Case Reference: EA-2023-0462

Neutral Citation Number: [2024] UKFTT 312 (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 allowed in part.

Substitute decision notice:

Organisation: HM Treasury

Complainant: Mr. Mark Tully

1. HM Treasury were not entitled to rely on section 14 of the Freedom of Information Act 2000 in relation to requests 1-3 made on 1 February 2022.

2. HM Treasury were entitled to rely on section 14 of the Freedom of Information Act 2000 in relation to requests 4 and 5 made on 1 February 2022.

3. HM Treasury must provide the complainant with the information requested in requests 1-3 within 42 days of the date this decision is sent to HM Treasury by the tribunal.

4. 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. 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-189898-L1M6 of 2 October 2023 which held HM Treasury (HMT) was entitled to rely on section 14(1) of the Freedom of Information Act 2000 (FOIA).

3. This appeal was heard on the same day as and by the same panel as the appeal in EA/2023/0539.

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 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.
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> 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.
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> 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.
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> 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. On 29 August 2021 Mr. Tully requested information relating to any meetings that took place between Jesse Norman MP and external stakeholders about the Loan Charge between June and August 2019.

16. HMT identified 10 such meetings and refused the request under section 12 FOIA on 27 September 2021.

17. 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 FOIA on the basis that reviewing the documents for exempt information would require a disproportionate effort.

18. 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.

19. 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).

20. On 19 January 2022 Mr. Tully requested information (some of which he referred to as 'metadata') relating to the HMT's reliance on section 14 in relation to the 2021 requests. On 1 February 2022 he refined that request. The request of 1 February 2022 is the subject of this appeal.

21. On 21 February 2022 Mr. Tully made a narrowed request for the information relating to the meeting on 12 June 2019 with Keith Gordon. That request is the subject of the other appeal heard today by this tribunal (EA/2023/0359).

Request, Decision Notice, and appeal

The request and the response

22. On 1 February 2022 Mr. Tully made the following request for information:

> "1. The total number of documents and the total number of emails for, or related to, the single meeting (6th June 2019: Keith Gordon) which were identified at the time of the first refusal following (and despite) the narrowing of the original request by 70%.
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> 2. The total number of documents and the total number of emails for, or related to, the single meeting (6th June 2019: Keith Gordon) which were identified at the time of the next refusal, following (and despite) the further narrowing of this request. This might/could be the exact same answer as (1).
>
> 3. The total number of documents and the total number of emails for, or related to, the single meeting (6th June 2019: Keith Gordon) which belatedly 'came to light' and which prompted you to claim a hitherto unmentioned use of section 14.
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> 4. All recorded information and documentation which provides evidence as to why and how these 'newly discovered' documents/emails were not originally located or recognised as relevant, and what specific internal process, procedure or policy caused the failure to identify these at the time of the original request, or indeed any earlier than was eventually communicated by HM Treasury.
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> 5. All metadata relating to FOI2021/20755, FOI2021/23104, FOI2021/27539, and IR2022/00365, which must include (but is not limited to) all recorded communications of any type, in any form (including smartphone exchanges), which provides evidence of internal discussions within HM Treasury, and any decisions which were taken with regard to these three distinct Freedom of Information requests and the associated internal review. It is considered that this much-narrowed scope, now focusing on ONE single meeting (6th June 2019: [named individual]) will enable HM Treasury to supply this information without further delay."

23. This was a refined request after Mr. Tully's earlier request of 19 January 2022 had been refused.

24. HMT responded on 21 March 2022 withholding the information under section 14(1) (vexatious request). HMT stated:

"Following a search of our records we can confirm that HM Treasury does hold information within scope of your request.

However, your request is very wide in scope, comprising of a request for counts of emails/documents and for the meta data relating to three FOI requests and one internal review request. Our search has identified a large number of documents to consider. In order to comply with your request we would need to review each document separately with a view to determining whether any information was exempt from release, for example, due to sensitivities or personal data, and to then redact any exempt material.

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.

It may be that if you were to amend your request, for example, by narrowing the focus and being more specific about the type of information that you are particularly interested in we may be able to comply with a future request. However, we cannot guarantee that this would be the case."

