



Case Reference: EA/2022/0049

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers
Heard on: 13 July 2022
Date of Decision: 26 July 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

TRIBUNAL MEMBER DAVE SIVERS

TRIBUNAL MEMBER RAZ EDWARDS

Between

GARY TINKER

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Decision: The appeal is allowed.

Substitute decision notice (for IC-197755-F8G9 of 2 January 2022):

Organisation: Her Majesty's Revenue and Customs

Complainant: Mr Gary Tinker

1. For the reasons set out below the public authority were not entitled to rely on s 14 of the Freedom of Information Act 2000 to refuse to answer the request.
2. The public authority is required to take the following steps. The public authority shall issue a fresh response, not relying on s 14, within 42 days of the date of promulgation of this decision.
3. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-197755-F8G9 of 2 January 2022 which held that Her Majesty's Revenue and Customs ('HMRC') were entitled to rely on s 14(1) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner did not require the public authority to take any steps.

Background to the appeal

3. To the extent that it is uncontroversial, as far as the tribunal understands, much of this background is taken directly from HMRC's response to the appeal.
4. Disguised remuneration tax avoidance schemes usually involve a loan or other form of payment from a third-party which is unlikely ever to be repaid, thereby avoiding the need to pay income tax and national insurance contributions,
5. A charge on disguised remuneration loans, known as the loan charge, was announced in 2016 to tackle the use of disguised remuneration schemes. This was legislated via the Finance (No.2) Act 2017 which came into effect on 5 April 2019.
6. On 28 November 2018 Mr. Tinker made a FOIA request to HMRC seeking information about the number of departmental contractors who had been discovered to have used a disguised remuneration scheme whilst engaged by HMRC ('the 2018 request'). In response on 18 December 2018 HMRC explained that it did not hold comprehensive records for the relevant time period, and on that basis did not hold the information requested. It explained that an analysis of the records that were held had been undertaken and that the answer based on those records was 'nil'.
7. In the course of the Commissioner's investigation into the 2018 request, HMRC disclosed to Mr. Tinker by letter dated 10 December 2019 that it was aware of five

departmental contractors who, at the time, were believed to have used a disguised remuneration scheme prior to their engagement by HMRC.

8. In November 2020, in response to a FOIA request from another individual, HMRC disclosed that in November 2019 it had identified a number of departmental contractors who had used disguised remuneration schemes while they were engaged by HMRC. HMRC states that this discovery had been made using compliance data which had not been available to HMRC at the time of the 2018 request. Mr. Tinker submitted a further request equivalent to the 2018 request on 23 November 2020. HMRC explained, on internal review, that the information provided in December 2018 was an accurate representation of information available at that time.
9. Mr. Tinker asserts that an internal HMRC email, dated 2 November 2018 (p 314 of the bundle) shows that HMRC held the information requested in the 2018 request at the time, and that their 'not held' response was wrong. He also asserts that HMRC misled the chairman of the Economic Affairs Committee in a similar way in its response to a similar question asked by the chairman in November 2018.
10. The internal HMRC email of 2 November 2018 states:

The exercise that I undertook regarding users of Contractor loan avoidance schemes was in relation to an earlier iteration of the database. As I said when we spoke, the database doesn't contain UTRs or NINOs for the individuals and in the iteration I was using often didn't have the PSC name. So the initial clash was simply on a 'same name' basis. That gave 87 potential matches. When further work was undertaken, we were confident that there were 3 definite matches and 2 more that looked likely. So overall only a small issue and only 1 of those matches was still engaged by HMRC at the time the exercise was completed (February 2018).
11. It is not clear to the tribunal whether HMRC accept that this email shows that they held information within in the scope of the 2018 request at the relevant time, or if they would argue that the single 'match' fell outside the scope of the 2018 request.

Requests, Decision Notice, and appeal

The Requests

12. The appeal relates to the following request, which was a refined version of an earlier request, on 21 December 2020. It is referred to in this decision as 'the disputed request':

Please supply a copy of all emails to/from Jim Harra from 30/9/2020 to 4/12/2020 that contain the following phrases "disguised remuneration"

"DR-Scheme" or abbreviation such as DR

"Loan Charge" or abbreviation such as LC"

... In order to limit the number of emails, please provide emails only between Jim Harra and Mary Aiston that contain the phrases defined above.

