Case Reference: EA/2023/0222; EA/2023/0431; EA/2023/0358
NCN: [2024] UKFTT 391 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 21 May 2024

Before

JUDGE NEVILLE
MEMBER R TATAM
MEMBER S COSGRAVE

Between

FIONA THOMPSON

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

HIS MAJESTY'S TREASURY

Second Respondent
(in EA/2023/0222 only)

Decision: All three appeals are dismissed.

REASONS

1. This decision concerns three requests made by Fiona Thompson to His Majesty's Treasury ("HMT"), pursuant to the Freedom of Information Act 2000.

2. All three requests concern the Loan Charge, a scheme introduced by HMRC in 2016 to target those using, or who had used, 'loan schemes' to avoid liability for income tax and national insurance. Following a range of concern over some of the scheme's effects, in particular its retrospectivity, the government commissioned Sir (later Lord) Amyas Morse to conduct the Independent Loan Charge Review[i]. This reported in December 2019, following which:

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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.

3. The above paragraph is taken from a detailed history of the Loan Charge and the Review contained in a recent decision of this Tribunal: Tully v Information Commissioner [2024] UKFTT 312 (GRC), EA/2023/0462. We gratefully adopt it as part of our own consideration.

4. There are many who remain dissatisfied with the outcome of the Review and the action taken in response to it. For example, there is a Loan Charge Action Group ("LCAG") that 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". There are numerous appeals before this Tribunal relating to Freedom of Information requests for information held by HMT concerning the enquiry.

5. Such grass roots activism in response to a measure combatting tax avoidance might at first seem surprising. In his report's Executive Summary, Sir Amyas Morse describes how many Members of Parliament had initially greeted constituents' concerns with scepticism, their views then evolving once the details emerged. He later explains that those affected by the Loan Charge:

> "…are not the 'usual suspects', by which I mean large corporates with an army of advisers, or – for the most part – very rich individuals. Large corporates settled and ceased using schemes when they saw that they were unmistakably not viable after late 2010. […]
>
> The residual group are frequently on mid-range or lower incomes, coming from industries like construction, IT and oil and gas, as well as financial or business services. It is clear to me that many of those affected may not have been fully aware what they were doing when using loan schemes or failed to distinguish between genuine professional advisers and those acting more as salespeople. Certain of them felt that they had little option but to use the schemes.
>
> I have a great deal of sympathy for those people. […]"

6. The majority of the impact statements received by the Review from those affected said that the author or a family member had experienced a decline in their mental health as a result of their experiences with the Loan Charge. On 18 January 2024, Sky News reported[ii] that "HMRC has admitted that there have been 10 suicides linked to

the loan charge", although of course we should not be taken as drawing any causative link ourselves.

7. The above background illustrates the emotive and serious context in which those dissatisfied at the Review's recommendations, and its recognition of the Loan Charge's effects and HMRC's surrounding conduct, have sought information about the way in which the Review reached its conclusions.

8. The parties have all consented to this appeal being decided without a hearing. We have had regard to the documents contained within the bundles, open and closed, filed in each appeal.

9. We should say at the outset that the length of these reasons will not reflect the length of the submissions and the volume of the papers before us. Ms Thompson has made very detailed submissions concerning the Loan Charge, the Review, and her disputes with HMT, HM Revenue & Customs, and the Commissioner. This Tribunal is neither required to, nor realistically could, rehearse and assess every factual and legal point made. We shall instead identify which issues we consider relevant to our decision, and explain how we have decided them. It has not been necessary to issue any closed reasons. An embargoed draft of this decision was sent to the respondents to ensure that none of the information requested in Request #1 had been inadvertently disclosed.

The three requests

10. They are as follows:

    a. Request #1 – Appeal No. EA/2023/0222 – IC ref: IC-157474-F0J6

        i. On 23 April 2020, in response to a previous request by another individual[iii], HMT disclosed 513 pages of information. Within that information, Ms Thompson had found an email to Tom Scholar, Permanent Secretary to the Treasury, copying in Beth Russell, Director General of Tax and Welfare, dated 6 September 2019, concerning the approach to be made to Sir Amyas to lead the Review. On 10 March 2021, Ms Thompson requested:

