Case Reference: EA-2023-0539

Neutral Citation Number: [2024] UKFTT 313 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers

Heard on: 9 April 2024
Decision given on: 18 April 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PIETER DE WAAL
TRIBUNAL MEMBER MIRIAM SCOTT

Between

MARK TULLY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed.

REASONS

Introduction

1. All parties agreed and the tribunal concurs that this appeal was suitable for determination on the papers.

2. This is an appeal against the Commissioner's decision notice IC-198579-P1Y0 of 16 November 2023 which held, on the balance of probabilities, that HM Treasury (HMT) held no further information within the scope of the request.

3. This appeal was heard on the same day as and by the same panel as the appeal in EA/2023/0462.

Background to the appeal

The Loan Charge

4. The background to this appeal is the Loan Charge. The following factual background is taken from a First-tier tribunal decision in relation to an unrelated request from another individual also arising out of the Loan Charge (EA/2023/0099).

5. The Loan Charge. This was a one-off charge imposed by the Finance Act (no.2) 2017 Sch11 on the amount outstanding, as at 5 April 2019, on any loans or quasi-loans falling within the scope of disguised remuneration (DR) rules. The effect is that the balances due on all qualifying DR loans made over the relevant years to an employee were rolled up and taxed as employment income received in the 2018/2019 tax year - potentially resulting in a very substantial tax bill for the recipient.

6. Mrs Justice Andrews provided the following factual background in **Petrus Jacobus Le Roux Zeeman, David Murphy v The Commissioners for Her Majesty's Revenue and Customs** [2020] EWHC 794 (Admin), an unsuccessful judicial review of the Loan Charge legislation:

> "5. This case is concerned with arrangements that HMRC characterise as "Disguised Remuneration" ("DR") schemes, by which an individual receives a reward for the work he performs for another (or services he provides to another) in the form of (i) a modest salary (if employed) or fee (if self-employed) which is much lower than what he would be entitled to be paid or to charge for the work or services, plus (ii) a loan which in effect makes up the difference in terms of remuneration. To take a simple example, he carries out work for which he might have charged £50,000, in return for a £10,000 salary or fee and a loan of £40,000. He is better off than he would have been if he took a salary or a fee of £50,000 for doing the same work, because the loan is supposedly free of any liability to tax or NIC. Moreover, if the salary or fee is kept low enough, he may not have to pay income tax at a higher rate. In many DR schemes, the loan represents by far the greater part of the financial compensation received by the individual in exchange for the work done or services rendered.

6. The loans are often made by trustees of Employee Benefit Trusts ("EBTs") rather than directly by the employer or customer, although the latter will be the source of the funds. In other cases, the loan may be made initially by the employer or customer and then assigned to the trustees of an EBT. The fact that the trustees of the EBT are, or become, the creditor, decreases the likelihood of the loan being called in, as the whole rationale of an EBT is to benefit past, present and future employees.

7. Whilst the salary (or the net profits in the hands of the self-employed contractor) will be liable to income tax and NIC, on the face of it the loan is not income, but rather, a transaction that gives rise to an indebtedness and a liability to repay. In balance-sheet terms the value of the "asset" in the form of the money received under the loan, is balanced against the corresponding liability. Neither item would usually appear in the profit and loss account of a self-employed individual, though the cost of borrowing (e.g. from a bank) might form a deductible expense. In practice, however, the creditor does not enforce the liability for many years, if at all - and is not expected to. The individual is free to spend the money as if it were his income, and rarely makes provision for its repayment. As a matter of economic reality, the loan is part of the reward he gets in return for his work or services, often the major part.

8. The position adopted by the Claimants (and by the promoters of such schemes) is that the loan does not attract a liability to income tax unless and until it is written off, at which point it can be characterised as a benefit. However, it could theoretically remain outstanding indefinitely, even after the death of the employee or trader, without attracting any liability to tax, at least on the capital element.

9. A large number of DR schemes exist, with many different permutations. Many have not been disclosed to HMRC under the disclosure of tax avoidance schemes legislation introduced in 2004 ("DOTAS"). Sometimes the trustees of the EBT are based offshore, making it harder for HMRC to obtain information from them. HMRC's position is, and has been for many years, that these arrangements are ineffective tax-avoidance schemes. The first witness statement of Mr Philip Gilbert, who was at all material times a member of HMRC's counter avoidance directorate, explains how HMRC's views were made known to the general public and to users of such schemes. Cockerill J describes in her judgment in *Cartreft* at [75]-[86] HMRC's "Spotlight" publications, going back to Spotlights 5 and 6 in November 2009, and other announcements and publications which made clear HMRC's intention to challenge arrangements where moneys which are a reward for the labour of an individual are diverted through some other form (including loans) without payment of PAYE or NIC.

