



Neutral citation number: [2024] UKFTT 00908 (GRC)

Case Reference: EA/2023/0303

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

Heard by: remotely by video conference

Heard on: 9 September 2024

Decision given on: 21 October 2024

Before

**TRIBUNAL JUDGE WILSON
TRIBUNAL MEMBER PALMER-DUNK
TRIBUNAL MEMBER TAYLOR**

Between

ADRIAN FINCH

Appellant

and

(1) INFORMATION COMMISSIONER

(2) HIS MAJESTY'S TREASURY

Respondent(s)

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The Appellant and First Respondent indicated that they would not engage in an oral hearing. The Appellant requested that his appeal was determined upon the papers that he had previously produced to the tribunal. The Second

Respondent requested an oral hearing. The Tribunal was satisfied that the parties had been notified of the hearing. Given the parties' position the Tribunal was satisfied that it was fair and in the interest of justice to proceed in the Appellant's and First Respondent's absence pursuant to Rule 36 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009("the Procedure Rules"). Mr Anderson (Counsel) was in attendance and represented the Second Respondent

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 22 May 2023, IC-183296-R6T7 , (the "Decision Notice). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information about the independent review into the remuneration loan charge ("the Loan Charge") which was commissioned by the then Chancellor of the Exchequer in September 2019. The Loan Charge was announced in the 2016 Budget to tackle disguised remuneration tax avoidance schemes. The review was asked to consider whether the Loan Charge was an appropriate response to the tax avoidance behaviour in question and whether changes announced by the government in advance of, and since, the Loan Charge came into effect, addressed any legitimate concerns that had been raised about its impact on individuals. The review was carried out by Sir Amyas Morse (now Lord Morse). Lord Morse published his review in December 2019. The government published its response to the review later in December 2019, accepting 19 of the 20 recommendations made by Lord Morse. HMRC published a report on the Loan Charge's implementation in December 2020.
3. On 14 October 2021, the Appellant wrote to the Second Respondent and requested information in the following terms:

"Please supply the following –

a) The recorded information which details the exact process (including any part or subset of that process) that was used to consider the range of individuals who might (or did) support the review.

b) The recorded information which details the position/role/grade of the person(s) making the decision(s) as to which individuals might be (or were) selected to support the review. If any person(s) is/are SCS (Senior Civil Service) grade, then please provide the name of that person(s).

c) The recorded information which details the conflicts of interests that were identified for Heather Self, Graeme Nuttall OBE, and David Goldberg QC, and any other conflicts of interests that were identified for that range of individuals who were being considered in addition or as alternatives, and that might (or did) support the review.

d) The recorded information which details how, and why, those conflicts of interests were considered and concluded as 'accounted for' by the person(s) making the determination/selection.

e) The recorded information which details all advance drafts of this report, and all comments which the experts named above (Heather Self, Graeme Nuttall OBE, and David Goldberg QC) provided as part of each advance draft."

4. The Second Respondent responded on 6 December 2021 and stated that it only held information within the scope of part "c" of the request. It provided some of this information but relied on section 40(2) of FOIA (third party personal data) to withhold the remainder.
5. Following an internal review, the Second Respondent wrote to the Appellant on 29 April 2022. The Second Respondent maintained its position that it held no information other than that which it had already identified as falling within the scope of part "c" of the request. It agreed to disclose one of the documents it held because the data subject had consented to the disclosure of their personal data. However, the Second Respondent maintained its position that it was entitled to rely on section 40(2) of FOIA to withhold the other information.
6. The Appellant complained to the Commissioner on 27 July 2022. The Appellant disputed the public authority's assertion that it did not hold the majority of the information that had been requested. The Appellant explained why he believed that the information should be held by, or on behalf of, the public authority. The Appellant asserted that the information within part "c" should be disclosed even if the name of the relevant individual was withheld.
7. During the course of the investigation, the Second Respondent revised its position as it had identified additional records which might contain information falling within the scope of the request – but the cost of searching those records for relevant information would, at the point that the request was responded to, have exceeded the appropriate limit and therefore these parts of the request should have been refused under section 12 FOIA. In respect of the information falling within the scope of part c that had not already been disclosed, the

Second Respondent additionally relied upon sections 41 (breach of confidence) and 43 (commercial interests) of FOIA to withhold the information.

8. The First Respondent issued his decision notice on 22 May 2023. The First Respondent's decision notice provides:

14. In a previous decision notice, the Commissioner accepted that accessing files and emails held originally by the Loan Charge Review would have exceeded the cost limit because the public authority would have needed to pay a fee in excess of £600 to its IT provider. The Commissioner is bound to accept that the same fee would be necessary in this case – not least because there would be a need to search deactivated email accounts as well as the Sharepoint folder.