        > *"…full and comprehensive details of all recorded communications and evidence (including, but not limited to reports, documents, notes, meeting minutes, emails, SMS messages, WhatsApp messages, computer files, letters and any sound or video recordings) between Beth Russell and any other individual prior to 06 September 2019 containing any reference to this subject, and which culminated in the final decision to select and approach Sir Amyas Morse to head the government's review into the Loan Charge. Please also provide similar details (noting that individual names can be redacted whilst enabling the substance of the debate around their suitability or otherwise to be published) of how many other potential candidates were considered for*

this role, and specifically what criteria was used by HM Treasury and government officials to determine how Sir Amyas Morse was considered as more suitable in experience than a wholly independent and qualified tax Judge, or indeed any other possible candidates for the appointed task. ...”

ii. The request was refused under section 12 of FOIA, on the basis that the cost of compliance would exceed the relevant limit. Ms Thompson submitted a request on 7 June 2021 that refined her request to information dated between 28 June 2019 and 6 September 2019.

iii. HMT refused the refined request on 1 September 2021, relying on the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA and concluding that the public interest test favoured non-disclosure of the requested information.

iv. Dissatisfied, Ms Thompson complained to the Commissioner. In a Decision Notice dated 28 March 2023, the Commissioner ordered disclosure of the total number of candidates considered for the role. Apart from that, the Commissioner agreed with HMT that all the requested information engaged the cited exemptions, and that the balance of the public interest favoured non-disclosure.

v. On 6 April 2023, HMT confirmed that 26 candidates were considered, excluding Sir Amyas.

vi. The present appeal was lodged with the Tribunal on 24 April 2023.

b. <u>Request #2 – Appeal No. EA/2023/0431 – IC Ref: IC-184661-L8B0</u>

i. On 4 November 2021, Ms Thompson made another request for information from HMT. It concerned how Request #1 above, refused under section 36(2), had been dealt with.

ii. A public authority may only rely on section 36(2) if, “in the reasonable opinion of a qualified person”, the requested information would, or would be likely to, cause prejudice to the effective conduct of public affairs in one of the ways stated. Ms Thompson requested the following information about the qualified person involved in HMT’s response to Request #1, already described above:

> *1) the name of the qualified person who provided that opinion, where qualified person, in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown; or, in relation to information held by any other government department, means the commissioners or other person in charge of that department.*

2) the full and unabridged text of that qualified person's opinion, and all recorded information, of any type or in any format, which contains submissions (or exchanges of opinion) provided to the qualified person for considering that request.

3) all metadata held in any recorded form by the department which relates to my original request (reference FOI2021/09786), the subsequent request (FOI2021/15854), the next allocated request (reference FOI2021/22729) and the recently allocated internal review (reference IR2021/25860).

iii. HMT refused this request on 2 December 2021, relying on the request being vexatious under section 14. On 31 January 2022, Ms Thompson submitted a refined request seeking only the information sent to the qualified person and within a narrower timeframe:

> *"…provide all recorded information, of any type or in any format, which contains submissions (or exchanges of opinion) provided to the qualified person for considering that request between 6th July 2021 and 1st September 2021. On the continued assumption that it was Kemi Badenoch who provided the opinion, then all communications covering this request should be held within a single mailbox - unless you are likely to inform me that there are other forms of recorded information on other types of media which contain this data? Please kindly confirm - thank you.*
>
> *With regard to the third point, which asked for all metadata held in any recorded form by the department which relates to my original request (reference FOI2021/09786), the subsequent request (FOI2021/15854), the next allocated request (reference FOI2021/22729) and the internal review (reference IR2021/25860), please restrict your search for metadata to dates between 7th June 2021 and 1st December 2021…"*

iv. This was treated as a fresh request, which on 28 February 2022 HMT again treated as vexatious. Ms Thompson complained to the Commissioner, who issued a Decision Notice on 7 September 2023 again agreeing with HMT that the request was vexatious. It should be noted that the multiple references in the above extract arise from HMT assigning new reference numbers to subsequent correspondence clarifying or refining the original request.

v. The present appeal was lodged with the Tribunal on 5 October 2023.

c. <u>Request #3 – Appeal No. EA/2023/0358 – IC ref: IC-181375-C8N7</u>

i. On 4 November 2021, Ms Thompson requested the following information from HMT:

"Please provide all sent and all received emails - including email attachments - containing the search terms 'Morse' and/or 'Amyas' and/or 'LCAG' and/or 'Loan Charge Action Group' between the period 21 October 2021 to 04 November 2021 inclusive (which equates to a period of eleven working days) from the mailboxes of the following senior HM Treasury officials:

Tom Scholar - Permanent Secretary

Charles Roxburgh - Second Permanent Secretary

Beth Russell - Director General, Tax and Welfare

Clare Lombardelli - Director General, Chief Economic Adviser.