> 10. Whilst HMRC have mounted successful challenges to certain DR schemes, and legislation was introduced which expressly imposed a liability to tax in respect of certain types of prospective arrangement, it was clear by the time of the 2016 Budget (when the introduction of the Loan Charge was announced) that there was still a proliferation of such schemes, and that the promoters of certain schemes were claiming that the targeted legislation was ineffective. Mr Gilbert explains the difficulties faced by HMRC in seeking to identify such schemes and their users in order to be able to challenge them effectively. The evidence of Ms Jacqueline McGeehan, the Deputy Director of Income Tax Policy at HMRC, is that the Government introduced the Loan Charges as a way to draw a line under this form of avoidance and ensure that tax was paid by scheme users, to be fair to the wider taxpaying population."

7. The Loan Charge was originally intended to extend to loans made as far back as 1999, but it was later retrospectively amended, by the Finance Act 2020, so as to limit its ambit as described in the extract below.

8. The following commentary on the Loan Charge is taken from *Employee Share Schemes* (Sweet and Maxwell) (at 22A.2b):

> "It attracted much comment and many objections both inside and outside Parliament on the basis that it was (a) retrospective in its nature; and (b) was, in effect, an unfair and punitive tax levied by way of making good the failings of HMRC to have taken action many years earlier and which sidesteps the balance between obligations under self-assessment and a taxpayer not being at risk of challenge if HMRC fails to take action within time limits after it has become aware of the facts of a taxpayer's circumstances. The latter objection was also raised to the government legislating, in the Finance Act 2018, to extend, from 4–12 years, the period in which an assessment may be raised if a loss of tax is attributable to offshore tax matters such as the use of an offshore trust. An amendment to the Finance Bill 2019 inserted a requirement that HM Treasury review, before the end of March 2019, the operation of the extension of time for opening enquiries and its impact on the Outstanding Loan Charge. This review, published on 26 March 2019 http://www.gov.uk/government/publications/report-on-time-limits-and-the-disguised-remuneration-loan-charge [Accessed 14 October 2020] concluded that the outstanding Loan Charge is "the right approach to ensure fairness for the vast majority of UK taxpayers who pay the right amount of tax at the right time and draw a line under this form of tax avoidance . . . the government is clear that the legislation is not retrospective".

9. HMRC did, however, concede that the Loan Charge would not be levied on those who had by 5 April 2019 registered with HMRC their intention to settle their affairs,

and who reached agreement with HMRC by 30 September 2020. Those on annual incomes of less than £50,000 would be given time to pay. Those choosing not to settle were required to notify their loan balances by 30 September 2019, file a self-assessment return for 2018/19 and pay the charges by 31 January 2020.

10. The Loan Charge was challenged by way of two separate applications for judicial review: **R. (Cartref Care Home Ltd) v Revenue & Customs Commissioners** [2020] S.T.C. 516, and **Zeeman v Revenue and Customs Commissioners** [2020] EWHC 794. Both challenges were dismissed. In particular, the decisions of HMRC to apply the Loan Charge did not involve any breach of the applicants' human rights to property and a fair trial under art.1 of the First Protocol (A1P1) and art.6 of the European Convention on Human Rights (as set out in Sch.1 to the Human Rights Act 1998). The DR legislation, including the Loan Charge, was rationally connected to its objective and its purpose could not be sensibly impugned.

11. Pressure on the government by campaigners, individuals and MPs resulted in the Prime Minister, Boris Johnson promising an independent review of the Loan Charge and Sir Amyas Morse was asked to report to the government in November 2019. His report was eventually published on 20 December 2019, following the general election.

12. The government accepted nearly all of the recommendations made and, as a consequence, the Loan Charge was retrospectively amended by the Finance Act 2020 so as to apply only to disguised remuneration loans made on, or after, 9 December 2010, that were still outstanding on 5 April 2019. Further, it would not apply to loans made from 9 December 2010 to 5 April 2016 if the loan arrangements had been reasonably disclosed to HMRC and HMRC had not taken action to recover the tax (for example, by making a determination to recover the PAYE tax from the employer). Provision was also made for payment of the tax to be spread over three years."

13. In March 2018 the Loan Charge Action Group ('LCAG') was formed to raise awareness of the Loan Charge. It describes itself as 'a non-profit volunteer run group that actively campaigns against Loan Charge legislation and the aggressive pursuit by HMRC of taxpayers to settle the associated tax demands'.

14. In January 2019 an All-Party Parliamentary Loan Charge Group (APPG) was established to raise concerns regarding the Loan Charge. LCAG was appointed as the secretariat of the APPG.

Background to this request

15. The request which forms the subject of this appeal relates to a meeting about the Loan Charge which took place on 6 June 2019 with Keith Gordon.