25. HMT upheld its position on internal review on 8 June 2022, stating, inter alia:

"For the avoidance of doubt, the element of your request which deems it burdensome is: "All metadata relating to FOI2021/20755, FOI2021/23104, FOI2021/27539, and IR2022/00365, which must include (but is not limited to) all recorded communications of any type, in any form (including smartphone exchanges), which provides evidence of internal discussions within HM Treasury, and any decisions which were taken with regard to these three distinct Freedom of Information requests and the associated internal review."

As we have previously noted, your request is very wide in scale: as well as the counts of documents it also spans the meta data for three separate FOI requests and one internal review request. As we have explained, there is a lot of information within scope. In order to comply with your request we would be obliged to review each individual document with a view to determining whether any information was exempt from release, for example, due to sensitivities or personal data, and to then redact any exempt material. It is my view that a refusal under section 14 is reasonable in these circumstances.

We have previously advised you that were you to narrow your request we may be able to comply. I would again invite you to narrow the scope of your request for our consideration."

The decision notice

26. In a decision notice dated 13 June 2023 the Commissioner decided that the Council was entitled to rely on section 14 FOIA.

27. The Commissioner recognised that there is a serious purpose in finding out as much information as possible about the Loan Charge Review. The Commissioner noted that the allegation that the impact of the Review has been a factor in a number of suicides is not hyperbolic. He noted that this is a point which has been officially considered, including at HMT.

28. The Commissioner stated that so-called metadata requests should not automatically be dismissed as being of less significance or importance than the original request to which they relate. The Commissioner nevertheless noted that this request was submitted following the complainant's earlier complaint to him and prior to the Commissioner's consideration of it.

29. The Commissioner recognised that the complainant is seeking to obtain as much information as possible about how HMT has handled the Loan Charge Review. The APPG has conducted enquiries on this matter and continues its work. However, the Commissioner noted that it published its inquiry report on 3 April 2019 and has published several reports and submissions since then. While the complainant remains concerned that there is more to discover, the Commissioner observed that the APPG has already conducted a thorough investigation.

30. The Commissioner stated that he would not describe HMT as having been unwilling to be transparent, as evidenced by disclosures it has already made. While the time it took to provide a response to this request was longer than ideally it should have been, the Commissioner had seen no evidence to support the assertion that this was a deliberate attempt at delay.

31. In light of the above, the Commissioner concluded that HMT was entitled to rely on section 14 as its basis for refusing this request. The Commissioner was not convinced that the considerable effort required to respond (the explanation of which, as provided by HMT, he accepted as reasonable) was commensurate with the value of this particular request in the circumstances of this case.

32. The Commissioner also took into account that the work of the APPG showed that the complainant's concerns had already been considered by elected representatives and that the APPG continued to operate. The important matter that the complainant is concerned about therefore already has the attention of Parliament.

Notice of appeal

33. In essence, the grounds of appeal are that the Commissioner was wrong to conclude that the request was vexatious.

34. Mr. Tully makes the following main points:

34.1. The Commissioner wrongly states that Mr. Tully was seeking an explanation when he was seeking recorded information and documentation.

34.2. The Commissioner did not look at all the circumstances and is biased towards HMT.

34.3. Mr. Tully argues that there is value in disclosing internal discussions about refusing a request because it provides proof of the reason for refusal.

34.4. The pattern of refusals by HMT suggest that they are attempting to frustrate the requests for information. Mr. Tully submits that HMT do not recognise the value of releasing the information.

34.5. There is value in publicising information about the Loan Charge because it has attracted intense criticism and disclosure would help assist victims.

34.6. Mr. Tully does not accept HMT's classification of the information as administrative information that would serve no purpose.

34.7. The first three parts of the request were a simple counting exercise.

34.8. The report by the APPG in April 2019 was its first response to the Loan Charge policy and was ignored by government. Much more information is now available.

The Commissioner's response

35. The Commissioner acknowledges that the Appellant made a preceding metadata request on 19 January 2022. The Appellant did not request an internal review of HMT's response, rather he submitted a refined request on 21 February 2022, stating, "Thank you for your reply, confirming refusal under section 14(1) on the 20th working day following my request. I will narrow the focus as advised." The Commissioner's section 50 investigation and Decision Notice were therefore limited to the Appellant's narrowed 21 February 2022 request and whether section 14(1) FOIA had been correctly applied to refuse this request.