If the department holds recorded information of any other kind and/or in any other format (including, but not limited to SMS text messages, WhatsApp messages, Signal messages, internal memos, documents etc.), which includes reference(s) to any of the search terms listed above and was received or sent by one or more of the four named individuals between the dates specified, please also disclose and provide this data".

ii. HMT refused the request on 2 February 2022. It relied on section 14 of FOIA, which states that a public authority is not obliged to comply with a request for information if the request is vexatious. Ms Thompson complained to the Commissioner, who issued a decision notice on 6 July 2023 agreeing with HMT that the request was vexatious.

iii. The present appeal was lodged with the Tribunal on 2 August 2023.

11. To summarise the context of Requests #2 and #3, Request #2 is about how HMT came to its conclusion on Request #1. Request #3 asks for information from the mailboxes of key officials at HMT, at a time immediately after LCAG sent a letter (dated 21 October 2021) to Lord Morse. This letter had set out LCAG's outstanding concerns at his report, including new evidence said to have emerged and criticism of the way in which the government had interpreted his recommendations.

Other Tribunal decisions

12. The Tribunal has already considered several cases related to the Loan Charge:

a. Tinker v Information Commissioner & HMRC [2022] UKFTT 263 (GRC), EA/2022/0049 – The Tribunal found that a request for information for emails from a named HMRC official containing particular keywords relating to the Loan Charge was not vexatious.

b. Campbell v Information Commissioner [2023] UKFTT 644 (GRC), EA/2022/0237 – The Tribunal held that requested information concerning the

way in which the Review panel was composed, and how it reached its conclusions, was not held by HMRC.

c. Campbell v Information Commissioner & HMT [2023] UKFTT 885 (GRC), EA/2022/0358 – The Tribunal allowed the requester's appeal, ruling that the Commissioner had been wrong to find that HMT was entitled to rely on the section 12 cost of compliance exemption in refusing to provide a draft copy of the Review.

d. Smith v Information Commissioner & HMT [2024] UKFTT 212 (GRC), EA/2023/0223 – This concerned a request that included emails received by Beth Russell containing the term 'loan charge' or its abbreviation 'LC' between the dates 1 January 2020 and 31 March 2020. That refers to the same official mentioned in Request #1. HMT confirmed that it held some information in scope, but decided that it was exempt under section 35(1)(a), being concerned with the formulation or development of government policy, section 36(2)(b), as relied upon in Request #2, and section 40(2), concerning personal data. The Tribunal allowed the appeal in respect of some of the requested information only, finding that the rest had been properly withheld.

e. On 22 January 2024, a different constitution of this Tribunal gave a preliminary decision in another appeal brought by Ms Thompson, under appeal number EA/2023/0099. The appeal concerned an identical request to Request #2 in this case, made on the same date to HM Revenue & Customs but by reference several of its named officials instead of HMT. The Tribunal found that the Commissioner was correct to decide that the requested information was exempt under section 36(2)(b), and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Other issues in that appeal remain outstanding pending further submissions.

f. Ms Thompson was also the appellant in Thompson v Information Commissioner [2024] UKFTT 131 (GRC), EA/2023/0003. The narrow factual issue considered by the Tribunal is not relevant to the present appeals.

13. We approach the appeals by first deciding whether the information subject to Request #1 is exempt under section 36. This will then inform our consideration of whether Requests #2 and #3 are vexatious.

14. We have had regard to the open bundle prepared in each appeal. In relation to Request #1, HMT has provided a closed bundle containing the requested information, the material submitted to the qualified person, and confirmation of the qualified person's opinion. A rule 14(6) direction was previously made in respect of this material. Applying the decision of Browning v Information Commissioner [2014] EWCA Civ 1050, we agree that continued reliance upon closed material is justified; this has enabled the Tribunal to view the withheld information for itself to determine the issues in the appeal, and Ms Thompson has been given a fair opportunity to make any submissions she considers appropriate.