HMRC's reply

13. HMRC responded on 19 January 2021. They refused to comply with the disputed request by virtue of s 14(1). HMRC upheld its position on internal review on 23 March 2021.
14. The appellant referred the matter to the Commissioner on 30 March 2021.
15. Subsequent to the decision notice HMRC wrote to Mr. Tinker by letter dated 6 April 2022 pointing out that the information he requested had been disclosed in response to another identically worded FOI request by another requestor. HMRC provided a link to that disclosure, which has been publicly available on the WhatDoTheyKnow website since 12 August 2021.

The decision notice

16. In a decision notice dated 27 January 2022 the Commissioner decided that HMRC was entitled to rely on s 14 FOIA.
17. The Commissioner stated that he could only take into account evidence from before the disputed request and up to 20 working days after the request (the statutory time for compliance).
18. With regard to assessing the purpose and value of the disputed request, the Commissioner understood that Mr. Tinker's disputed request stemmed from HMRC's handling of his request in November 2018 to which it explained that it did not hold information about contractors using loan charge schemes. However, subsequent disclosures of information by HMRC in October 2020, using data not previously available, clarified this position.
19. The Commissioner stated that she understood that the current request was not an attempt to challenge directly the 'not held' finding by the Commissioner in relation to the November 2018 request. The purpose was to understand the shift in the HMRC's position from the request in November 2018 to the subsequent clarified position in October 2020. The Commissioner accepted that it was understandable why the complainant might want clarification. The Commissioner accepted, to some extent, that there was a purpose and value to Mr. Tinker seeking information on this subject.
20. The Commissioner appreciated that as HMRC had refused a number of Mr. Tinker's requests under s 12 and s 14, it seemed reasonable that Mr. Tinker would want to refine his request to a point that it was reasonable.

21. The Commissioner nevertheless accepted HMRC's position that the broader context needs to be considered. Mr. Tinker's position appears to be, in part, that HMRC deliberately lied to him. The Commissioner's understanding was that different answers were provided on the basis that more data had become available.
22. The Commissioner acknowledged that at the point the disputed request was submitted HMRC had disclosed the data originally sought by the November 2018 request. Furthermore HMRC had responded to two of the complainant's emails since September 2020 resulting in the disclosure of some e-mail chains. This only led to further requests and to that extent the Commissioner accepted that the specific purpose and value of the request was perhaps open to question and the disputed request had some elements of a fishing request.
23. The Commissioner noted that the requests were targeted and specific, but the Commissioner was sympathetic to HMRC's assessment that the requests were fishing for information which Mr. Tinker did not know whether HMRC would hold or not, and aiming to locate information or correspondence that senior managers may have exchanged on this topic. Ultimately the Commissioner accepted that there was a speculative element to the series of requests including the disputed request.
24. In summary, whilst the Commissioner accepted that there was on one level a serious purpose to the disputed request, this has to be seen in the context of Mr. Tinker's previous requests, and in particular HMRC's clarification in October 2020 of its position in relation to contractors using DR schemes. When seen through this prism, in the Commissioner's view the legitimate purpose and value of Mr Tinker's dispute arguably started to decline. In reaching this decision the Commissioner also accepted HMRC's point that the evidence would suggest that Mr. Tinker would be unlikely to be satisfied with the information provided in response to the request and would therefore submit further similar requests. In the Commissioner's view this also called into question the purpose and value of the disputed request.
25. The Commissioner noted that complying with the request in isolation would not place an undue burden on HMRC. The Commissioner accepted there was some burden in considering Mr. Tinker's requests of September 2020 to December 2020 but stated that it was arguably not an overwhelming one. The commissioner agreed with HMRC that further similar requests were very likely to be submitted to it, placing an additional burden on HMRC.
26. The Commissioner accepted that processing of this request should be placed in the context of the other focussed requests that HMRC had received on this subject up to 21 January 2021. The Commissioner accepted that the significant number of requests from individuals other than the complainant on this subject matter had placed a considerable demand on HMRC's resources. The Commissioner accepted that there appeared to be evidence of some form of campaign, even if this is informal rather than coordinated.