36. The Commissioner acknowledges that the 21 February 2022 request can be categorised as one request containing five parts.

37. The Commissioner accepts that there is serious purpose and value to the request.

38. The Commissioner notes the Appellant's distrust of HMT and reiterates his position that metadata requests should not automatically be defined as vexatious. However, the metadata request was made 3 days after the section 50 complaint regarding the 1 December 2021 request was made to the Commissioner. The Appellant was aware of his right to submit a complaint to the Commissioner to scrutinise HMT's handling of the 1 December 2021 FOIA request but chose to additionally make the metadata request as another means to challenge HMT's position. During the Commissioner's section 50 investigation, HMT withdrew its application of section 14(1) FOIA. The Commissioner accepts that this did not occur until after the

metadata request was made but demonstrates that the Appellant's concerns were being addressed via an alternative route to the metadata request.

39. Disclosure of the metadata requested would not directly promote transparency or further public understanding of the Loan Charge policy. It will only provide transparency and understanding regarding HMT's handling of a FOIA request relating to this subject matter. The Appellant has argued that the information requested would assist the APPG. The Commissioner considers that this argument is limited.

40. The Commissioner submits that given this metadata request relates to HMT's handling of three prior FOIA requests, it is understandable that this may encompass a large volume of emails. The Commissioner accepts that considerable effort would be required to respond.

41. Weighing up the limited serious and purpose and value in the request (given the ongoing appeal in EA/2023/0201 and the fact it would shed very little light directly on the Loan Charge policy), coupled with the burden that compliance would impose upon particular departments within HMT, the Commissioner stands by the position reached in the DN.

Legal framework

S 14(1) Vexatious Request

42. Guidance on applying section 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).

43. 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. 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).

44. The test under section 14 is whether the request is vexatious not whether the requester is vexatious. 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.

45. 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.

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.

46. 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.

47. 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.

48. 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. 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.

49. 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.

50. 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..."

51. 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.

52. 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

53. 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.

Evidence and submissions

54. We read and took account of an open bundle. We also took account of the bundle in the other appeal that we heard today (EA/2023/0539), where relevant.

55. 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

56. 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'.

57. 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.

58. 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.

Section 14

Preliminary observations

59. In Kennedy v Charity Commission [2014] 2 WLT 808, Lord Sumption, with whom Lord Neuberger and Lord Clarke agreed, said as follows, at para 153:

> "The Freedom of Information Act 2000 … introduced a new regime governing the disclosure of information held by public authorities. It created a *prima facie* right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals."

60. It is important to remind ourselves of those observations. FOIA creates a *prima facie* right to disclosure of information held by public authorities, save in so far as that right is qualified by the terms of FOIA or the information in question is exempt. Further, we remind ourselves that the qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure.

61. The purpose of section 14 is "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA." (UT, *Dransfield,* para 10). In order to achieve this purpose, as the Court of Appeal noted (CA, *Dransfield,* para 68), Parliament has chosen to use a strong word, and therefore the hurdle of satisfying it is high.

62. Section 14 must not be interpreted in a way that in effect introduces a 'public interest' threshold that all requestors have to pass. If no exemption is engaged, there is a right to disclosure of information held by public authorities whether or not there is any public interest in disclosure.

63. Nor should section 14 be interpreted in such a way that it operates as a 'catch all' exemption. It should not be used to avoid the need to consider whether the authority is entitled to rely on an exemption to withhold the information, even where it might appear obvious to the authority, the Commissioner or to the tribunal that the requested information ought to be withheld either in the public interest or for some other reason. Parliament has chosen which exemptions to include and determined how those exemptions operate in order to embody the 'careful balance' identified above. Section 14 is not designed to avoid the need to consider the application of individual exemptions.

Application of section 14

64. 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 checklist, 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.

A multi-part request or 5 separate requests?

65. This is not a case where HMT relies on improper motive or harassment. Whilst there is some reference by HMT to Mr Tully's other requests, the application of section 14 is based primarily on the disproportionate burden of part 5 of the request in the light of the limited purpose or value of that part of the request. HMT has only asserted a burden in relation to the response to part 5 of the request. HMT acknowledged in its letter to the Commissioner dated 16 August 2023 that responding to parts 1-3 and 4 would not be a burden.