Legal Principles

15. In Information Commissioner v Malnick [2018] UKUT 72 (AAC), at [45] and [90], it was confirmed that the Tribunal exercises a full merits appellate jurisdiction. We make any necessary findings of fact and decide for ourselves whether the provisions of the Act have been correctly applied. But we do not start with a blank sheet: the starting point is the Commissioner's decision, to which we should give such weight as we think fit in the particular circumstances. The proceedings are inquisitorial save that we are entitled to respect the way in which the issues have been framed by the parties. We address matters as they stood at the date of the relevant response by HMT: Montague (Information rights - Freedom of information - public interest test, qualified exemptions) [2022] UKUT 104 (AAC) at [62]-[63].

Section 36 – Prejudice to effective conduct of public affairs

16. So far as relevant to this decision, section 36 provides as follows:

    36. Prejudice to effective conduct of public affairs.

    […]

    (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

    […]

    (b) would, or would be likely to, inhibit—

    (i) the free and frank provision of advice, or

    (ii) the free and frank exchange of views for the purposes of deliberation, or

    (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

17. Where information is held by a government department, section 36(3) provides that the qualified person must be any Minister of the Crown. The Upper Tribunal in Malnick at [29-30], noting the requirement for seniority in section 36(3), held that while the qualified person's opinion is not conclusive as to prejudice, it is to be afforded a measure of respect. At [47], the Upper Tribunal held that 'reasonable' in this context means 'objectively reasonable', and at [52-56] that it is intended to refer to substantive reasonableness rather than impose a procedural requirement. If the Tribunal agrees that the qualified person's opinion is reasonable, then the procedure by which it was reached is irrelevant. A FOIA appeal is not a judicial review; it is concerned with matters of substance, not process.

18. Section 36 is subject to the public interest balancing test. If the Tribunal finds that the qualified person's opinion that the relevant prejudices or inhibitions are engaged was reasonable, it must then decide whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Only if that is so will the public authority be relieved from the obligation to provide the requested information.

Section 14 – Vexatious requests

19. Section 14(1) provides that a public authority is not obliged to comply with a request if it is vexatious. For the principles that apply to deciding whether a request is vexatious, we first turn to Information Commissioner v Dransfield [2012] UKUT 440 (AAC). The Upper Tribunal emphasised that the request must be vexatious, not the requester. A request may be inconvenient, irritating, or burdensome to the public authority without necessarily being vexatious; holding public authorities to account by giving access to information is one of the purposes of the legislation. That creates a balancing exercise, where the distress, disruption, irritation or burden caused by a request that must be weighed against the justification for making it. It is important to adopt a holistic and broad approach that considers all the relevant factual circumstances. They are likely to fall under four headings: (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. The Upper Tribunal gave more detailed guidance on each of those topics, to which we shall refer if necessary within our own analysis.

20. An appeal against the Upper Tribunal's decision was dismissed, in Dransfield v Information Commissioner [2015] EWCA Civ 454. Arden LJ (as she then was) approved the Upper Tribunal's analysis and guidance subject to some clarification of her own. While the aim of s.14(1) might be to protect the authority's resources from being squandered on disproportionate use of FOIA, as held by the Upper Tribunal, that aim would only be realised if the high standard set by vexatiousness was also satisfied. Parliament had chosen a strong word in 'vexatious', meaning that the hurdle of satisfying it is a high one: consistent with the constitutional nature of the right. It is an objective standard, primarily involving making a request where there 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. This, and a relevant motive that could be identified with a sufficient degree of assurance, such as vengeance for the public authority's actions, might both be evidence from which vexatiousness could be inferred. Arden LJ nonetheless added that 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." At [85], Arden LJ also agreed that a request might be vexatious in part because of, or solely because of, the costs of complying with it. The preservation of the Upper Tribunal's guidance in Dransfield has subsequently been confirmed in authorities such as Cabinet Office v ICO and Ashton [2018] UKUT 208.

21. In some of her written arguments, Ms Thompson has sought to expand on the legal principles concerning vexatiousness. The above summary of the law is sufficient for us to properly address the issue in these appeals.

Request #1

22. We are satisfied that a qualified person has given an opinion that the prejudice and inhibitions mentioned at section 36(2) would be caused by disclosure. The Decision Notice confirms that the qualified person is the Rt. Hon. Kemi Badenoch MP, who was then Exchequer Secretary. We have seen, in the closed material, the materials provided to the qualified person and confirmation of her opinion. That opinion having been given, and by a person specified by 36(3), we disregard Ms Thompson's concerns on both how it was reached and Ms Badenoch's ability to give it; what matters is whether we consider it reasonable, a decision we take based on the evidence and the parties' arguments. In any event, and to reassure Ms Thompson, we see nothing improper in how the matter was put to the qualified person.