16. Mr Tully made previous requests for information to HMT on 29 August 2021, 4 October 2021 and 1 December 2021. These are referred to as the 2021 requests and are also the subject of an appeal to this tribunal (EA/2023/0201).

17. The 2021 requests relate to meetings that took place between Jesse Norman MP and external stakeholders about the Loan Charge between June and August 2019.

18. On 29 August 2021 Mr Tully requested information relating to all such meetings. HMT identified 10 such meetings and refused the request under section 12 FOIA on 27 September 2021.

19. On 4 October 2021 Mr Tully narrowed his request to information relating to three of those meetings (5th June 2019: Chartered Institute of Taxation and ICAEW 6th June 2019: Keith Gordon 12th June 2019: Lord Forsyth of Drumlean). HMT refused the request on 29 November 2021 under section 14 on the basis that reviewing the documents for exempt information would require a disproportionate effort

20. On 1 December 2021 Mr Tully narrowed his request further, to 'exclude any information which relates to the first entry on my revised submission (5th June 2019 – Chartered Institution of Taxation and ICAEW) and only include/provide the second (6th June 2019 00 Keith Gordon) and the third (12th June – Lord Forsyth of Drumlean). HMT again refused the request under section 14 FOIA.

21. Mr Tully requested an internal review on 7 January 2022. HMT upheld their response on internal review on 4 February 2022. In its internal review HMT stated 'There are over 100 documents and emails, many of which contain attachments relating to the meeting of 6 June 2019 (Keith Gordon) and the meeting of 12 June 2019 (Lord Forsyth of Drumlean).

22. On 19 January 2022 Mr Tully requested information (some of which he referred to as 'metadata') relating to HMT's reliance on section 14 in relation to the 2021 requests. On 1 February 2022 he refined that request. That request is the subject of the other appeal heard today by this tribunal (EA/2023/0462).

23. On 21 February 2022 Mr Tully further narrowed the request, limiting it to information 'for this single meeting only: 6 June 2019: Keith Gordon'. That is the scope of the request for the purposes of this appeal.

Requests, Decision Notice and appeal

The Request

24. This appeal concerns a request originally made to HMT on 29 August 2021 and subsequently refined and narrowed as set out in paragraphs 19 – 23 above, resulting in the following request made on 21 February 2022:

"You recently refused a Freedom of Information request (FOI2021/27539) I submitted, stating that you believe section 14(1) of the FOIA was engaged due to the disproportionate effort that would be required to comply with the request. This response came after the original request (FOI2021/20755, refused under section 12) had already been narrowed by 80%.

In the response to my request for an internal review (IR2022/00365), you upheld that refusal on the basis that you hold over 100 documents and emails, many of which contain attachments relating to the meeting of 6th June 2019 (Keith Gordon) and the meeting of 12th June 2019 (Lord Forsyth of Drumlean), and that you believe that the effort required to review, assess and extract that information would be considerable and would require a disproportionate level of staff effort.

I repeat an extract from the Information Commissioner's Office guidance on section 14(1):

(40) "Public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance."

However, I would like to further assist HM Treasury by (at least) halving the burden which is claimed as falling on the authority, thereby helping you to meet that important commitment to transparency and openness.

Please therefore provide:

- all briefings/documents (received from HMT and/or HMRC)

- all minutes of such meetings

- all follow-up correspondence to/from HMT and/or HMRC officials

- all memoranda (for file and/or as sent to other individuals including any retained drafts) from Mr Norman or members of his office

for this single meeting only: 6th June 2019: Keith Gordon

As you have already successfully located and identified this information as part of my previous (unsuccessful) request, I feel confident that you will be able to respond to this new and revised request well before any statutory deadline is reached."

The response

25. On 21 March 2022, HMT confirmed that it held information within the scope of the request. Having previously refused three earlier iterations of the request in reliance on section 12 FOIA and section 14 FOIA respectively (see paragraphs 18 – 22 above), HMT now indicated that it considered that the information engaged section 35(1)(a) FOIA and estimated that it would take another 20 working days to consider the public interest balance. It wrote to Mr Tully indicating that it needed further time on 19 May 2022.

26. Mr Tully complained to the Commissioner about the delay. On 13 June 2022 the Commissioner required HMT to respond within 10 working days.

27. HMT responded substantively on 27 June 2022. It disclosed the information but redacted third party personal data under section 40(2) and redacted information which HMT considered was outside the scope of the request.

28. On 28 June 2022 Mr Tully requested an internal review. As part of that request he also asked that HMT provide three attachments referred to in the body of two emails provided in response to his request.

29. HMT upheld its position on internal review. In respect of the missing email attachments, it stated that it no longer held them.

30. During the course of the Commissioner's subsequent investigation of Mr Tully's complaint HMT located further information within the scope of the request which was disclosed to Mr Tully on 9 October 2023.