27. The Commissioner accepted that the individuals who were the subject of such targeted requests were likely to feel at the very least constrained, or potentially harassed if they knew that an e-mail on a particular subject was very likely to be the subject of one or a series of FOI requests in the very near future. The series of requests sent by Mr Tinker specifically and routinely target recent emails sent by/to particular individuals. The Commissioner accepted that the requests clearly have at the very least the potential to harass the individuals in question.
28. In conclusion, the Commissioner considered this to be a finely balanced case. He accepted that at the point the request was submitted there was some legitimate purpose and value to it, albeit that he considered the purpose and value to be arguably limited. However, the Commissioner was just persuaded that this was outweighed by the impact that answering this request would have on HMRC, both in the context of Mr. Tinker's recent requests to it, the wider context of very similar requests being submitted to it and the likelihood of the complainant submitting further similarly targeted requests to it.

Notice of appeal

29. The tribunal's understanding of the grounds, in essence, is that Mr. Tinker argues that the Commissioner was wrong to conclude that the request was vexatious because:
 - 29.1. **There is a legitimate purpose behind the requests.** HMRC engaged contractors using DR schemes. They deliberately withheld that information from the public and the Economic Affairs Committee. They knew at the time of the request in November 2018 that the answer was not nil. The request covers a period of time when Sir Amyas Morse had been commissioned to undertake an independent review of the loan charge and its impact. There is great interest from Mr Tinker and other loan charge victims in understanding what exchanges took place between the senior management of HMRC at that time that resulted in Sir Amyas Morse producing such a flawed report.
 - 29.2. **The burden was not disproportionate.** The overall burden has been caused, in part, by HMRC. Persistence was necessary because HMRC have been unwilling to provide information. It is unsurprising that HMRC are receiving lots of requests on this subject given the level of controversy that this legislation has provoked. There is little burden in responding to this particular request.
 - 29.3. **In relation to the Commissioner's conclusions on harassment and distress.** There are a number of key people 'at the centre of this storm' who are likely to be closely involved in any of the decisions to which this request was addressed.

The Commissioner's response

30. The tribunal will only overturn the decision notice and order HMRC to disclose the information requested if it is persuaded that the decision notice is wrong in law and that the request was not vexatious.
31. The Commissioner maintains that the request is vexatious adopting a holistic approach considering the previous course of dealings between Mr. Tinker and HMRC, the purpose and value of the request and burden being imposed on HMRC's staff and resources.
32. The Commissioner submits that any consideration of the burden of dealing with the material request not only incorporates the time and effort which would be expended in dealing with the specific request in issue but also the burden of dealing with the request in light of the context and history of Mr. Tinker's previous interaction with HMRC. This interaction may include previous requests as well as general (email or letter) correspondence.
33. The Commissioner also understands that the Appellant's correspondence has contributed to the wider burden placed on HMRC by other members of the public who have also submitted information requests on the same subject, and which HMRC believes to be a campaign against it in relation to the subject of disguised remuneration schemes.
34. The Commissioner notes that the requests are targeted at specific senior individuals in HMRC and that while the Appellant may not intentionally mean to harass these individuals, that his routine and specifically targeted requests for information may potentially have that effect on the individuals in question.
35. The Commissioner considers that it would be burdensome to respond to the current request when set against that backdrop. Taking all of the factors outlined in the Commissioner's DN and this response into consideration, the Commissioner considers that further compliance with the request is likely to lead to further communication and requests for information from the Appellant which could impose a real and significant burden upon HMRC.
36. To the extent that the Appellant is using information requests to obtain information with which to pursue a grievance against HMRC, then this is likely to diminish any serious objective value or purpose of the request. The Appellant is already clear that he has sufficient information with which to substantiate his allegations of dishonesty by HMRC and so the value of obtaining the requested information may be reduced. Further, it is open to him to further pursue those allegations with any relevant regulators or ombudsmen who would have their own powers to request any further information and would not rely on Mr. Tinker obtaining any information via the Act. The Commissioner remains satisfied that the actions of the

Appellant from 2018 to present mean that the current request for information can be determined as vexatious.

HMRC's response

37. Mr. Tinker refers in the summary of his grounds of appeal to a period between September and December 2019, which was when an independent review of the loan charge had been commissioned. For the avoidance of doubt HMRC confirms that the request and response relate to the period between September and December 2020.

