FOIA policy team within the Central Policy Directorate at the Revenue. She has for a number of years been in that position. She provided a short written statement in which she dealt with the various exchanges between the Appellant and the Revenue principally in November 2008 relating to the question of consent. In essence she confirmed that she had not recommended any specific consent but had suggested that a letter from Mr H be sent by the Appellant authorising the Appellant to request information on its behalf. She went on to explain that by this she meant it would be sufficient in order for a specific team within the Revenue known as the Complex Personal Returns Team to consider what information might then be available to the Appellant as a formal FOIA applicant, either under the DPA in respect of personal information or under the Revenue's own discretionary powers under the 2005 Act with regard to any non personal information that pertained to Mr H.

45. Again with respect to the way in which Ms Earing gave her evidence the Tribunal does not find that it added materially to its resolution of the main issues on the appeal. In her oral evidence she maintained that the Revenue took the view that FOIA was not, as she put it, "in play" and that the consent produced in this case addressed disclosure which was discretionary in nature only.

46. After considering all the evidence the Tribunal is firmly of the view as put forward by the Revenue that it never represented that the form of consent used would be adequate for any disclosure to be made under FOIA.

47. The Appellant responded to these contentions of the Revenue by alleging that the legislation in the words of the Appellant's written submissions was "simple". This meant that section 18(1) is in all respects subject to the exemptions set out in section 18(2) and in particular in the present case to section 18(2)(h). Reliance was placed on three 2008 Decision Notices issued by the Commissioner and in particular on the previous decision of this Tribunal in Allison v Information Commissioner and HMRC: see above. The Decision Notices in two of the three cases refer to the Allison decision. In the circumstances, the Tribunal does not feel that any further reference need be made to these two Decision Notices.

48. Before turning to a reconsideration of the Allison decision, the Tribunal wishes to address one subsidiary argument raised by the Appellant in relation to section 18(2)(h) which, it contended, "does not incorporate any question of whether or not the disclosure would result in disclosure to the wider public". In effect the Appellant's submission was that subject to any professional duty and confidentiality applicable to the particular tax adviser disclosure to a tax adviser with the taxpayer's consent "already amounts to public disclosure" (emphasis added).

49. The Tribunal respectfully disagrees. In particular the Tribunal does not understand Mr Davidge in stating that the CRCA "does not provide for a statutory restriction on onward disclosure" to be asserting as much. If, as the Tribunal finds, the FOIA and the section 18 CRCA regimes are distinct, the nature and content of the consent addressed by section 18(2)(h) can have no bearing upon disclosure under FOIA. Quite apart from that fundamental finding, the specific terms and effect of the form of consent engaged in this case render it impossible to justify the conclusion that some wider disclosure was thereby triggered.

50. In support of that proposition, the Appellant contended that nothing in FOIA expressly makes reference to disclosure to "the wider public" as

distinct from disclosure to an applicant making the relevant request. In the Tribunal's judgment, such a contention completely misunderstands the legislative philosophy underlying FOIA. During the sponsorship debate relating to the original Bill, frequent mention was made of the "right to know", that right being vested in the public, albeit very often through the agency and efforts of the press. Each request made under FOIA reflects a general right subject to certain exemptions enjoyed by every person to have disclosed to the public, all information legitimately disclosable within the terms of the request held by the requested public authority, irrespective of the requesting person's interest in that information and irrespective of the subject matter of the information.

51. As indicated above, the Commissioner also takes issue with the Revenue's contention as to the proper construction of section 18(1). In particular the Commissioner contended that section 18(1) "by itself" did not constitute a "prohibition on a disclosure" within the meaning of the heading of section 44 of FOIA at least. This is because section 18(3) provides as has been seen above that sub section (1) "is subject to any other enactment permitting disclosure". That simple contention is clearly uncontroversial but it does not of itself inevitably lead to the conclusion that section 23 "makes provision for a sub set of the information to which section 18(1) applies", specifically the type of information, ie the type of information fulfilling the considerations of section 23, such as to be exempt information for the purposes of section 44. That in the Tribunal's respectful view is merely to restate the argument: It does nothing to reconcile the two regimes which find expression in sections 18 and 23 respectively.