23. We unhesitatingly conclude that the qualified person's opinion was reasonable. As Ms Thompson anticipated, the withheld information consists of discussion by officials of the possible candidates to lead the review, and the authors' views of those candidates' ability to do so. Not only are the candidates named, but the perceived 'pros' and 'cons' of each, in relation to various considerations, are frankly described. It is that exchange of free and frank advice that section 36(2) protects.

24. The nature and scope of a review falling outside a particular statutory framework, such as sensitivity, timescales and resources, are properly matters for the executive to decide. This is the case even if those objectives reduce the transparency with which the necessary arrangements are made. It is no function of this Tribunal to question such decisions, and the civil servants involved were under a duty to implement them. Many of the personal and practical considerations that they needed to address can be readily inferred by anyone.

25. Free and frank advice, and exchange of views for the purposes of deliberation, is plainly essential if an exercise such as the Review is to be effective. The voicing of opinions, including comparative opinions, would inevitably be inhibited if it were thought that those opinions would later be read by the world at large. This in turn would prejudice the effective conduct of public affairs. We can express that conclusion in general terms, finding that such inhibition and prejudice would be likely in relation to the organisation of any similar exercise. There is nothing in the closed material marking out this Review an exception. The prejudice and inhibitions at section 36(2) would plainly arise in relation to future such exercises if this requested information is disclosed, and in circumstances where the qualified person's opinion is reasonable.

26. Next undertaking the public interest balancing test, we first weigh the factors supporting maintenance of the exemption. This includes those listed in the above three paragraphs. The ability of officials to gather information and freely and frankly exchange opinions and advice on the positive and negative practical and personal

aspects of possible candidates carries significant weight. Ms Thompson argues in her grounds that this factor is diminished by the Review having concluded and time having passed. While we agree that that there no longer exists any possibility of this Review's actual work being undermined, as would very likely have been the case if disclosure occurred while it was still in progress, this does nothing to reduce the inhibitory and prejudicial effect on future exercises as we have already discussed.

27. In support of disclosure, Ms Thompson puts forward the importance of the issues surrounding the Loan Charge as supporting transparency. We agree that there is a general public interest in transparency. We disagree that public debate and scrutiny of the Loan Charge and the response to it would be greatly assisted by the requested information being disclosed. The Review's Terms of Reference have been published. The fact that Lord Morse was ministerially selected to lead the Review is known, and his suitability can be debated and scrutinised by reference to what is publicly known about him, the Review's work, and its conclusions and recommendations under his leadership. Disclosure would shed no further light on the evidence considered by the Review after Lord Morse's appointment, and would not assist with addressing concerns such as those set out in LCAG's letter of 21 October 2021.

28. Contrary to Ms Thompson's grounds, it is not in the public interest that scrutiny of the Loan Charge Review be informed by the assessment of who should lead it. Even in the case of more formal appointments, such as those made in accordance with the Principles of Public Appointments and the Cabinet Office's Governance Code on Public Appointments, or even judicial appointments, it is the procedure for appointment that is transparent rather than what the panel thought were the various candidates' comparative strengths and weaknesses. In fairness to Ms Thompson, she does state that she would be satisfied with redaction of the various candidates' names and any identifying details. Due to the seniority of those considered, however, virtually all commentary and description of candidates' roles would need to be removed to avoid their identification. While not something we need take into account for present purposes, it is likely that removal of identifying details would be required under section 40(2) in any event.

29. Ms Thompson also ascribes value to the selection of candidates in a broader sense, for example why "demands for [the Review] to be chaired by a truly independent and knowledgeable tax judge" were rejected. In our view, the professional background of the appointee cannot reasonably be extracted from the discussion of individual candidates' pros and cons. More importantly, it is one of the factors which attracts the need for frank advice and discussion to be protected that we have discussed above. The decision to appoint a person with Lord Morse's background can, again, be scrutinised and debated by reference to the Review itself.

30. From Ms Thompson's grounds, we also derive her concerns that the discussion and assignment of merit to candidates included whether they would deliver a pre-determined result, disclosed a free-standing intention to avoid a transparent public appointment process, contrived urgency or sensitivity in support of that objective, or attempted to introduce partiality. We would accept any of those as increasing the

public interest in disclosure, if established, but we can see nothing in the closed material calling into question the good faith of those involved.