Value or serious purpose

38. It is acknowledged that disguised remuneration schemes and the loan charge remain important matters. When taking into account the full history of dealings with Mr. Tinker, it is plain that his subsequent requests, including this request, do not have any continuing justification.
39. Mr. Tinker has been unreasonably persistent seeking to allegedly get to the bottom of what knowledge HMRC had in 2018. In the three month period leading up to the request in issue, Mr. Tinker made six FOIA requests on the same issue. Even where email chains were disclosed in response to two of those requests, he remained unsatisfied and made further requests.
40. Mr. Tinker is trying to re-open an issue which has been comprehensively addressed. He has been told why his 2018 request generated a 'nil' response. He is refusing to let the matter drop.
41. Mr. Tinker has adopted a scattergun approach. His requests are designed for the purposes of 'fishing' for information without any clear view as to what might be revealed. This is further evidenced by the grounds of appeal in which he refers to a different time period in 2019.
42. The series of requests has imposed a burden by requiring HMRC to sift through a substantial volume of information and there is a pattern of persistent fishing expeditions.
43. It is submitted that there is limited value in and not continuing justification for the request.

Burden

44. The request viewed in isolation would not be unduly burdensome to comply with. Taking into account the number, breadth, pattern and duration of Mr. Tinker's previous requests, as well as the wider requests received by HMRC about the loan charge, the request places a significant burden on public resources.

45. Mr. Tinker has made a large number of FOIA requests starting with the 2018 request. Since November 2020 several requests have specifically targeted the emails of senior officials. There were 6 requests in the period 8 September 2020 to 21 December 2020.
46. HMRC's past dealings strongly indicate that he would not be satisfied with any response and would continue to submit follow up enquiries.
47. HMRC relies on the wider burden imposed by the cumulative FOIA requests received about the loan charge. The wider requests have similar or identical wording. Several different requestors appear to be acting in a co-ordinated fashion even if not formally acting together.
48. The email records can only be accessed by a small number of private office staff. The coordination or any possible redactions falls to a small number of staff.
49. The aggregated effect, if not the intent, of the volume of similarly worded requests directed at specified senior officers is one of harassment.
50. Overall the significant burden imposed by the request viewed in context is plainly disproportionate to the limited, at best, value and purpose of the request.
51. The information requested has been disclosed to another requestor and has been publicly available since 12 August 2021. The pursuit of the appeal is academic.

Mr. Tinker's reply

52. The reason that several requests are made for a specific piece of information is that HMRC are reticent to supply information so that the initial request has to be recrafted to meet HMRC's requirements.
53. The 2018 request was seeking to show that HMRC knowingly engaged contractors using Loan Charge schemes. The disputed request is seeking evidence that will show whether the Loan Charge review by Sir Amyas Morse was or was not independent. There have been claims and counter claims about the independence of the review.
54. The 2018 request resulted in six exchanges between Mr. Tinker and HMRC. The disputed request resulted in several exchanges.
55. The disputed request is not scattergun. The dates are and the subject matter are clearly defined. Mr. Tinker reduced the scope of the request. HMRC changes the reference number for each modified request. This creates the impression of multiple requests.

56. It has been revealed by other FOI requests from other people that HMRC did have the information requested in the 2018 request at the time and prior to the response to a question from the chairman of the Economic Affairs Committee. This issue was not settled at the time.

Issues

57. The issue for the tribunal to determine is whether or not the requests are vexatious within s 14 FOIA.

Legal framework

S 14(1) Vexatious Request

58. Guidance on applying s 14 is given in the decisions of the Upper Tribunal and the Court of Appeal in **Dransfield** ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454). The tribunal has adapted the following summary of the principles in **Dransfield** from the judgment of the Upper Tribunal in **CP v Information Commissioner** [2016] UKUT 427 (AAC):
59. The Upper Tribunal held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA (para 10). That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied' (para 72 of the CA judgment).
60. The test under section 14 is whether the request is vexatious not whether the requester is vexatious (para 19). The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA (para 24). As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule.
61. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account (para 25). The Commissioner's guidance that the key question is whether the request is likely to cause distress, disruption, or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request (para 26).
62. Four broad issues or themes were identified by the Upper Tribunal as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff).

These considerations are not exhaustive and are not intended to create a formulaic check-list.

63. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.
64. As to burden, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern, and duration of previous requests may be a telling factor [para 29]. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request [para 32].
65. Ultimately the question was whether a request was a manifestly unjustified, inappropriate, or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests [paras 43 and 45].
66. In the Court of Appeal in **Dransfield** Arden LJ gave some additional guidance in paragraph 68:

In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available...

67. Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor.

68. The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. Public interest cannot act as a 'trump card'. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

The role of the tribunal

69. The tribunal's remit is governed by s.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.

Evidence

70. We read and took account of an open bundle and a large number of additional documents provided subsequently by the appellant.
71. Whilst we have read and taken account of all the information that the appellant provided where it was relevant to the issue we had to determine, it was not necessary or proportionate to summarise or refer to all the information considered in this decision.

Discussion and conclusions

Section 14

72. Although the four broad issues or themes identified by the Upper Tribunal in **Dransfield** are not exhaustive and are not intended to create a formulaic check-list, they are a helpful tool to structure our discussion. In doing so, we have taken a holistic approach and we bear in mind that we are considering whether or not the request was vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA.

Burden

73. Responding to the disputed request in isolation does not place an unreasonable burden on HMRC. Although the appeal relates only to the disputed requests, when assessing the burden on HMRC we must consider the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, in assessing whether the request is properly to be described as vexatious.

74. In looking at context and history we take account of matters that had occurred by the time HMRC responded to the request, not matters that have occurred since.
75. We accept that the 2018 request and related correspondence stems broadly from the same underlying issue as the disputed request and the other requests in 8 September 2020 to 21 December 2020. They all relate to the issue of the Loan Charge.
76. However, we find that the 2018 request and the disputed request have very different focusses. The 2018 request was focussed on whether HMRC engaged contractors using Loan Charge schemes. The disputed request asks for emails between specific people during a specific limited period in late 2020. It is clear from the submissions by Mr. Duff that the disputed request is intended to focus on the emails sent during the period of the report by Sir Amyas Morse. In fact, Mr. Tinker has, apparently in error, requested emails from 2020 rather than 2019. We find that the disputed request is not intended to reveal evidence relating to HMRC's use of contractors using the Loan Charge.
77. On this basis, although we accept the disputed request is broadly part of the same course of dealings as the 2018 request and its associated requests and correspondence in 2018/2019, we take into account the fact that the disputed request has a different focus. We do not view the disputed request as an attempt to reopen a matter that has already been comprehensively addressed.
78. Further there is no clear evidence before us on the extent and nature of the correspondence between Mr. Tinker and HMRC surrounding the 2018 request. HMRC states that Mr. Tinker made three further FOIA request between December 2018 and December 2019, two of which were related to how the department engaged contractors. This does not appear to be excessive, particularly given HMRC's tendency to label refined requests as new requests.
79. Between September 2020 and the disputed request on 21 December Mr. Tinker made a series of further requests on the subject of the Loan Charge. Some of these requests were focussed on the same issue as the 2018 request, and the related issue of whether or not HMRC's response that the 2018 request was accurate.
80. For example the series of requests between 6 September 2020 and 5 November 2020 relate explicitly to the issue of whether or not HMRC's response to the 2018 request. Although HMRC describe these as 6 separate requests, we note that many of the different requests are in fact attempts by Mr. Tinker to refine the scope of the request, so that HMRC cannot claim that the request exceeds the s 12 limit or would impose an unreasonable burden.
81. The request of 8 September 2020 (**the first request**) is a broad request for all emails between HMRC and RCDTS which contain the words 'disguised remuneration'. HMRC refused the request on the basis of s 12.