15. The Commissioner recognises that he is bound to consider that situation as it stood at the point the public authority should have responded to the request (ie. within 20 working days). The Commissioner cannot say definitively whether the public authority did or did not hold further information within the scope of the request at the point it should have responded. All he can say is that determining whether any information was held would, at that point, have exceeded the cost limit.

9. This appeal came before the tribunal on 28 November 2023. In a decision dated 15 January 2024, the tribunal made a preliminary decision on whether section 12 of the Freedom of information act 2000 (FOIA) is engaged. The tribunal found that section 12 of FOIA was not engaged. This was primarily because the second respondent had not provided any evidence as to the costs of obtaining the information. The tribunal recorded that before it was able to consider the other elements of the appeal the parties would need to provide further submissions in relation to exemptions at 40(2), 41 and 43 of FOIA. Case management directions were set for the parties to provide written submissions in relation to these issues and for the original tribunal to be reconstituted so these issues could be determined.

The Hearing

Preliminary Issues

10. At the hearing the Second Respondent's representative indicated that there was an outstanding application for an extension in relation to the Second respondent's written submissions. The Second Respondent's representative confirmed that the application has been made in a timely matter, before expiry of the relevant directions. The Second Respondent's representative confirmed earlier case management directions did not prevent the second

respondent from filing and serving their written responses outside of the time imposed by earlier directions. Accordingly, this was not a situation where a relief from sanctions application was required. In light of the Second Respondent's representative submissions the tribunal determined that it was in the interest of justice to grant the extension application and the application was granted.

11. At the hearing, the tribunal asked the second respondent's representative to identify the case management powers pursuant to which the tribunal could revisit the section 12 decision. The tribunal asked the Second Respondent's representative to confirm whether he was relying upon the set-aside provisions set out in rule 41 of the Tribunal procedure rule. The second respondent's representative stated that he was not. Rather, the Second Respondent's representative confirmed that he did not seek to disturb the original section 12 preliminary decision. However, matters had developed. The Second respondent had conducted significant searches and enquiries to comply with the request. The results of those searches and enquiries provided a new factual matrix upon which the continued application of section 12 should be considered. These issues are considered in further detail below.

Documents and Submissions

12. We had a bundle of open documents which included the written submissions of the parties [213 pdf pages], a closed bundle [17 pdf pages], the original hearing bundle [279 pages], the Second Respondent's open and closed written submissions, skeleton argument and witness statements for both witnesses.
13. The proceedings were split into open and closed sessions. We heard witness evidence in the open session. The second respondent's representative made oral submissions at both sessions.
14. We have considered all the documentary evidence together with the written submissions, the Skeleton argument, the oral evidence and oral submissions. However, we do not rehearse all the documentary evidence and submissions in detail but include in this decision and reasons such evidence and submissions as were relevant to our decision.

Closed Session

15. We held a closed session to hear submissions from the Second Respondent's representative.
16. The following is a gist of the closed session produced by the Second Respondent's counsel and agreed by the tribunal:

- a. The Tribunal introduced the closed session. The closed witness was unable to join the session but the Second Respondent's representative indicated that he had no questions for the witness and the Tribunal panel had no questions for the witness. In these circumstances, the Tribunal decided to proceed on the basis of the signed witness statement.
- b. the Second Respondent's representative made submissions that section 40, considerations would arise only in the event that the Tribunal rejected the second Respondent's case on section 12.
- c. The Second Respondent's representative submitted that the exemption under s. 40 (personal data) applied because disclosure of the information would directly identify the identity of the independent adviser and could indirectly lead to jigsaw identification of another individual. The Second Respondent's representative submitted that information had been provided to the second respondent in confidence, there being an express agreement by the second respondent that the information would not be disclosed. The Second Respondent's representative submitted that while there was a legitimate interest in disclosure in the interests of transparency, that had to be seen in the context of the fact that the Loan Charge Review expressly noted that any potential conflicts of interest were considered; that it was independent of the Treasury; and that there were other professional regulatory mechanisms to ensure that the individual upheld high standards of integrity and that in these circumstances the interest in maintaining the exemption outweighed the interest in disclosure. The Second Respondent's representative relied on the same reasons to submit that s. 41 applied. Counsel also submitted that s. 42 applied because it was likely that the commercial interests of a third party would be affected by disclosure

Applicable law

17. Section 58 of FOIA provides that:

- (1) *If on an appeal under section 57 the Tribunal considers—*
 - (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

18. Section 12(1) of FOIA states that a public authority is not required to comply with a request for information if it estimates that the cost of doing so would exceed the appropriate cost limit.