The Decision Notice

31. In a decision notice dated 13 February 2023 the Commissioner decided that the HMT held no further information within the scope of the request on the balance of probabilities.

32. The Commissioner found that HMT contravened its obligations under section 1(1)(b), section 10(1) and section 10(3) FOIA in failing to provide all the disclosed information within 20 working days or following a permitted extension of time to consider the balance of public interest.

Notice of Appeal

33. The Grounds of Appeal are that:
    33.1. The Commissioner was wrong to conclude that the redacted information was out of scope. Mr Tully argues that all information contained in the emails and attachments is within the scope of the request. He argues that HMT have excluded information because it includes comments, details and opinions about person/persons involved in the relevant meeting, and the

subject on which this meeting was held, which HMT wish to keep from the public.

33.2. The Commissioner was wrong to conclude that HMT held no further information (missing emails and attachments).

33.3. The Commissioner was wrong to conclude that HMT had conducted adequate searches and that no further information was held on the balance of probabilities.

33.4. The Commissioner failed to consider the redaction of the roles of those whose names had been redacted.

34. Mr Tully also raises concerns about the way in which HMT's procedural breaches were dealt with by the Commissioner, and about the Commissioner's investigation.

35. Mr Tully asks the tribunal to consider his concern that further information within the scope of the request had only been provided during the Commissioner's investigation. He asks the tribunal to establish why this information was excluded from earlier responses.

36. Finally Mr Tully suggests that the tribunal contact the APPG directly with any necessary enquiries.

The Commissioner's response

37. The main points of the Commissioner's response are as follows.

38. The Commissioner submits the scope of the request excludes information that is not related to the 6 June 2019 meeting with Keith Gordon. It is open to Mr Tully to make a new FOIA request for any specific material redacted as falling out of scope of the request in issue.

39. The Commissioner remains satisfied with HMT's explanation that attachments have not been provided where they do not fall within the scope of the request. However in relation to the two specific attachments referred to in the Mr Tully's internal review request (the attachment referred to on page 7 and the attachment referred to on page 9 of HMT's disclosure of 27 June 2022), the Commissioner does not appear to have been provided with a copy of these particular out of scope attachments.

40. The Commissioner reiterates that it is open to Mr Tully to make a further FOIA request to HMT specifically for the two missing attachments referred to in the internal review.

41. The Commissioner submits that he was entitled to rely upon HMT's submissions and suggests that the further check conducted during his investigation which led to a further disclosure demonstrates the adequacy of the searches ultimately conducted. The Commissioner remains of the view that, on the balance of

probabilities, no further information is held by HMT falling within the scope of the request.

42. The Commissioner submits that there is no error of law in the procedural breaches by HMT recorded in the decision notice.

43. In relation to the fact the Commissioner allowed HMT an extension of time to provide submissions in response to his section 50 investigation, the Commissioner submits that his handling of Mr Tully's section 50 complaint falls outside the jurisdiction of the Tribunal.

44. Whilst HMT has not followed the Commissioner's good practice guidance in redacting the roles of persons whose names have been redacted, it is not a formal requirement under FOIA to give an indication of roles.

The reply of Mr Tully

45. The main points of Mr Tully's response are as follows.

46. Mr Tully submits that the redacted information is in scope of the request. The title of page 2 of the annex (in the information disclosed on 27 June 2022) shows that the information relates to the meeting in question, so does the reference to Mr Gordon's name. Other examples of redactions said to be inappropriate by Mr Tully include entries such as 'I've gone through [Redacted s40(2) - accepted] extensive read-outs from the meetings with [out of scope] Keith Gordon, and extracted the key criticisms (below)'. There are no grounds which could justify this redaction, as the content clearly relates to the meeting with Keith Gordon.

47. Mr Tully submits that where the information is held, but said to be out of scope, the balance of probabilities test is not relevant.

48. Mr Tully submits that the Commissioner is wrong to rely on the word of the public authority and not investigate further.

49. HMT admits that it holds over 100 documents and emails containing attachments relating to the meetings of 6 June 2019 and 12 June 2019. It has only disclosed a quarter of this. On this basis it is submitted that the Commissioner was wrong to find that no further information was held on the balance of probabilities.

50. Mr Tully submits that his concern is not with any 'inconsistency' but that information is being withheld on the basis of untrue claims and statements from HMT.

51. Mr Tully submits that there is no reasonable or acceptable excuse for a response to take 86 days to be provided.

52. Mr Tully submits that good practice guidance is meaningless if it does not need to be followed.

53. Mr Tully submits that the Commissioner's suggestion that a new request should be made is complicit in attempts by HMT to frustrate and delay access to the information.

Legal framework

54. Section 1(1) FOIA provides:

> "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."

