



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0253

BETWEEN

ELIZABETH ROBERTS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

HMRC

Second Respondent

Tribunal

**Brian Kennedy QC
Paul Taylor
David Sivers**

Hearing: 31 March 2015.

Location: Piccadilly Exchange, Mosley Street, Manchester.

Decision: Appeal Refused.

Subject Matter: The Freedom of Information Act 2000 (“FOIA”) and reliance by the Second named Respondent (“the Public Authority”) on Section 44 (2) to neither confirm or deny whether the requested information was held.

Introduction:

1. This decision relates to an appeal brought under section 57 of FOIA. The appeal is against the decision of the the First Named Respondent, the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 11 September 2014 (reference FS50537767) which is a matter of public record.
2. An oral hearing took place on 31 March 2015 where the Appellant appeared as a Litigant in Person, the Commissioner relied on his DN and his written Response, dated 7 November 2014, to the Grounds of Appeal from the Appellant dated 5 October 2014 and the Public Authority was represented by Robin Hopkins of counsel.

Background:

3. The Appellant wrote to the Public Authority on 26 September 2013. The request, made in the following terms was made directly to the Records Retrieval Service which deals with requests for employment histories on a business as usual basis: "I am completing my family history and would like to know the following work record of a close relative. This person, born 1906 in Lancaster died 10 December 1953 Age 47. A qualified teacher he taught from 1926 at Ardwick municipal school — until its closure in July 1952. But from 1943 until 1949 there is a gap of six years. His address from 1934 until his death was (redacted) etc.". This resulted in a number of exchanges between the Appellant and the Records Retrieval Team.
4. On 27 November the appellant made the following request by way of a FOIA request; *"Requesting information on; [Named Person redacted], d.o..b. 3 February, 1906 at [Address redacted] Lancaster. Died 10 December 1953."*
5. The public authority responded on 29 November 2013. It refused to confirm or deny whether it held any information within the scope of the request on the basis of the exemption at section 44(2) FOIA. This decision was challenged by the Appellant who requested an internal review on 18 December 2013. She queried the public authority's response in view of her previous exchanges with the Records Retrieval team and also disagreed that confirming or denying whether the requested information was held by the public authority would lead to the identification of [Named person] because in her own words; *"I have prior knowledge of the identity of [Named person] and in fact identified that individual to HMRC hater than HMRC identifying him to me."*
6. Following an internal review the public authority wrote to the Appellant on 17 April 2014. It clarified and distinguished the position in relation to her exchanges with the Records Retrieval team as opposed to the FOIA request and upheld the original decision in relation to the exemption at section 44 (2) FOIA. The Commissioner has at all material times distinguished the request of 26 September 2013 from the request under FOIA of 27 November 2013.

Scope of the Case:

7. The Appellant contacted the Commissioner on 7 April 2014 by way of complaint against the Public Authority's handling of her request for information. She informed the Commissioner that she did not request details of [Named Person]'s employment records from 1943 to 1949. Rather she wanted to know where [Named Person] worked from 1943 to 1949. The scope of the Commissioner's investigation therefore, was to determine whether the public authority was entitled to rely on section 44(2) to neither confirm nor deny whether it held any information about where [Named Person] worked from 1943 to 1949.

Legislative framework:

8. Under section 1(1) of the FOIA, a person who has made a request to a public authority for information is, subject to other provisions within the FOIA: (a) entitled to be informed in writing whether it holds the information requested and (b) if it does, to have that information communicated to him. This duty to provide the requested information will not arise where the information is itself exempted under provisions contained in Part II of the FOIA.

9. In this case the Respondents argue that the exemption relied upon is an absolute exemption under section 44 of the FOIA which (in so far as it is relevant to this appeal) provides:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it - (a) is prohibited by or under any enactment —“ & (2) The duty to confirm or deny does not arise if the confirmation or denial would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of the paragraphs (a) to (c) of subsection (1).

10. The relevant “enactment” under section 44 for the purposes of this appeal is the Commissioners for Revenue and Customs Act 2005 (“CCRCA”) at Section 18(1) CRCA which states: *“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.”*

11. Section 23(1) CRCA states: *“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 FOIA — 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.*

The Decision Notice:

12. The Commissioner found that the exemptions at section 44 are absolute. He further considered the factual matrix pertinent to this request and found that confirming or denying whether the requested information is held by the public authority would reveal information which if held by the authority, would be held in connection with its functions to assess and collect tax. The Commissioner further found that confirming or denying whether the requested information is held, would reveal the identity of [Named Person].

13. The Commissioner clearly indicated in his reasoning that the reason for the appellant making the request is irrelevant and requests under FOIA are considered motive blind. The public authority, he explained has to provide a response which is not just for the benefit of the Appellant, but also for the benefit of the public at large.