19. Section 12(2) states that subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

20. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 set that limit at £600.

21. The public authority's estimate must be reasonable, in the sense of being sensible, realistic and supported by cogent evidence [Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)].

22. Under regulation 4(3), may only take account of the following activities:

- a. determining whether the public authority holds the information,
- b. locating it, or a document which may contain the information,
- c. retrieving it, or a document which may contain the information, and
- d. extracting it from a document containing it.

23. The regulations then provide, at regulation 4(4), that:

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

24. As held in Kirkham v Information Commissioner [2018] UKUT 126 (AAC), the test is subjective to the public authority but then qualified by an objective element. The Tribunal first makes findings as to the nature of the estimate made by the public authority. These will be related to the way in which the public authority holds the information; FOIA does not impose any particular record-keeping practices. The Tribunal may next remove from the estimate any amount which it considers unreasonable, either on account of the nature of the activity to

which it relates or its amount. In performing its assessment, the Tribunal recognises that the statute's use of the word 'would exceed' likely indicates a higher degree of certainty than if read 'may' or 'might'.

Issues in Dispute

25. The issues in dispute can be summarised as follows:

- e. Whether the Second Respondent can seek to rely upon the section 12 exception in light of the tribunal's preliminary determination in relation section 12;
- f. if so, whether the section 12 exemption applies;
- g. In the alternative, whether the second respondent can rely upon the exemptions at sections 40 (personal information) 41 (breach of confidence) and 43 (commercial interests) of FOIA to withhold part of the information requested.

Can the Second Respondent Rely upon Section 12.

26. The second respondent submissions can be summarised as follows:

- h. The second respondent originally pursued its case on the basis that the information was produced by the secretariat responsible for supporting the review team and was stored on a repository which the second respondent could not access without the assistance of its IT provider. The costs of the IT provider exceeded the appropriate limit of £600. It was however acknowledged that since the date of the original response (or 20 days after the request was received given that the response was late) the Second Respondent had changed its IT provider resulting in different charges for accessing information. Nonetheless the second respondent submitted that the decision was correct at the appropriate date
- i. Since this Tribunal's preliminary section 12 decision the Second Respondent has changed its position. The second respondent now accepts that it has access to the repository. However, the second respondent asserts that the time taken to search the repository and to review the results of those searches in order to respond to the request will take approximately 46.5 hours.
- j. Having now carried out searches of the repository the second respondent submits it is entitled to rely on section 12 on different grounds, i.e. that the time it would take to obtain and review the results of those searches to establish whether second respondent holds information within scope of the request would exceed the appropriate limit.
- k. It is well-established in the case law that a public authority may, at a later stage in the decision-making process, seek to rely on an

exemption to justify withholding information which it did not seek to rely on in its original decision: Birkett v Department for Environment, Food and Rural Affairs [2011] EWCA Civ 1606; Browning v Information Commissioner [2013] UKUT 236, [60]. The Second Respondent submits that this principle applies in this case, where the second respondent seeks to rely on the same basis for refusal (in this case, section 12) but on different grounds.

- i. The Second respondent relies upon the Information Commissioner v Malnick [2018] AACR 29, [102] where the Upper Tribunal held:

“... The decision in Birkett means that there is no limitation on the issues which the FtT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. ...”

- m. The Second respondent submits that the initial reasons for relying on section 12 have fallen away following the Tribunal’s preliminary decision. As a result of that preliminary decision, the second respondent has – for the first time in the decision-making process – carried out searches and made an estimate of the amount of time required to comply with the request. The need to make this estimate – which the second respondent submits it is entitled to make under section 12(1) of FOIA – has only arisen as a result of the Tribunal’s preliminary decision. In these circumstances, it is submitted that it is open to the second respondent to rely on section 12 to justify a refusal to comply with the Appellant’s request, notwithstanding the Tribunal’s preliminary decision. It is an issue which fairly arises on the facts of the appeal and therefore is part of the “core question” for the Tribunal to answer.

27. In light of the preliminary decision and case management directions, the First Respondent asserts that the appropriate course of action is for the second respondent to appeal the preliminary decision that section 12 of FOIA was not engaged rather than to revisit the issue within the current proceedings. The second respondent asserts that case law relied upon by the second respondent “may not be relevant” where the application of section 12 has been determined as a preliminary issue.