31. In conclusion, the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. Disclosure would cause significant prejudice, and would undermine rather than support the integrity and effectiveness of this and future reviews. It would provide no material contribution to the debate surrounding the Loan Charge.

32. We therefore find that the requested material in Request #1 is exempt from disclosure. The Commissioner's Decision Notice to that effect was therefore correct in law and this appeal must be dismissed. There is no need to address the other exemptions upon which HMT relied.

Request #2

33. We approach vexatiousness under the four headings suggested by the Upper Tribunal in Dransfield.

Burden

34. As recorded in the Decision Notice, HMT's arguments to the Commissioner had focused on burden. This request was closely related to Request #1 and was made at or about the same time as a request for an internal review. HMT was therefore simultaneously addressing both a detailed request for information and another request about that process. Adding to that inherently burdensome process was the work required by Request #2. Hundreds of emails were potentially in scope, and because records of how Request #1 was dealt with inevitably referred to the requested information, work would have to be done to remove and redact information claimed by HMT to be exempt under (among others) section 36(2).

35. The Commissioner agreed that HMT's analysis above was well-founded, and we reach the same conclusion ourselves. Requests about requests are always burdensome, and this one was made while the parties were still corresponding about HMT's response to Request #1.

36. We also accept HMT's observation that, contrary to what Ms Thompson had argued, being a large government department did little to reduce the effect on its resources of complying with the two requests. The mailboxes to be searched belong to high level officials, and review of material for disclosure had to be conducted by someone with enough knowledge and seniority to identify potential exemptions.

37. Also on this topic, HMT had relied on a list of the various requests made by Ms Thompson. We treat this list with caution as it is not clear where a narrowing or refinement of a request has been treated as an entirely new request. Nonetheless, the overall burden posed by Ms Thompson's requests as described already in these reasons does fall to be taken into account. We have not found it necessary to consider whether requests by other individuals on the same topic make any contribution.

<u>Motive, value and serious purpose</u>

38. These can be taken together, as we accept that Ms Thompson's stated purpose for making the request accords with her genuine motivation for doing so. In her grounds of appeal she describes it as follows:

> The sole purpose of these Freedom of Information requests (for metadata) - to the Information Commissioner's Office in these instances - has been to obtain more detail and information on the complaints I have raised, with the intention of sharing that information with the Tribunal at appeal. I included some initial comments for the Tribunal's attention in my submission dated 12 July 2023 under EA/2023/0222 (where it was also listed as supplementary evidence), as I felt it important for the Tribunal to be aware of the Information Commissioner's sudden resistance to disclosure of that information.
>
> To help furnish this Tribunal panel (should it not be heard by the same members) with some background, I include those initial comments from EA/2023/0222 again here:
>
> "On 23 April 2023, I submitted a Freedom of Information request to the Information Commissioner's Office, asking for the metadata associated with the DN (IC-157474-F0J6) now under appeal here. The following day, the ICO confirmed receipt of this request under case reference IC-228704-V6R0 (with a response due by 23 May 2023).
>
> This request followed another similar request I had sent to the ICO on 30 January 2023, asking for the metadata associated with IC-134697-P3P3 and IC-179260-X8F3. This was allocated case reference IC-209635-B8F9 by the receiving officer. On 10 February 2023, the ICO responded with full disclosure of the metadata sought; I followed this up on 12 February 2023 with additional points arising from that disclosure, which were answered in full by the case officer on 23 February 2023.
>
> The disclosure of metadata for the above referenced complaints was crucial in establishing how the case officer in question had arrived at her decision. This information proved – beyond any doubt – that the decision was taken without the evidential proof it had requested from HM Treasury. All this has been previously communicated to the Tribunal as part of appeal EA/2023/0003.
>
> The fact that this disclosure had revealed the flawed decision taken by the Information Commissioner's Office is now being used by the ICO to deny me any further access to the metadata related to the DN under appeal here. It has refused my request on this occasion – in complete contrast to the first I had raised – and despite my subsequent request for internal review, has again withheld information, claiming that it prejudices its function as regulator. In my view, it has demonstrated a serious inconsistency in the way it has handled these separate requests, and – as a direct result of the highly inconvenient position it finds itself in following the first release – is now using an entirely different

argument to withhold the type of data it had previously released without question.