The Grounds of Appeal:

14. The Appellant argues that the requested information will assist her in tracing family members and their personal history and the refusal to disclose any such information, if it exists is a breach of her Article 8 right under the ECHR Act 1998. While the Commissioner recognises Article 8 rights, he argues that the Appellant is not the victim, and in any event the interference is justified under statute and is not disproportionate.
15. The Appellant argues further that the Commissioner erred in his interpretation of section 23(1) CRCA in three ways: (a) in that the Commissioner should have concluded that the section relates only to the current function of the HMRC, (b) the identity is already known to the Appellant therefore disclosure would not “specify the identity of the person” and (c) the section does not relate to deceased persons.
16. The Commissioner was satisfied that the information, if held, on places where the relevant person was employed would be information held by the public authority in connection with its function to assess and collect tax. The Commissioner found that there is nothing in the wording of the section to suggest that it is restricted to the “current function” of the HMRC as suggested by the Appellant. The Commissioner determined that the fact that the identity of the Named Person was known to the Appellant is not relevant. Disclosure under the FOIA would, through the name and or address and or work details, if held permit identification of the named person to the public. Finally, and again, the Commissioner found that there is nothing in the wording of the relevant section to suggest that the reference to a person could not include persons who are deceased if disclosure would “*specify the identity of the person to whom the information relates*”. This again the Commissioner found includes information such as the place of work or home address of the Named Person all of which could inform members of the public of the identity of the named person.

REASONS

17. The Tribunal accept and adopt the reasoning as set out by the Commissioner in the DN and in his Response to the Grounds of Appeal as referred to above. At the hearing, the Appellant recognised the weight to be given to the Commissioners reasoning but simply sought assistance in finding information on the lost years of a much loved relative. It is fair to say that the Tribunal observed and the Appellant acknowledged that the Public Authority went beyond the bounds of their duty to assist the Appellant in this matter both prior to the hearing and at the oral hearing herein. The Tribunal also suggested a number of ways in which the Appellant might find more information on the lost years of the loved relative. However the Tribunal explained the particular difficulties for her appeal in relation to the exemption raised and relied upon under section 44(2) of the FOIA in this case and in the reasoning provided by the Commissioner in support of the DN, the subject matter of the appeal.

18. If there were any doubt about the veracity and soundness of the reasoning given by the Commissioner in his DN and in his Response to the Grounds of Appeal, the Tribunal, and apparently the Appellant were left in no doubt about the reasoning in the comprehensive and cogent submissions at the oral hearing by Mr. Hopkins on behalf of the Public Authority. It is often very difficult for those coming to FOIA for the first time to appreciate it covers information which satisfies public interests rather than matters of private interest. To compound this, when one corresponds with a public authority in connection with a request this may seem to be done, and was at the early stage of this request, in private. However, at the point of disclosure or refusal this is a matter of public record (save for the requestor's personal details). In other words, when a public authority considers a request it must ask itself whether the information can be disclosed to the world at large, rather than just to the requestor. Section 1(1) of FOIA says "*Any person making a request for information* - - -"; - consequently it cannot disclose to one person and not another.
19. In this case, under FOIA, the appellant requested information about a deceased loved relative. Her formal request followed a period whereby the public authority were, understandably, doing their best to assist her with her inquiries outside the FOIA. However at the point when the request was presented under FOIA, the public authority had no choice but to respond as they did given that any information, if found, would have been to the world at large. In particular this meant, they had to take account of the provisions under the Commissioners for Revenue and Customs Act 2005, and specifically sections 18(1) and 23(1). These provisions form a statutory bar against disclosure which is why the public authority properly claimed exemption under section 44(2) of FOIA. The Tribunal wish to acknowledge the kind consideration given to the appellant by the public authority, the HMRC and their team, in the way they handled the appellants sensitive request up to and including the oral hearing. This Tribunal has every sympathy with the appellant and wishes her success in tracing any records that she so deeply and understandably desires to find.
20. Further to the submissions on behalf of the public authority, this Tribunal find section 44(2) is an absolute exemption and the public interest test to be applied to qualified exemptions does not arise.
21. We find that for the public authority to confirm or deny whether it holds the requested information would itself reveal information, if it existed, that would be considered exempt from disclosure on the basis of section 44(1)(a).
22. We find by virtue of the fact that sections 18(1) and 23(1) of the CRCA which effectively prohibit the public authority from disclosing any information held in connection with a function of HMRC under the FOIA, the public authority in the circumstances of this case were correct to rely on the exemption under section 44(2).
23. We repeat, accept and adopt the reasoning of the Commissioner as set out in paragraphs 22 to 27 of the DN as supported by the detailed submissions by counsel on behalf of the Public Authority. For the avoidance of doubt we accept

the interpretation of “function” is wide and can and does include information relating to a workplace or employment details pertaining to a person living or deceased. We accept that there is no reason why information should no longer be exempt because of the death of an individual who might be identified from that information.

24. For the above reasons we refuse the appeal herein.

Brian Kennedy QC

8th April 2015.