28. As set out above, due to personal circumstances, the appellant has not engaged in this element of the appeal. The appellant relies upon the written

submissions that he has made earlier in the appeal and comprised within the original hearing bundle. As these written submissions predate the preliminary decision in relation to section 12 they do not directly engage with the second respondent's position. The appellant's position was summarised in the preliminary decision and has been considered. In relation to Section 12 the appellant asserts that the second respondent should be prevented from relying upon section 12 because this issue has been raised late in the proceedings and there were earlier opportunities to do so.

29. We have considered the submissions made by the parties. In our judgement notwithstanding the determination of the preliminary issue the tribunal remains seized of the appeal as a whole to include the section 12 issues. We find that the broad case management powers contained within rule 5 of the Procedure Rules, in particular, rule 5(1) allow the tribunal to set its own procedure and enables the tribunal to revisit the section 12 issue. We accept that there is a significant public interest in finality and legal certainty which weighs against re-visiting the section 12 issue. However, as set out in Malnick the tribunal must consider everything necessary to answer the core question of whether the authority has complied with the law. In our judgement that will include the new factual matrix (that even with access to the repository the time incurred in searching the repository reviewing its results will exceed 24 hours) and new evidence which was not considered by this Tribunal in its preliminary decision.

30. Accordingly, for the reasons set out above, notwithstanding the preliminary decision in relation to the section 12 issue, in our judgment the Second Respondent can nonetheless continue to rely upon section 12 within the context of a different factual matrix and new evidence in support of that factual matrix.

Does Section 12 apply

31. The second respondent relies upon the evidence of Mr Stephens in support of its assertion that the time incurred in searching the repository would exceed 24 hours.

32. At the hearing we found Mr Stephens to be a credible witness. Mr Stephens answered the questions put to him in an open and instinctive manner. Mr Stephens evidence when questioned by the tribunal was consistent with that in his witness statement. Mr Stephens was willing to make concessions even where he knew it would not assist the second respondent's case. For example, when asked about certain elements of this statement he conceded that he did not have first-hand knowledge and was relying upon what he had been told

by members of the relevant team. In addition, the first respondent and the appellant have been served with the statement of Mr Stephens and neither have sought to challenge the witness statement of Mr Stephens either by way of written submissions or by cross-examination at the hearing.

33. Mr Stephens evidence can be summarised as follows:

- n. As a result of the Tribunal's preliminary decision the Second Respondent commenced fresh searches for the information requested.
- o. The high volume of items identified by these searches led to a sampling exercise to determine how long it would take to obtain and review information within scope of the request. By applying the results of the sampling exercise to the searches, the Second Respondent estimated that it would take significantly over 24 hours to locate, extract and retrieve the information requested by the Appellant, and as a result s12 FOIA is engaged.
- p. The methodology conducted was to carry out a broad search followed by a refined search identifying information that may be within the scope of part a and b of the Appellant's request. The refined search included the relevant date range of 1 September 2019 to 31 December 2019. The refined search included names of the independent assessors, "conflict of interest" and "loan charge review". All three search terms would need to be present and accordingly it was accepted there was no guarantee all relevant information would be identified. Nonetheless 91 unique emails were located. A process was then adopted for discounting duplicate emails. A sample of emails was then identified to establish how long it would take to review the emails to establish their relevance to the request. An estimate of two minutes per email was provided. This included time spent to open the email and where necessary download it so that attachments could be viewed. Based on the methodology it estimated that to locate the 91 emails and subsequently review their contents would take approximately six hours and this related solely to parts a and b of the request.
- q. A similar process was adopted with a focus upon part e of the request but also encapsulating part a, b and c of the request which identified 408 potentially relevant emails in the repository with 606 items found in other mailboxes. Six duplicates were established and in total there was 1014 unique files and emails. The review time for these emails alone was estimated to be approximately 33 hours. With an additional time estimate in relation to meetings and design of refined searches of 6.5 hours. In total, the second Respondent estimates the time incurred in complying with requests would be 46.5 hours.

34. We do have some concerns that original search parameters could be considered too wide and that the time incurred in meetings to identify search terms and parameters is potentially generous. However, we accept that the refined search terms were appropriate. These refined searches identified in excess of 1000 items that may be relevant to the request. We accept that the time estimate for reviewing these emails of two minutes per email where that includes downloading emails to review attachments is reasonable. On this basis alone, the time estimate for complying with the request would be approximately 33 hours and therefore in excess of the 24 hours envisaged pursuant to section 12 of FOIA.

35. It follows that we find that the exemption set out within section 12 of FOIA applies and accordingly the second respondent is exempt from producing any of the information contained within the request.