55. The scope of a request is determined objectively, in the light of all the surrounding circumstances.

56. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The role of the tribunal

57. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

58. The issues for the tribunal to determine are:

    58.1. What is the scope of the request?
    58.2. Is the redacted information outside the scope of the request?
    58.3. On the balance of probabilities did HMT hold any further information within the scope of the request?

59. There are a number of issues raised by Mr Tully which are outside our remit for the reasons set out in discussions and conclusions below.

Evidence

60. The tribunal read an open and a closed bundle. We also took account of the bundle in the other appeal that we heard today (EA/2023/0462), where relevant.

61. Although Mr Tully asked us to take account of all the information submitted in his other appeals (EA/2023/0201 and 0316), it is for the parties to ensure that all relevant information is in the bundle. It was not proportionate for the tribunal to read the entire bundles prepared for the purposes of two other appeals. We did, however, read the published decision notices in those two other appeals.

Discussion and conclusions

The tribunal's remit

62. Whilst the First-Tier Tribunal (Information Rights) is an inquisitorial tribunal, and carries out a full merits review, it is not the role of the tribunal to gather evidence in support of a party's case. It would not be appropriate for the tribunal to adopt Mr Tully's suggestion 'to contact [the All Party Parliamentary Group] directly with any inquiries'.

63. The tribunal does have the power to require a person who is not a party to provide documents, information or submissions under rule 5(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, but, taking account of the overriding objective it is not proportionate or necessary to make any such order in this case in relation to the APPG, given the extensive information already before the tribunal.

64. Any complaints about the procedure adopted by the Commissioner are outside the remit of the tribunal and in any event the tribunal carries out a full merits review.

65. To the extent that Mr Tully complains about the process adopted by HMT, the Commissioner found that HMT breached sections 1(1)(b), section 10(1) and section 10(3) FOIA. Those matters cannot therefore be challenged by Mr Tully on appeal. The tribunal has however made certain observations below although they do not form part of the reasons for our decision.

Scope of the request

66. Mr Tully makes two arguments in relation to the information that has been provided. First, he says that HMT have redacted information which, he thinks, relates to the meeting with Keith Gordon and is therefore in scope of the request. Second, he asserts that in any event the entirety of the documents falls within the scope of his request based on the Upper Tribunal's decision in **Independent Parliamentary Standards Authority (IPSA) v Information Commissioner and Leapman** [2014] UKIT 0033 (AAC) (**Leapman**).

67. Dealing with the second issue requires some consideration of the decision in **Leapman**. Although Mr Tully relies on the Upper Tribunal decision, we note that

the case went the Court of Appeal ([2015] EWCA Civ 388) albeit that the same conclusion was reached.

68. The request in **Leapman** was for 'the original receipts submitted by several MPs [*identified in the request*] in support of expenses claimed during the period May-August 2010'.

69. In its response IPSA provided a table setting out the information it had extracted from those invoices. The Commissioner held that the request should be interpreted as a request for all the recorded information contained within the three invoices. The decision notice acknowledged that section 1 of FOIA is drafted so as to provide a right to information rather than copies of documents. It stated that a request for a copy of a document will generally be a valid request for all of the information contained within that document unless the context of the request makes clear that this is not the case; and that in practice, in the vast majority of cases the only way to communicate all of the information recorded in a document will be to provide the applicant with a copy of the document.

70. On the facts of the case, the Commissioner identified a number of categories of recorded information that was contained in the invoices and had not been included in the table given in response to the request. This included logos and letterheads, manuscript comments and the layout/style of a document.

71. The Upper Tribunal identified that the request was for copies of the invoices in question, which the Upper Tribunal took as being a request for '**all** of the information on the individual requests other than that properly redacted, not some of it' (para 13).

72. The Upper Tribunal noted at paragraph 19 that it was 'trite law to point out that this is a request for information not a request for records or documents'. The Upper Tribunal decided that matters such as trademarks and handwritten comments amounted to 'recorded information':

> "21. The factual focus of this appeal is on the information recorded in an invoice or receipt. Applying the ordinary use of the English language to the term information in this context, I take that to be a reference to all aspects of the invoice that informed the viewer when looking at the invoice…
>
> 22 It is to me also trite to note that the wording on a typical receipt or invoice is only part of what a recipient sees when looking at it. Typically there will be verbal and numerical content to be read and understood, but there will also be visual content to be seen, rather than read, but which may also require to be understood for the recipient to have appreciated the whole of the experience, if I may term it that, communicated by the receipt or invoice. …

27. I cannot see how full information about a receipt or invoice that contains trademarks can be conveyed if the trademark material is not reproduced in the trademarked form so confirming (or not confirming) that unique identity. And equally I accept the argument that the presence of that trademarked material in a document is information recorded in the document. In my view that must be a matter of law, not fact."