I ask that the Tribunal closely considers this aspect of my appeal, as I believe it is integral to this case, and reveals the clear prejudice which the Information Commissioner's Office now holds against any request for metadata which I submit to it as part of my own investigations of fact. To further validate that point, I have received the same response from the ICO to other follow-up requests for metadata, most recently under case reference IC-217653-S1G8, which I have now been forced to issue as a complaint to the Information Commissioner's Office. The irony of that position is not lost on me."

39. As stated in the Decision Notice at paragraph 44, it may sometimes be reasonable to make a so-called 'meta-request' and that in this case, for example, HMT ought to have simply informed Ms Thompson of the qualified person's identity in its response to Request #1.

40. Here, we are entirely satisfied that the purpose described by Ms Thompson above has no serious value to either her or the public in general. The statutory scheme in FOIA entitles a person to complain to the Commissioner about a public authority's response to an information request. Parliament has given the Commissioner powers to investigate that complaint, including by requiring the public authority to provide information. It is a matter for the Commissioner when and how he should do so. If dissatisfied, there is a right of appeal to the Tribunal. This Tribunal has powers to require a public authority to provide documents, attend court for questioning, and even to permit a search of its premises. Failure to comply with requirements imposed by the Commissioner and the Tribunal may, ultimately, be subject to contempt proceedings and punished by imprisonment. A judge will decide whether to exercise the Tribunal's powers in accordance with the overriding objective to its Procedure Rules and in pursuit of its inquisitorial function under FOIA. If the Commissioner does not do its job properly, then this can be remedied on appeal, by a complaint to the Parliamentary and Health Service Ombudsman, or by judicial review proceedings. If the Tribunal does not do its job properly then it can be corrected by the Upper Tribunal. This is how Parliament has decided that proper investigation of public authorities' compliance with FOIA should be conducted.

41. Ms Thompson's meta-request sidesteps the regime described above by requiring the public authority to disclose everything it holds in any event. This was done in relation to a request where no complaint had even yet been made to the Commissioner. That would have been the proper place for Ms Thompson to air her concerns. We have now dealt with her appeal concerning that request, and there has been no application for us to exercise our enforcement powers. Nor, even on the basis of Ms Thompson's various complaints, do we see any value in doing so.

Harassment and distress

42. This is not such a weighty factor as those above. Ms Thompson is not abusive in her language, although she does make serious allegations against HMT that are not well-founded based on the evidence before us. We further find that the patterns of requests, including requests about requests, has a harassing effect even if that is not its intention.

Conclusion

43. We are reminded of the Upper Tribunal's description in Dransfield of "vexatiousness by drift", where successive requests become disproportionate to the original aim. Ms Thompson wished for greater transparency concerning the Loan Charge Review, and has made numerous requests. It has not been argued that Request #1 was vexatious. But Request #2 is a request about the request, born out of unjustified suspicion and for which more suitable remedies existed. It is not truly related to her original aim at all, and is disproportionate to it. The request's timing, purpose and burden combine to outweigh any justification for making it, and the request meets the high hurdle of being vexatious. The Commissioner's Decision Notice to that effect was therefore correct in law and this appeal must be dismissed.

Request #3

44. This request originated on the same day as Request #2. Its timing and content is the same as a request made by Ms Thompson relating to HMRC officials, as under consideration in appeal EA/2023/0099 described above. HMRC and the Commissioner did not consider the request to be vexatious, and instead the principal issue in that appeal is exemption under section 36(2)(b) . The Commissioner argues (Response 11 December 2023, paras 38-41) that it is impermissible for the Tribunal to engage in any form of comparative analysis to determine vexatiousness in this case. We disagree with that statement of principle, but on considering the preliminary decision in EA/2023/0099 we find that it contributes nothing of significance in the present appeal. As a public authority, HMRC will hold different information from HMT, hold it in different ways and face a different overall pattern of requests. There is nothing inherently objectionable about finding that one request is vexatious and the other not.

45. Ms Thompson engages in considerable criticism of the Commissioner's investigation. We do not consider this relevant to our decision, as we are concerned with the request itself. Any criticisms she makes of the Commissioner's analysis we shall take into account when reaching our own view.

Burden

46. We repeat our observations under Request #2 as to HMT's size and the administrative burden posed by requests that concern senior officials' mailboxes. While the act of searching a mailbox for a text string is not particularly onerous, extracting the various threads and attachments takes time. HMT described to the

Commissioner how the junior member of staff conducting that search would then have to submit their returns to a policy official who must spend time reading, extracting and highlighting information, as well as other tasks. We accept this, and the factor carries weight when considering burden. We also accept that the second part of the request would require significantly more work than searching email inboxes.