82. On 5 October Mr. Tinker narrowed his request to emails to/from two named individuals that contain the words 'disguised remuneration'. This was labelled as new request (**the second request**). HMRC responded on 2 November 2020 and provided some of the information requested, but interpreted the request in conjunction with his previous request and therefore limited the search to the individuals' inboxes containing the terms 'disguised remuneration' and 'RCDTS'.
83. Mr. Tinker replied on 3 November pointing out that HMRC had disclosed only a subset of the requested information. This was labelled as a new request (**the third request**). HMRC responded relying on s 14, in part on the basis of the unreasonable burden, because a search in relation to one of the individuals had yielded over 3,500 results, and the fact that the request was seen to be 'fishing for information without any idea of what might be revealed'.
84. Mr. Tinker replied on 5 November 2020. He explained that the purpose of the request was to find evidence that HMRC were engaging contractors using disguised remuneration schemes prior to November 2019 and the senior management were aware of that. He limited the scope of the request to look only at emails between one of the named individual and a third named individual. This was labelled as a new request (**the fourth request**). In a response dated 18 November 2020 HMRC provided the requested information.
85. Although this has been counted by HMRC as 4 separate requests, in effect it was one broad request, narrowed down to the level at which HMRC could and did provide the requested information without s 12 or s 14 being triggered. In our view, it is not unreasonable persistence to attempt to reduce the scope and burden of a request to the point at which the public authority is able to comply.
86. **The fifth request** was made on 23 November 2020. In this request Mr. Tinker focussed on whether or not HMRC's response that the 2018 request was accurate. HMRC answered the request by email dated 1 December 2020.
87. During the internal review process HMRC explained that the information provided in December 2018 was an accurate representation of the information available at that time. The internal review response was provided after the disputed request was made. HMRC state that following this response and explanation, Mr. Tinker continued to make further requests for copies of emails of senior officials. Again these took place after the disputed request was made.
88. On 4 December 2020 Mr. Tinker made a request (**the sixth request**) which was a wider version of the disputed request. It was identical apart from the limitation to emails between Jim Harra and Mary Aiston. HMRC rejected it on the basis that it would produce too many emails. Mr. Tinker therefore refined the request to produce the disputed request that is the subject of this appeal.

89. We accept that the focus of most of the requests for 2020 on emails of senior officials is likely to focus any burden on specific members of the team.
90. We accept, based on previous correspondence, that Mr. Tinker is likely to make further requests or follow up correspondence. We do not think that this has been done unreasonably in the past, and therefore we do not infer that this will be done unreasonably in the future.
91. Looked at as a whole, we find that the request, looked at in the context of the entire course of dealings, does not place an unreasonable burden on HMRC. The correspondence and requests in 2018 and 2019 were not excessive. The first to the fourth requests made between September and November were, in reality, what the tribunal views as reasonable attempts by Mr. Tinker to clarify or reduce the scope of the first request made on 8 September. The separate request on 23 November 2020 does not add significantly to the burden, and most of the related correspondence, including the respondent's explanation, took place after the disputed request. Taken together, we do not accept that the aggregated burden would place a significant strain on HMRC's resources.
92. Further, we do not accept that Mr. Tinker showed unreasonable persistence. The request of 23 November 2020 arose out of a specific item of correspondence which had been recently disclosed and (set out in para 9 above) which does appear to demand an explanation from HMRC in relation to their response to the 2018 request. Whilst an explanation was provided in response to the internal review, that took place after the disputed request. We do not accept that Mr. Tinker was, at the time of the disputed request, attempting to reopen an issue that had already been comprehensively addressed.
93. In addition, we do not accept that the requests overall demonstrate a 'scattergun' approach. The first request on 8 September started as a wide request, which might be described as scattergun, but it was subsequently narrowed down (through what HMRC classes as requests two, three and four) to a focussed request and answered by HMRC. The request of 23 November 2020 could not be described as scattergun. The request of 4 December 2020 was fairly wide, although it was limited to two specific individuals during a specific period intended to illuminate the independence of the Amyas review. It was narrowed down in the disputed request to a very focussed request which only produced two emails.
94. We accept that, to some extent, the first request on 8 September and the following refinements were 'fishing' for information, in the sense that Mr. Tinker cast his net wide initially, presumably in the hope of catching some useful information. Mr. Tinker did however, as set out above, narrow his request. We also accept that, to some extent, in making the disputed request and its wider incarnation of 4 December 2020 Mr. Tinker was 'fishing' for useful information. The period of the request was intended to be limited to the specific period in which Mr. Tinker was interested, specific individuals were identified, and the request was intended to be

focussed on correspondence relevant to the Amyas review. We accept that the search terms were reasonably wide, but once the disputed request was submitted it had been narrowed to the extent that it only produced two emails.

95. Overall Mr. Tinker's requests, *once clarified or refined*, do not require the authority to sift through a substantial volume of information, are not excessively wide in scope (and therefore do not encompass information which is of limited value because of their wide scope) and do not require the authority to spend considerable time considering exemptions and redactions.
96. We do accept that Mr. Tinker's approach in September and December to start wide and then narrow in response to a refusal does create some additional burden but not one which we consider unusual or unreasonable in the context of FOIA. Mr. Tinker has taken the initiative to reframe or refocus his request with a view to bringing it within the costs limit and/or reducing the burden to a reasonable level. This is similar to the approach that might be suggested by a public authority in accordance with its duty to provide advice and assistance:

Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit. (Freedom of Information, Code of Practice, para 2.10).