73. The Court of Appeal stated:

"34. A central position in the argument before us was occupied by the opinion of the court, given by Lord Reed, in Glasgow City Council v Dundee City Council [2009] CSIH 73. This was a decision of the Inner House of the Court of Session on two appeals under the Freedom of Information (Scotland) Act 2002. One of those appeals concerned emails from a firm of solicitors stating that, on behalf of a client, the firm "would like to (and hereby does) make an Information Request that we be provided with a copy of [a specified document or documents]" held by Glasgow City Council. The original requests related to a number of statutory registers, notices and orders, but the matter came down to 28 categories of notice. The Council's response to the requests was to the effect that all the information requested was available for purchase in the form of Property Enquiry Certificates ("PECs") under the Council's publication scheme. The Council was evidently concerned that the request under the 2002 Act was an attempt to circumvent the charging regime it had established by way of PECs. The Commissioner decided, however, that the Council had not dealt with the requests in accordance with Part I of the Act.

35. In considering the appeal against that decision, Lord Reed stated at paragraph 42 of the opinion that the first question was whether the emails were requests for information within the meaning of the Act. He continued:

"43. As we have noted, section 1(1) of the Act creates an entitlement to be given information; and section 73 defines 'information', for the purposes of section 1, as meaning 'information recorded in any form'. That terminology, which reflects that of the Freedom of Information Act 2000, was carefully chosen: most earlier freedom of information legislation in other jurisdictions confers a right of access to documents (as in the Commonwealth of Australia Freedom of Information Act 1982) or to records (as in the Canadian Access to Information Act 1982, the Irish Freedom of Information Act 1997 and the United States Freedom of Information Act 1966); and the New Zealand Official Information Act 1982, which requires 'official information' to be made available on request, is not restricted to recorded information. The word 'information' is itself of wide range, as has been emphasised by courts construing the New Zealand and Australian legislation (as, for example, in Commissioner of Police v Ombudsman [1988] 1 NZLR 385,

> R v Harvey [1991] 1 NZLR 242 and Kwok v Minister for Immigration and Multicultural Affairs [2001] FCA 1444). The definition in section 73 is therefore wide in scope, but it is not unlimited. In the first place, it does not include unrecorded information. Secondly, it is implicit in the definition that a distinction is drawn between the record itself and the information which is recorded in it. That is consistent with section 11(2)(c), which implies that 'information' is capable of being contained in a record. The distinction is also reflected in section 65(1) of the Act, which, as we have explained, makes it an offence to alter a record with the intention of preventing the disclosure of information. What a person can request, in terms of section 1(1), is the information which has been recorded, rather than the record itself. The right conferred by section 1, where it applies, is therefore to be given the information, rather than a particular record (or a copy of the record) that contains it. Put shortly, the Act provides a right of access to information, not documentation."

36. The correctness of that statement of principle is common ground before us, and it is acknowledged in particular that there is a conceptual distinction between the record and the information contained in it and that the statutory entitlement relates specifically to the latter. The point is made by Mr Hopkins on behalf of the Commissioner, however, that there will be cases (of which the present case is said to be one) where it is necessary in practice to disclose the record itself, whether by providing a copy of it or by providing an opportunity to inspect it, in order to communicate the entirety of the information contained in it. The fact that disclosure of the record may be necessary in order to give effect to the entitlement to the information does not undermine the conceptual distinction between the record and the information and does not confuse the statutory entitlement to recorded information with an entitlement to the record

…

39. In this case, by contrast with the Glasgow City Council case, the Commissioner interpreted the request not as a request for copies of the invoices rather than for the information contained in them, but as a request "for all of the recorded information contained within the three receipts/invoices" (paragraph 17 of his decision); and his reasoning in relation to the provision of copies was simply that there had been a shortfall in the information communicated and that IPSA needed to provide him with copies of the documents in order to remedy the shortfall and communicate all the recorded information to which Mr Leapman was entitled. Nor is it suggested that the Commissioner ought to have interpreted the request differently, as a request for copies of the documents rather than for the information contained in them: the only point taken as regards the interpretation of the request is IPSA's contention, considered and rejected later in this judgment, that it ought to have been interpreted as expressing a preference for an opportunity to inspect the originals… paragraphs 45-48 of

the opinion are addressed to arguments that are not advanced in this case, including in particular the argument that a record of information is itself information. Thus it was that Mr Hopkins, for the Commissioner, did not take issue with Lord Reed's analysis but submitted, in my view correctly, that it did not assist on the specific question with which we are concerned in this appeal.

…

46. …There may be cases, as here, where the available means of communication are limited by the need to disclose a document itself in order to communicate all the information recorded in it."

74. In **Leapman** the request was for the entirety of the recorded information in the receipts. In that appeal, it was necessary to disclose the document itself in order to communicate all the information recorded in it.