47. We also consider that if Ms Thompson wanted to know about the reaction to the letter (which we find as a fact that she did), the request could have been far more focused. We accept HMT's description of the number of results. Ms Thompson additionally specified high level officials, who are likely to be engaged in long-term strategic discussions on a wide range of subjects, and potential exemptions must be carefully assessed by someone who is in themselves in a position of knowledge and authority.

48. Like the Commissioner, we nonetheless decline to place any meaningful weight on HMT's claimed lack of resources for FOIA compliance generally. There may be proactive steps to publication that could be taken that would lessen its overall burden. HMT also drew attention to the overall pattern of requests. We again attribute limited weight to the list provided by HMT in terms of simple numbers, due to the designation of properly narrowed or refined requests as fresh requests. But the close timing of the three requests considered in these proceedings, and the nature of the other requests to which we have referred, carries weight in our analysis for the reasons already given.

<u>Motive, value and serious purpose</u>

49. Ms Thompson says the following:

> "I wish to categorically assure the Tribunal that the reason for, and intention of my request is entirely driven by those four important values and principles above. HM Treasury has been an instrumental, key element in everything which has happened to the tens of thousands of individuals caught up in this ongoing government scandal. Its decisions on this policy have been opposed by hundreds of MPs, peers, legal experts and financial journalists - the concerted efforts by some of those affected to use the Freedom of Information legislation to prise out information regarding those decisions are fuelled by increasingly loud calls for a transparency which has so far been non-existent, and charged by an urgent demand for some sense of justice against what appears to be "the worst legislation introduced by Parliament in my entire professional life", according to one of those financial journalists (attached as supporting evidence - contained within document #12)." "I would also ask the Tribunal to note that the Information Commissioner confirms (in paragraph 39) that he "has no doubt of the seriousness of the complainant's purpose". The very solemn nature of this purpose, and the inherent value of the information being sought, should not be underestimated in any way, shape or form - this policy has been the cause of ruin for many thousands, and untold misery for all. HM Treasury knows this - but refuses to reconsider its position. So those who can, continue to seek information

which is in the public interest, to try and ensure that help will eventually come to those many thousands who are broken by its impact, and who now can't help themselves. An outing of the actual truth, as opposed to the misleading lines spun by those responsible. Trying is everything, even when confronted with the rolling, relentless machinery of an uncaring, failing government."

50. In our view, this request constitutes further evidence of the "drift" discussed in relation to Request #2, taken with which it can be seen that Ms Thompson's real purpose is to expose some sort of perceived corruption or concealment on the part of HMT officials. While exposing such behaviour, where it exists, is a valid use of FOIA, repeated, burdensome and speculative monitoring of senior civil servants' inboxes and telephones is not. Request #2 requested information about a request for information about the selection of Lord Morse. This requests information from the same officials about a subsequent letter purporting to show inadequacies in that report. The letter may well be a legitimate way to address any perceived shortcomings in the report, but Request #3 is not. Even if what Ms Thompson says in the above paragraph is entirely well-founded, use of FOIA to monitor the subsequent actions of the officials she considers responsible is unjustified in light of all the circumstances.

51. When considered objectively, there is no reasonable foundation for thinking that the information sought would be of value to Ms Thompson or the public at large.

Harassment

52. The Commissioner drew attention to the length and tone of Ms Thompson's correspondence, which included referring to HMT staff as displaying "a shameful dereliction of public duty and service to demonstrate such an overt unwillingness to be transparent and open to members of the public." This is far from the most abusive correspondence received by public authorities. But the way in which Ms Thompson writes to HMT makes a modest contribution to vexatiousness.

Conclusion

53. Taking the above factors together, to form a 'holistic assessment' that includes our consideration of Ms Thompson's, we consider that Request #3 also crosses the high hurdle of being vexatious. The Commissioner's Decision Notice to that effect was therefore correct in law and this appeal must be dismissed.

Signed	Date:
Judge Neville	15 May 2024
Promulgated	21 May 2024

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[i] https://www.gov.uk/government/publications/disguised-remuneration-independent-loan-charge-review

[ii] https://news.sky.com/story/you-feel-like-you-cant-fight-back-how-thousands-are-being-targeted-by-a-harsh-hmrc-tax-collecting-scheme-linked-to-10-suicides-13050426
[iii] https://www.whatdotheyknow.com/request/all_correspondence_between_sir_a