52. The Commissioner further contended that section 23 only applies to taxpayer information to which section 18(1) applies. That proposition too not only misstates the lack of pure symmetry between the two regimes but also fails to provide any reasons as to why section 18(1) must be read subject to the exemptions in section 18(2) in all cases.

53. The Commissioner also contended that the Revenue's reading of section 18 as a whole would mean for example that a court-ordered or court-generated disclosure referred to under section 18(2)(e) "would never be a disclosure under FOIA". The Tribunal does not interpret the Revenue's argument as in any way suggesting as much. If disclosure were made by the Revenue in the wake of a court order, no doubt with little or no room for the operation of any discretion on the part of the Revenue, whether or not a request for disclosure under FOIA should be acceded to would constitute an independent exercise. Such an exercise would depend upon considerations which went beyond the scope of the court order in question including but not limited to the applicability or otherwise of the relevant exemptions under FOIA.

54. In Allison supra the Appellant sought disclosure under FOIA from the Revenue of its dealings and exchanges with a leading mutual assurance company relating to one of its pension related products and plans. The Revenue refused to disclose the information requested relying upon section 44 and sections 18 to 20 of CRCA. In his Decision Notice the Commissioner upheld the refusal on the grounds that he was satisfied that the information held by the Revenue was obtained under one of its functions within the meaning and effect of section 18 of CRCA. In particular the Commissioner found the disclosure under FOIA did not constitute a "function" of the Revenue.

55. However, the grounds of appeal addressed four alleged failures on the part of the Commissioner. Three grounds addressed the omission to deal with the exceptions set out and reflected by section 18(2)(c) and (2)(h) of the CRCA. The fourth dealt with a generalised complaint that the Commissioner had failed to deal properly with certain correspondence.

56. Six specific issues were considered by the Tribunal. The only issue which is relevant to the primary issue considered on this Appeal relates

to what was called the fifth question, namely whether in considering the prohibition against disclosure in section 18(1), account should be taken of the exceptions set out in section 18(2). That issue was the only issue on which the Commissioner and the Revenue differed. The Revenue contended, as it does now, that section 23(1) when read together with section 18(1) leads to the conclusion once section 18(1) is engaged, section 44 necessarily applies.

57. At para 65 the Tribunal which dealt with the Appeal found that "on balance" the Commissioner's arguments were to be preferred on the above issue, namely that section 44 would only be engaged when none of the exemptions apply. At that paragraph the Tribunal stated as follows, namely:

> "*It is simply not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). … As a matter of statutory construction, therefore, the Tribunal finds that in the absence of clear words which would expressly distance the operation of section 18(2) with section 18(1) such as to make section 18(1) a complete code in the way suggested, it is necessary to consider whether any of the exceptions under section 18(2) apply before an answer can be given to the question of whether disclosure is prohibited under section 18(1).*"

58. It can be seen from what has been said above that strictly speaking the said reasoning was not part of the ratio of the decision in the appeal given the scope of the three principal grounds of appeal. In any event this Tribunal is not bound by its own earlier decision.

59. As is clear from this judgment, the issue regarding the interplay between Section 18(1) and Section 23 has been revisited in much further depth than was done in the Allison decision. Moreover, the

Allison decision was conducted on paper. It seems, however, that the decision in that appeal caused sufficient concerns such that the findings as quoted above were the subject of subsequent express legislative amendment in the form of section 19(4) of the Borders Citizenship and Immigration Act 2009. The said provision provides as follows, namely:

> "*(4) In section 23 of the Commissioners for Revenue and Customs Act 2005 … after sub section (1) insert:*
>
> *"(A) 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 informations relating to a person is prohibited by subsection (1) of that section."*

60. An Explanatory Note provides as follows, namely:

> "*[Section 19] makes clear that exceptions to the duty [of confidentiality] are disregarded for the purposes of this analysis [ie the exception and information subject to the duty of confidentiality] as to do otherwise would be at odds with an FOI regime that does not require a requestor to justify a request. There is a consequential amendment to section 23 of CRCA 2005 in similar terms."*

61. In further submissions provided to the Tribunal pursuant to directions made following the appeal, the Commissioner quite properly referred to the fact that a later Act, ie the 2009 Act which by definition was not in force at the time of the request of this case or the Decision Notice, may only be taken into account in interpreting a statutory provision if the earlier provision is ambiguous. See generally *Cape Brandy Syndicate*

v IRC [1921] 2 KB 407 especially at 414. The Tribunal in the light of the submissions now made to it is now entirely satisfied that no such ambiguity exists as between Sections 18 and 23.