66. In those circumstances, whilst there appears to be agreement between the parties that HMT were correct to treat the request of 1 February 2022 as a single request, we find that for the purposes of relying on section 14, HMT should have considered each part as a separate request, and decided whether each of those requests was vexatious within the meaning of section 14.

67. Despite this finding we use the terminology 'parts 1-5' or 'parts of the request' to avoid confusion with other requests made by Mr. Tully.

Motive

68. There is no suggestion of an improper motive in this appeal.

Burden

69. There is a conceptual difference between parts 1-3 and parts 4-5.

70. Parts 1-3 ask for the total numbers of documents and emails for or related to a meeting with Keith Gordon on 6 June 2019 that had been identified by HMT on 3 separate occasions and when it relied on section 14 FOIA to refuse the request.

71. Parts 4 and 5 both, in essence, ask for recorded information and documents which contain information on why HMT responded to or handled the requests in the way it did when in relied on section 14 FOIA.

72. There is a clear overlap between parts 4 and 5 and we find that it was appropriate to consider the burden of responding to these parts together.

73. HMT clearly sets out the burden involved in responding to part 5 of this request at page 122 and 123. HMT has carried out a number of sampling exercises that have produced significant numbers of emails in relation to only a subsection of the request. For example, in relation to only one of the previous requests, a search of the mailbox of the FOI Case advisor resulted in 51 emails, some with attachments. A search of the Head of Information Rights Unit's emails resulted in 54 items, of which 37 had attachments. We accept that the answering part 5 would also involve searching other mailboxes such as the Private Office and that of the policy official. On this basis we accept HMT's submission that the likely number of emails, if similar searches were carried out in relation to each request, would be 400+ emails within the Information Rights Unit alone.

74. We accept that considerable time would need to be spent extracting and collating the information and redacting, for example, the names of junior members of staff.

75. We accept that this would result in the two small teams who work on information rights and the policy team responsible for the Loan Charge being taken away from their other work.

76. Overall, we find that responding to parts 4 and 5 would place a very significant burden on HMT.

77. In contrast, we find that responding to parts 1-3 would have placed no significant burden on HMT, even looked at in the light of the history of other requests. The emails or documents that had to be counted had already been located.

Harassment and distress

78. There is no evidence of harassment or distress in this case.

Purpose or value

79. We have not considered the purpose or value of parts 1-3 because we do not consider that complying with those parts would have placed any significant burden on HMT.

80. In respect of parts 4 and 5, we accept that the requested information is likely to shed some light on the decision-making processes and why HMT acted as it did when it relied on section 14 FOIA. There is therefore some value to Mr. Tully in obtaining a complete paper trail in relation to HMT's handling of his requests. However, there is a mechanism available for both challenging and investigating a public authority's handling of a request for information. It is not necessary for Mr. Tully to receive the entire paper trail because he is able to request an internal review. He is also able to submit a complaint to the Commissioner and appeal that decision to the tribunal and the Upper Tribunal. The existence of any alternative significantly limits the value and purpose of such information being released to Mr. Tully.

81. Overall, we conclude that the information sought would only be of limited value to the requester. Further, we do not accept that the information is of any significant value to the public or a section of the public. We agree with the Commissioner that disclosure would not directly promote transparency or further public understanding of the Loan Charge policy. It will only provide transparency and understanding to Mr. Tully regarding HMT's handling of a FOIA request for the purposes of section 14 FOIA.

Conclusions on whether the request is vexatious

82. The tribunal takes a holistic approach and the request must reach the high hurdle of vexatiousness. 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.

83. Looked at as a whole our conclusion is that requests 4 and 5 are vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA. The very significant burden of complying is grossly disproportionate to the limited value to Mr. Tully and there is no significant wider value to the public.

84. We find that requests 1-3 are not vexatious.

85. We conclude accordingly that the exemption in section 14 applies to requests 4 and 5 but that HMT was not entitled to rely on section 14 in relation to requests 1-3.

Observation

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

87. Had we concluded that HMT were right to treat this as a single request and refuse it all as vexatious, whilst HMT did invite Mr. Tully to narrow his request, we would have taken the view that under section 16 of FOIA HMT should have specified which parts of the request it could have provided without any disproportionate burden and invited him to re-submit a separate request for those parts.

Signed Sophie Buckley Date: 17 April 2024

Judge of the First-tier Tribunal