97. Overall, we do not accept that there is a pattern of persistent fishing expeditions by Mr. Tinker.
98. HMRC states that in the period 1 October 2020 to 31 May 2021 it received over 150 FOIA requests related to disguised remuneration, representing over 5% of all requests received across the department. Over half of those requests were made by just 10 individuals with the majority of requests using similar or identical wording.
99. In our view, it is not legitimate to take account of the burden on HMRC of dealing with all FOIA requests from different requestors relating to disguised remuneration. We find that the use of similar wording is not evidence of an organised campaign. Mr. Tinker has explained that where it is often useful to use someone else's form of words when they appear to either be more succinct and/or have resulted in HMRC providing the requested information. This is credible, given that many requests and their responses are publicly available on WhatDoTheyKnow. This in itself does not in our view provide any reason to take account of the burden of responding to all requests relating to disguised remuneration. We are not persuaded that there is a campaign or coordination in submitting the requests. Further, we note that HMRC has responded to at least some other requests relating to disguised remuneration.

Harassment and distress

100. We do not accept that there is evidence of distress or harassment. The fact that requests are directed at specific senior officers does not, in our view, constitute harassment. The fact that specific staff members have to deal with a large number of similar requests does not, in our view, constitute harassment. We do not accept that the requests made by Mr. Tinker have a ‘plainly harassing effect’.

Motive

101. We find that the requests are not made simply to cause annoyance or disruption at HMRC, or as part of any campaign of harassment.

Purpose or value

102. The underlying issue of the loan charge is of significant interest to a portion of the public, in particular those who were personally affected by its imposition. There is therefore some general public interest in transparency in relation to HMRC’s approach to this issue. There is also a general public interest in transparency of the workings of public authorities and the HMRC in particular.

103. The specific request is intended to focus on correspondence between particular senior individuals at the time the loan charge review was being carried out by Sir Amyas Morse. Mr. Tinker submits that there were concerns about the independence of the Amyas Morse review. The disputed request, perhaps in error, relates to a period in 2020. The Amyas Morse review took place in the same period in 2019. There is therefore no specific public interest that we are aware of in the disclosure of emails between these particular individuals from the particular period covered by the disputed request.

Conclusion

104. Although there is no specific public interest in the particular information requested, there is a general public interest, at least for a section of the public, in transparency in relation to HMRC’s dealings with the loan charge. In our view, even though the disputed request appears to relate to a different period to that on which Mr. Tinker intended to focus, it cannot be said that there is no reasonable foundation for thinking that the requested information would be of value to the requestor, or to the public or to any section of the public.
105. Looked at as a whole, our conclusion is that the burden on HMRC is not unreasonable and is not disproportionate to the, albeit fairly limited, value of the requests.
106. We have taken a holistic and broad approach and have looked at the requests in the light of the past course of dealings between the appellant and HMRC. We have considered the nature of the requests under consideration and the nature of previous requests and correspondence. We have considered the

burden on HMRC and the value and purpose of this request. We have looked at the appellant's motive and any harassment or distress that was likely to be caused by the request. Looking at all these factors we find that the request was not vexatious in the sense of being a manifestly unjustified, inappropriate, or improper use of FOIA.

107. We conclude accordingly that the exemption in s 14 does not apply and the appeal is allowed.

Next steps

108. HMRC states that it has disclosed the information in scope of the disputed request in response to a request by another individual. HMRC says that the information is publicly available. We have considered in the light of this statement whether it is appropriate to order that no steps need to be taken.
109. Although it is not entirely clear, we understand Mr. Tinker might be asserting in his reply that the information made public by the HMRC does not amount to all the information in scope of the disputed request. He says that HMRC have release 'two emails' and that his request remains that HMRC supply 'all the emails'. It is possible, therefore, that there remains a dispute as to what information is held within the scope of the request.
110. In the light of this, we have decided, as suggested by the Commissioner, that it is appropriate to order HMRC to provide a fresh response which does not seek to rely on s 14 FOIA.

Signed Sophie Buckley

Date: 22 July 2022

Judge of the First-tier Tribunal