62. However, in the alternative, the Tribunal is content to recognise the force of the further written submission by the Revenue that in the present case there was an ambiguity or a sufficient ambiguity in section 23 inherent in the very wording of that section. In such a case in accordance with the principles briefly referred to above, section 19 of the later Act can therefore legitimately be taken into account.

63. It is fair to say that the Commissioner quite properly pointed out that in general terms it can be inferred that Parliament enacted a statutory provision for a purpose. However, in the Tribunal's view insofar as that proposition goes it does not follow in this case that the subsequent enactment of itself compels the construction contended for by the Commissioner and by the Appellant. It is enough to presume that clarification was thought appropriate and no more.

64. In conclusion, the Revenue pointed to the facts in this case as serving to illustrate the difficulties of reconciling the two regimes as set out and reflected in sections 18 and 23. If in the present case, it was said, the Revenue had taken the view that in the light of the particular form of consent granted by Mr H, information was disclosable under FOIA, then by disclosing the same to the world there would have been at least a tension if not an outright inconsistency with the Revenue's overall duty of confidentiality.

65. In general terms the Tribunal would be prepared to accept that proposition. However it feels inclined to say that the same facts as related in that example beg the question as to how the Revenue could in fact be said to be disclosing information to the world in general, let alone why it would seek to do so. The facts of this case, as has

already been indicated, involve in effect a fiction. The Appellant used the FOIA regime to engage in what was in effect a subject access request by Mr H himself.

66. It is for that reason mindful of the particular facts of this case that the Tribunal is firmly of the view that to import the notion of consent, coupled with the fact that the type of consent on the Commissioner's own case and that of the Appellant would differ dependant upon whether a request was made under section 18(2)(h) or under FOIA, is to introduce an unwarranted complexity totally avoidable if the Revenue's arguments on construction are adopted.

67. The findings made above are sufficient to dispose of the primary issue which divided the Revenue and the Commissioner. However, the Tribunal is of the view that the appeal can otherwise properly be disposed of on the more straightforward basis that Section 40 of FOIA was engaged and that there was no demonstration made by or on behalf of the Appellant and/or Mr H that disclosure was otherwise warranted under that provision. On the Appellant's own admission despite its clear terms, the subject access request was used as a means of attempting to seek disclosure for the Appellant's own professional benefit of certain tax insights and learning believed to be held by the Revenue regarding certain specific taxation issues. Whatever other means were open to the Appellant to seek such disclosure, the means in fact employed were inappropriate.

The secondary issue

68. For the reasons set out in the preceding section, particularly in the last two paragraphs, in the Tribunal's judgment determination of the first issue in favour of the Revenue is sufficient to dispose of this Appeal.

69. However, in the event that the Tribunal is wrong in so finding it is necessary to consider whether the "consent" in fact produced by Mr H was sufficient. The Tribunal has no hesitation in saying that it was not sufficient for the following reasons but subject to certain qualifications.

70. First, as is implicit from the terms of section 18(2)(h), the consent referred to must reflect and correspond to the circumstances in which the consent is relevant. A typical case may well be a case such as the present where taxpayer information is to be relayed to an adviser. It is self evident that the consent cannot therefore be given in a vacuum: it must be framed to take into account and reflect the actual disclosure which is in issue.

71. Second, it appears that the usual type of consent reflects DPA considerations and the applicable guidance to which resort is apparently had by the Revenue, ie that provided by the Commissioner's office with regard to the DPA in determining whether consent provided is adequate. The relevant passage which was produced to the Tribunal says that consent should be fully informed and limited to the information necessary to support a particular request. As indicated above, this Legal Guidance is designed to deal with data processing. In the Tribunal's view its contents do not fit easily or at all into a purely FOIA related context.