75. That does not mean that a public authority must always disclose all the information recorded in a particular document. It depends on whether what has been requested is all the information recorded in a particular document, and this depends on the scope of the request.

76. The scope of a request is construed objectively in the light of all the surrounding circumstances. The relevant circumstances in this case include the fact that Mr Tully had previously made a number of broader requests, and this request had specifically and deliberately been narrowed in scope.

77. On 29 August 2021 Mr Tully requested the following information 'relating to all meetings between Jesse Norman MP and external stakeholders about the Loan Charge between 01 June and 31 August 2019':

"- all briefings/documents (received from HMT and/or HMRC)

- all minutes of such meetings

- all follow-up correspondence to/from HMT and/or HMRC officials

- all memoranda (for file and/or as sent to other individuals including any retained drafts) from Mr Norman or members of his office."

78. On 4 October 2021 Mr Tully narrowed his request to include the same list of information but specified to be 'for these three meetings only:' 5 June 2019: Chartered Institute of Taxation and ICAEW, 6 June 2019: Keith Gordon and 12 June 2019: Lord Forsyth Of Drumlean.

79. On 1 December 2021 Mr Tully narrowed his request further, to 'exclude any information which relates to the first entry on my revised submission (5th June 2019

– Chartered Institution of Taxation and ICAEW) and only include/provide the second (6th June 2019 00 Keith Gordon) and the third (12th June – Lord Forsyth of Drumlean).

80. On 21 February 2022 Mr Tully made a further narrowed request (the request in issue in this appeal) for the same information but 'for this single meeting only: 6 June 2019: Keith Gordon'.

81. In our view that background would support an interpretation of the request that reflected Mr Tully's clear intention to request recorded information which related to the meeting with Keith Gordon only and intended to exclude recorded information that related to the other meetings with external stakeholders.

82. In our view the wording of the request, interpreted objectively and in the light of that background information, lends itself naturally to that interpretation. The request includes a list of the types of documents in which the relevant information might be recorded. It is not a request for those documents, because FOIA gives a right to request recorded information not documents. Mr Tully then limited the scope of the recorded information to be provided to information 'for this single meeting only'. Taking into account the previous correspondence set out above, the tribunal finds that HMT was right to construe this as including **only** recorded information relating to that specific meeting. In order to provide all the requested information, unlike in Leapman, it was not a request for all the recorded information in each document and therefore, unlike in Leapman, this is not a case where it is necessary to disclose the entire documents (subject to redactions for exempt information) to provide the requested information.

83. On that basis we find that HMT was entitled to redact any recorded information that did not relate to the meeting with Keith Gordon because it fell outside the scope of the request.

84. There remains the question of whether any of the information redacted by HMT was improperly redacted, i.e. whether it did indeed relate to the meeting with Mr Gordon. We have reviewed the redacted information. It falls broadly into two categories (i) information that relates purely to the other external meetings and (ii) information relating to the Loan Charge in general which only forms part of an email or document because it relates to the same broad topic but does not form part of any follow up to the Keith Gordon meeting and is not, for example, a briefing or document or memo provided for or as a result of that meeting.

85. We find that the information in both those categories falls outside the scope of the request and HMT were entitled to redact it.

86. Mr Tully is at a disadvantage because he cannot see the withheld information, but where he has highlighted specific concerns as to whether the redacted information related to the meeting with Keith Gordon we can confirm that we have reviewed

each section, along with all the redacted content, and none of it relates to the meeting with Keith Gordon.

Was further information held?

87. Mr Tully has highlighted two attachments which he says are missing and fall within the scope of his request. The first is referred to in an email with the subject 'Re: DR Lines for FST [Deadline Weds 19 June]'. This email starts at page A56 of the closed bundle. Mr Tully highlights that the email refers to an attachment as follows: 'The attached is very similar to the version which went to FST on 4 June (the only new sections so far are 5.4 and 5.5'.

88. From the content of the disclosed email, it is clear that the attached document is 'an updated pack of standard lines [*for the financial secretary to the treasury*] in light of the criticisms that have surfaced over the course of his external meetings'. HMT's position is that the standard lines for the financial secretary to the treasury do not fall within the scope of the request. We agree. Even though those lines had been updated 'in the light of' those meetings, including the meeting with Keith Gordon, we find that the pack of standard lines for the financial secretary to the treasury does not fall within the scope of the requested information. It is not a briefing or a document for the meeting with Keith Gordon. It is not the minutes of that meeting. It is not follow-up correspondence to that meeting. It is not a memoranda for or from that meeting.