Sections 40(2), 41 and 43(2) of FOIA

36. We have found that the section 12 exemption applies to all of the information comprised within the request. Accordingly, it is not necessary to separately consider sections 40, 41 & 43 of FOIA. However, we do so for completeness. The second respondent has confirmed that it holds independent assessors' conflict of interest forms for three independent assessors. Two of those forms have been disclosed with the consent of the relevant independent assessors. The third independent assessor declined to give their consent for their form to be disclosed. The second respondent submits that the exemptions at Sections 40(2), 41 and 43(2) of FOIA applied to this independent assessor's form.

37. The Appellant in his original written submissions submits that the second appellant should not be entitled to rely on sections 41 and 43 as these grounds were raised late where there had been earlier opportunities to do so.

38. The First respondent makes no submissions in relation to sections 40, 41, 43 within its email of 27 March 2024. The first respondent relies on its response to the appeal. Within that response the first respondent confirms that it did not consider sections 40, 41 & 43 because the first respondent's view was that the second respondent was not obliged to comply with the request in its entirety pursuant to section 12 of FOIA.

39. We have considered the written submissions of the second respondent together with the closed evidence, the closed written submissions and the oral submissions made within the closed session. We find merit in those submissions. We deal with each of the relevant sections below.

Sections 40(2)

40. Sections 40(2) and 40(3A) of FOIA provide that information constituting the personal data of a third party is exempt from disclosure where disclosure would breach any of the data protection principles in Article 5 of the UK GDPR.
41. We find that the information, constitutes the personal data of the independent assessor in that it reveals their name, employment and information about the work they have performed. The independent assessor does not give consent for disclosure.
42. We find that there is a legitimate interest in disclosure to promote transparency and more particularly understanding of conflicts of interest relating to an independent adviser to the loan charge review. However, we find that the consequences for the independent adviser and a third party who may be identified by jigsaw identification outweigh the legitimate public interest pursued by the request. This is because the independent adviser was given a specific assurance that the information would not be disclosed; the independent adviser's role was not public facing and they had no responsibility for the content of the report or its recommendations; conflicts-of-interest are not routinely made public and accordingly disclosure would be contrary to the independent adviser's reasonable expectation that such information would not be disclosed. In any event, the independent adviser had been given a specific assurance that "HM Treasury confirms that such information will not be disclosed to any person other than the reviewer and the review team without the consent of the reviewer and adviser". Accordingly, in our judgment the relevant information is exempt pursuant section 40.

Sections 41(1)

43. Section 41(1) provides that information is exempt if it was obtained by the public authority from another person and its disclosure by the public authority would result in an actionable breach of confidence.
44. It is undisputed that the information was provided to the second respondent by a third party; the independent assessor.
45. We accept that the information has the necessary quality of confidence, the information cannot be considered to be trivial, there is no evidence to suggest that the information is otherwise accessible, we accept the conflict-of-interest forms are not usually disclosed such that the independent assessor would have expected confidentiality. In any event, the information was given subject to an explicit assurance that it would not be disclosed without consent, see above. We accept, as set out within the closed written submission and in oral

submissions made during the closed sessions that disclosure of the information would result in detriment. For these reasons, we find that it is more likely than not that disclosure would result in an actionable claim for breach of confidence that will be likely to succeed. We accept, for the reasons set out above that there is a public interest in disclosure. However, we find that there is also significant public interest in withholding the information. We find that there is a significant public interest in private sector professionals' being able to provide their expertise, advice and services to government and independent review bodies. We believe that disclosure of personal information to include potential conflicts of interest would potentially act as a deterrent to appropriate qualified individuals applying for such roles. This in turn would reduce the availability of appropriate expertise to government bodies and to public sector bodies. We attach significant weight to this factor and accordingly find that the public interest in withholding the information outweighs the public interest in its disclosure.

Sections 43(2)

46. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person. This exemption requires consideration of both prejudice caused by disclosure and the public interest test. Having found that the exceptions at sections 12, 40 & 41 apply it is not necessary to consider section 43(2) in any detail. In any event the prejudice to third party commercial interests was exclusively dealt with in closed submissions and the closed witnessed evidence. On the basis of the closed evidence and closed submissions we are satisfied that disclosure of the information would prejudice third party commercial interests. In addition, for the same reasons set out above we find that the public interest balance weighs in favour of withholding the information.

Conclusion

47. For the avoidance of doubt, notwithstanding the Tribunal's earlier preliminary decision the Tribunal is satisfied on the second respondent's case as now presented that section 12 applies. In addition, the Tribunal is satisfied that section 40(2), 41 and 43 apply. Accordingly, the appeal is dismissed.

Signed

G Wilson

Judge of the First tier Tribunal

Date: 10 October 2024