72. Both the Commissioner and the Revenue (subject to the latter's primary reliance on the correctness of the arguments on the first issue) in effect then tailored the above principles coupled with the Revenue's own internal guidance criteria in order to maintain that the consent in place in the present case did not satisfy FOIA requirements in that it was not freely and fully informed, given or adequate.

73. The Tribunal considers that, even if it were possible to make a FOIA-related disclosure under section 18(2)(h), there would be a very high

threshold regarding the degree and type of informed consent required. The Tribunal finds that it was clear from the brief evidence of Ms Jane Thomson (a tax adviser to the Appellant) that she did not realise the effect of FOIA disclosure would be to place the Appellant's client's tax affairs in a category of information that would be disclosable to anyone who chose to ask for it. The Appellant maintained throughout the hearing, as well as in its further written submissions, that information relating to Mr H which was disclosed to it would remain confidential under the Appellant's professional rules and obligations. As already indicated above this ignores the way in which FOIA works which is to characterise information as either generally disclosable or not disclosable, in the latter case because it is subject to an exemption. Mr H did not provide a signed consent which recognised that the effect of a successful FOIA application would be to strip his information of all confidentiality, in the event that any other person made a request for the very same information. This is perhaps not surprising, as this point was in the Tribunal's judgment, clearly not understood by the Appellant.

74. Nonetheless on the Tribunal's finding that it was not possible at the time of the request in this case for the taxpayer to have consented to the disclosure of his taxpayer information under FOIA by virtue of section 18(2)(h), the Tribunal respectfully agrees with the Commissioner and with the Revenue that two criteria need to be applied. First, the law on guidance as to consent as to disclosure of personal data must be respected and secondly, there must be a clear and unequivocal consent to the particular disclosure in question.

75. The Commissioner suggested that it was conceptually or legally possible for an individual to be in a position to give "informed consent" to release of his personal data under FOIA. The Tribunal respectfully declines to accept that proposition. It is true that outside the realm of data processing, a person making a request under FOIA "must

understand that the information released under FOIA is deemed to be released to the public as a whole …" (Commissioner's original written submissions at paragraph 51) but this is not to say that any wider proposition can be drawn from this. Reliance was placed by the Commissioner on the Tribunal's decision in Stephen v Information Commissioner and Legal Services Commission (EA/2008/0051) (28 February 2009). In that case a provision in the Legal Aid Act 1988 attracted the operation of section 44 of FOIA. There was, however, an express exemption to the former provision if the relevant individual consented to the request of the required information. This last factor, arising as it did in a quite different statutory context, cannot in the Tribunal's judgment be used as basis for a wider proposition such as the one advanced in this appeal that can justify the existence of some generalised form of informed consent for release of information under FOIA. The Commissioner's Legal Guidance refers to and addresses the DPA and not FOIA.

76. The Commissioner's response to this is to allege as was done during and after the appeal that all information covered by section 23(1) would almost certainly constitute personal data. The Tribunal would be inclined to agree with this but has not heard full argument on the point. The Commissioner has also quite properly admitted in his subsequent written submissions that there is no relevant material or other authority on the point. In the circumstances the Tribunal does not regard it as being necessary to rule on this and is content to adopt the narrow proposition that a consent to disclosure of information caught by section 23(1) under section of FOIA would need to constitute a consent that complied with the requirements for consent as to disclosure of personal data.

Conclusion

77. For all the above reasons the Tribunal dismisses the Appeal.

Supplementary Notice

78. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the area or areas of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

4th March 2010

IN THE UPPER TRIBUNAL **Appeal No. GIA/1205/2010**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	PricewaterhouseCoopers LLP
Tribunal:	First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No:	EA/2009/0049
Tribunal Venue:	London Pocock Street
Hearing Date:	4 March 2010

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I give permission to appeal.