89. The second attachment highlighted by Mr Tully is referred to in an email at p A61 of the closed bundle, with the subject line 'RE: Un-official note of FST meetings yesterday [OFFICIAL-SENSITIVE]'. The closed bundle makes clear that there was one attachment to that email which is 'Item 6' in the closed bundle. Item 6 is at page A44-A48. Having reviewed that document we are satisfied that HMT have disclosed any parts within scope of the request. The redacted parts of the document relate to other meetings.

90. Finally, Mr Tully makes a broader point about the difference between the 100 emails/documents that HMT said they had located in response to an earlier wider request, and the number of emails eventually disclosed in relation to this narrower request. This is a reference to the internal review outcome dated 4 February 2022 which concerned the request for information relating to meetings with Keith Gordon and Lord Forsyth of Drumlean. In that letter HMT stated:

> "There are over 100 documents and emails, many of which contain attachments relating to the meeting of 6 June 2019 (Keith Gordon) and the meeting of 12 June 2019 (Lord Forsyth of Drumlean). Having considered the amount of information within scope of your narrowed request again, it remains the case the amount of information - particularly emails - within scope of this new request is still so much that we believe that the effort required to review, assess and extract that information would be

considerable and would require a disproportionate level of staff effort. We therefore consider that the request engages section 14(1) of the Freedom of Information Act due to the disproportionate effort that would be required to comply with the request.

91. We do not accept that it is possible to infer that further information is probably held just from the fact that HMT had initially identified over 100 documents and emails, many with attachments, relating to two meetings including the meeting with Keith Gordon. There are many possible explanations for the difference in the number of emails/documents, not least the fact that the final request only relates to one of the meetings and that at the time of the response to the internal review the request was being refused on vexatious grounds, so presumably the content of the emails and documents had not yet been reviewed to determined which were out of scope.

92. In deciding whether further information is held, we have considered whether the searches carried out are adequate. It is surprising that HMT have no record of the search terms that were initially used, but we accept that the later search that was carried out, as described at pD295, was adequate and would be likely to have revealed any information within the scope of the request.

93. It is unfortunate that HMT initially told Mr Tully, wrongly, that attachments had been deleted. However, we are satisfied on the basis of the searches carried out that HMT have now located all potentially relevant attachments and included any that are within the scope of the request.

94. For all those reasons, on the balance of probabilities, HMT hold no further information within the scope of the request.

Redaction of job titles/roles

95. Mr Tully does not challenge redactions of personal information made under section 40(2). However, he does question in the grounds of appeal whether or not HMT should have redacted individual job titles or roles.

96. The Commissioner did not deal with this issue in the decision notice and it was not explicitly raised in the section 50 complaint. We do note that Mr Tully asked the Commissioner to consider and take account *all* the different points that he had raised with HMT, and he had raised this issue with HMT. However, the Commissioner did not include this matter in the scope of the investigation as defined in his letter of 14 June 2023, nor was it included in Mr Tully's response to that letter.

97. As this was not dealt with by the Commissioner, the tribunal is unable to deal with it, and we have not, in any event, been provided with the information that has been redacted under section 40(2).

98. If we had had to deal with this we could have concluded that where HMT is entitled to redact a name, it is also entitled to redact their role or job title where a motivated intruder would be able to identify that person from the role or job title. If an individual cannot be identified by their role or job title then the role or job title is not personal information and cannot be redacted under section 40(2).

Summary of conclusions

99. For the reasons set out above, the appeal is dismissed.

Observations

100. This section does not form part of the reasons for our decision.

101. As we noted above, the Commissioner found in the appellant's favour in relation to the procedural breaches by HMT and this is accordingly outside our remit. However, the tribunal has a number of concerns about the way that HMT handled these requests which it wishes to highlight. First, HMT kept no record of the searches originally carried out. Second, HMT originally informed the appellant that it no longer held the attachments. We do not know how this occurred but this was clearly untrue. Third, over a period of 10 months, HMT relied on a number of different exemption in the course of 'dealing with' the request and with the subsequent attempts made by Mr Tully to narrow the request. Fourth, HMT requested numerous extensions of time and routinely left its reply until the very end of the time limits. All this has contributed, perhaps unsurprisingly, to Mr Tully forming the impression that HMT are deliberately trying to avoid disclosure of the requested information.

102. It also contributed to a significant delay in the process of handling the request: By the time that HMT eventually gave a substantive response to the refined request and provided information (and only following the Commissioner's intervention), 10 months had passed since the original request was made and 4 months had passed since its final refinement.

103. The Cabinet Office **Freedom of Information Code of Practice** sets the standard for all public authorities when responding to FOIA requests, and states in its foreword: "Freedom of Information is one of the pillars upon which open government operates. The Government is committed to supporting the effective operation of the Freedom of Information Act." Accordingly, persons who make FOIA requests to HMT have a legitimate expectation that best practice will be followed in both letter and spirit.

Signed Sophie Buckley Date: 17 April 2024

Judge of the First-tier Tribunal