REASONS AND OBSERVATIONS

Introduction

1. The grounds of appeal are arguable, at least in part. The Observations that follow are designed to assist the parties in the preparation of their further submissions on the appeal. The comments that follow are thus provisional in nature and are certainly not intended to indicate a fully considered and concluded view on the issues. Case management directions follow at the end of this document.

The interpretation of sections 18 and 23 of CRCA 2005

2. The principal ground of appeal appears to be that the First-tier Tribunal (FTT) was incorrect in its interpretation of sections 18 and 23 of the Commissioners of Revenue and Customs Act (CRCA) 2005 (Grounds of Appeal, paragraphs 1 and 2). If that submission is right, then on that basis it is arguable that the FTT decision dated 4 March 2010 contained a material error of law. I agree that this point is arguable.

3. In April 2008, in the earlier case of *Allison v Information Commissioner and HMRC* (EA/2007/0089), the Information Tribunal (now the FTT) ruled that it was necessary to consider whether any of the exceptions in s.18(2) apply before an answer can be given to the question of whether disclosure was prohibited under s.18(1). In doing so, on that occasion the Information Tribunal accepted as correct the construction which is now being put forward in the present case by the appellant and the Information Commissioner. For the present, I see no significance in the structural change from the status of the Information Tribunal to part of the General Regulatory Chamber (GRC) of the FTT.

4. In the present case, the FTT has taken a different approach to that adopted by the Information Tribunal in *Allison*. Instead, the FTT has adopted the construction urged by HMRC (the very construction which had been rejected in *Allison*), namely that, read together, the effect of ss.18 and 23 is such that s.18(2) is not a complete code on disclosure. Rather, HMRC argued that the information sought was exempt information within s.44 of the Freedom of Information Act (FOIA) 2000 as its disclosure was prohibited under s.18(1) CRCA 2005.

5. There may, of course, be grounds for the FTT taking a different view in the present case. For example, the point was arguably obiter in *Allison*, which had been decided on the papers alone. However, while the decision in *Allison* was not binding on the FTT in its consideration of the present appeal, the different approaches adopted in the two tribunal decisions demonstrate that there are arguable and competing interpretations of the legislation. The main ground of appeal is arguable and warrants exploration by the Upper Tribunal.

The adequacy of reasons point

6. The appellant raises a number of subsidiary arguments. In particular, the appellant argues that the FTT failed to give adequate reasons for preferring HMRC's view and for rejecting the appellant's arguments to the contrary (Grounds of Appeal, paragraph 2(d)). Given that there are complex issues of statutory interpretation at stake, and plausible arguments exist on both sides, and given that the FTT's decision is apparently at odds with that of the Information Tribunal in *Allison*, it is also arguable that the FTT's reasons in relation to the specific question of the construction of, and interaction between, ss. 18 and 23 (the "primary issue") were possibly inadequate. I note that the appellant argues that there is little evidence of the FTT having engaged with the detailed arguments regarding statutory interpretation that were raised by the parties in their submissions prior to the appeal hearing. Did the FTT need to give a fuller account of <u>why</u> it preferred HMRC's position to that shared by the appellant and the Information Commissioner? Was it enough for the FTT, in effect, to adopt the HMRC arguments by incorporation? Or, rather, was there an increased onus on the FTT to provide fuller reasons for its rejection of the appellant's and the Information Commissioner's submissions?

Other grounds of appeal

7. The appellant raises a number of other subsidiary arguments. These only need be considered briefly at this stage. It is argued that the FTT was in error in being influenced by the amendment made by s.19(4) of the Borders, Citizenship and Immigration Act (BCIA) 2009 (Grounds of Appeal, paragraph 3). The effect of that amendment was that s.23 CRCA 2005 expressly provided that s.18(2) should be disregarded when determining whether the disclosure of information is prohibited by s.18(1) for the purposes of s.23. However, is it not arguable that the FTT's discussion in relation to the amendments made by BCIA 2009 was focused on rejecting the argument that the amendments supported the construction proposed by the appellant and the Commissioner, rather than contending that the amendments necessarily supported HMRC's position? Indeed, the FTT specifically stated (at

paragraph 61) that it was satisfied that there was no such ambiguity between ss. 18 and 23.

8. The appellant also makes a series of detailed objections (Grounds of Appeal, paragraph 4) to the FTT's conclusion that Mr H's consent to the disclosure of the information requested of HMRC by the appellant did not satisfy s.18(2)(h) CRCA 2005, because it failed to recognise the extent and implications of a disclosure of that information under the FOIA. It appears that the FTT may have dealt more thoroughly in its reasons for its decision with this question (the "secondary issue") than the primary statutory construction point. Do the appellant's arguments actually address the contention of the FTT and the Information Commissioner that an adequate consent under section 18(2)(h), in relation to an FOI disclosure, would have to be a consent to disclosure to the public at large? I acknowledge, however, that this issue, like the "primary issue" (with which it is intertwined), is a complex legal question. On that basis the point may be arguable, although I have to say that the *Pepper v Hart* point in Grounds of Appeal paragraph 4(f) is less than convincing, given that there was only a passing mention of *Pepper v Hart* by the FTT as part of the background to the case.

9. The appellant's point at Grounds of Appeal, paragraph 5 seems to be merely an extension of the general argument advanced at paragraph 4 of the Grounds, as the FTT's discussion of data protection was part of its consideration of the necessary form of the consent under s.18(2)(h).

10. The appellant argues generally that the FTT's treatment of the evidence was unreasonable and unfair (Grounds of Appeal paragraphs 6, 8, 9 and 10). I would merely note that the evaluation and weighing of evidence is always a matter for the first instance tribunal, especially where that is an expert tribunal as here. In addition, the appellant appears to be incorrect in its assertion that the FTT entirely failed to record that Jane Thomson had given evidence for the appellant at the oral hearing (see paragraph 73 of the FTT decision). The complaint that the FTT failed to make findings of fact in relation to the contention that the appellant had its own genuine interest in obtaining the requested information may also not be borne out (see paragraph 67 of the FTT decision). Plainly the FTT decision gave much greater consideration and emphasis to the evidence of the witness statements on behalf of HMRC (see e.g. paragraphs 37-45). However, it is arguable that the questions in relation to which Ms Thomson gave evidence (which appear from paragraph 6(a) of the Grounds of Appeal to have been firstly whether Mr H had given oral consent prior to the FOIA request being made, and secondly whether the appellant was making the request on account of its own interest or on behalf of Mr H) were perhaps of little significance in the context of the FTT's overall decision.

11. The appellant's argument that the FTT's decision was confused and unclear (Grounds of Appeal paragraph 7) may add little or nothing to the other grounds of appeal considered above.

CASE MANAGEMENT DIRECTIONS

1. In these proceedings before the Upper Tribunal the Appellant is PricewaterhouseCoopers LLP, the First Respondent is the Information Commissioner and the Second Respondent is Her Majesty's Revenue and Customs (HMRC).

2. The Upper Tribunal Office is to send each of the parties a set of the papers held on Upper Tribunal file GIA/1205/2010, i.e. pages 1 – 63 together with the Notice of this Determination with Reasons and Case Management Directions. The Upper Tribunal also holds the original FTT file. It is assumed that the parties have their own copies and so the original FTT file will not be duplicated.

3. The parties are to make their written submissions in the following order:

(1) the First Respondent;
(2) the Second Respondent;
(3) the Appellant.

4. By 4 p.m. on 30 July 2010 the First Respondent has permission to serve a response to the appeal on the Upper Tribunal and on the other parties.

5. By 4 p.m. on 27 August 2010 the Second Respondent has permission to serve a response to the appeal on the Upper Tribunal and on the other parties.

6. By 4 p.m. on 24 September 2010 the Appellant has permission to serve a reply to the First and Second Respondent's responses on the Upper Tribunal and on the other parties.

7. In their respective submissions the parties should indicate:
   (i) whether or not they wish to have an oral hearing before the Upper Tribunal;
   (ii) the terms of any decision which it is suggested the Upper Tribunal should give on the appeal;
   (iii) if it is suggested that there should be a re-hearing by the first-tier Tribunal, what directions the Upper Tribunal might give;
   (iv) whether or not they would consent to a decision without reasons.

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **30 June 2010**