Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0067
Information Commissioner's Ref: FS50129143

Appeal determined without oral hearing
On 23 February 2009

Decision Promulgated
On 10 March 2009

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS QC

and

MICHAEL HAKE
ANDREW WHETNALL

Between

HM COMMISSIONERS FOR REVENUE AND CUSTOMS

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The Tribunal allows the appeal of the Appellant against the determination of the Information Commissioner in Decision Notice Reference No. FS50129143.

Reasons for Decision

General

1. This appeal has been dealt with by agreement of the parties on the papers alone. The Tribunal has however been enormously helped by extensive written submissions for which it is duly grateful.

2. The background to the request and to the appeal concerns the Appellant's (HMRC) ability to recover duty in relation to tobacco revenue. For some time, the problem created by tobacco smuggling and the consequent loss of duty has been well documented. In particular, a House of Commons Public Accounts Committee report in 2002 noted that although HMRC collected duty and VAT of £9.5 billion on tobacco and cigarette sales in the period 2000/2001, an additional estimated £3.5 billion had been lost through evasion and/or fraud or other related reasons. The same report noted that HMRC was understandably very concerned about a perceived lack of cooperation from at least one well known tobacco manufacturer in assisting HMRC with its investigations in this regard. HMRC had entered into, and presumably still persists, in utilising, what are called "Memoranda of Understanding" with a number of companies and sought to do so with a view to eliciting suitable levels of assurance with regards the company's business practices since such Memoranda in effect ensured the transmission of relevant information to HMRC. In early 2001, HMRC under its earlier incarnation as Customs and Excise introduced a system of red and yellow cards to identify customers of tobacco manufacturers about whom HMRC have particularly serious concerns. This card system reflected the varying extent to which a specific customer's total purchases appeared to find their way back into the United Kingdom.

3. In a report dated 7 October 2005, the National Audit Office (NAO) acting by its Comptroller and Auditor General, published what was described as a Standard Report on the Accounts of HM Customs and Excise for the period 2004-2005. This report was carried out by virtue of the statutory duty placed upon the Comptroller on behalf of the House of Commons. It dealt in particular with the measures used to tackle tobacco fraud. Reference was made to the need to enhance the relationship

between HMRC and the tobacco manufacturers, including reviewing the use of the Memoranda of Understanding.

4. In paragraph 81 and following, in a section headed "Allegations of a proposed amnesty with tobacco manufacturers", reference was made to a Sunday Times article published in February 2005. In that article, which the Tribunal feels need not be reproduced here in full and which was headed "Tobacco giants in probe over a smuggling deal", it was alleged that HMRC (although at the outset of the press article, reference was in fact made to the "government") had instructed Messrs KPMG to approach "Britain's big five tobacco firms" and discuss a proposal in relation to which the producers would agree to pay VAT and excise duty allegedly lost at the Exchequer as a result of cigarette smuggling in return for an amnesty from prosecution.

5. Reference was made to a specifically named individual described as the senior partner in KPMG who, it was alleged, had been approached by Customs officials in early 2000 and asked if he would act as a "cut-out". The Tribunal is somewhat perplexed by this term, but infers that in its popular or slang sense, it connotes the role of managing a particular matter and/or handling the same successfully. The five firms in question were said to be shocked by the individual's offer, replying that there was no involvement at all on their part in smuggling.

6. Paragraph 82 of the NAO report referred to the subsequent request by HMRC's Chairman that there be an investigation "*to be carried out by a member of the Inland Revenue Board, independent of the operational areas affected*." Paragraphs 83 to 86, in Chapter Two of the NAO report read as follows, namely:

   "*83. As this was not a tax investigation, the Department had to rely on the good will of the tobacco industry and their advisers in gathering evidence for the report.*

   84. The resultant report concluded that:

   - *Discussions were held between the Department and the firm about how tobacco companies could be encouraged to prevent the smuggling of their products;*

- *All of the available evidence suggested that the idea of an amnesty as described in the Sunday Times was a marketing initiative of a firm although it seems that the word "amnesty" was first used by a Customs official. One of the then employees of the canvassing firm suggested Customs saw the "amnesty scenario" as a strategic initiative but there is no independent evidence to support this;*

- *There was no evidence that Customs were willing to offer immunity from prosecution in return for payment of substantial duty; and*

- *There was no evidence that Customs were acting in any way as agents of HM Treasury, or that HM Treasury played any role at all in discussions between the parties concerned in late 1999 and early 2000.*

85. *The National Audit Office examined the report, along with supporting documentation. The evidence gathered by the Department [***i.e. HMRC***] supports the conclusions drawn in the report; namely that the Department did not propose or sanction an amnesty. The Department's approach was instead to work to engage with tobacco manufacturers to prevent smuggling.*

86. *Nevertheless, the National Audit Office considered there to be some weaknesses which emerged as a result of the investigation, which the Department needs to address:*

- *The Department was unable to produce records of meetings held with the advisers of tobacco manufacturers. The investigation carried out by the Department had been reliant on recreating records through interview, and obtaining copies of records retained by tobacco manufacturers, the Tobacco Manufacturers' Association and other third parties.*

- *The Department's investigation was delayed because one officer, currently on secondment overseas, had difficulty in recalling, without access to records, details of meetings at which he was present which were key to the allegations made by the Sunday Times. The Department should ensure that notes of key meetings are made and*

retained to provide a chain of evidence to demonstrate how decisions are taken.

- *The Department found that one official involved was at least a close acquaintance and possibly a personal friend of one of the employees of the accountancy firm developing the amnesty proposal. The official should have disclosed that to his managers and the Department should now consider the adequacy of its guidance on potential conflicts of interest.*"

7. The complainant, a Mr R Brooks, asked for a copy of the HMRC report ("the Report") and for information about the investigation. HMRC provided the latter, but not the Report, citing section 31 (law enforcement), section 40(2) and (3)(a)(i) (personal information), section 41 (confidential information) and section 44 (statutory prohibition on disclosure) of the Freedom of Information Act (FOIA).

8. The Information Commissioner (the Commissioner) in his Decision Notice overruled HMRC's reliance on section 44 and ruled that it should disclose the information sought. HMRC appeals from that decision. The appeal raises in particular important issues regarding the operation of section 44 and section 31.

The request

9. Mr Brooks' request dated 25 October 2005 requested disclosure of the following information, namely:

- the Report as referred to in paragraph 83, Chapter Two of the NAO report;
- the name of the Inland Revenue board member who conducted the investigation referred to;
- a list of his or her duties in the year leading up to the merger of the Revenue and Customs and in the period since then.

10. The third specific request is a reference to a matter already referred to. HMRC was formed on 18 April 2005 in the merger between HM Customs & Excise and the Inland Revenue.

11. HMRC replied by its Director General, a Mr David Hartnett, on 23 November 2005. Mr Hartnett provided a closed and an open witness statement to the Tribunal which will be referred to below. He confirmed that he had carried out an investigation and then produced a report on the Sunday Times allegation. He relied on the exemptions set out in section 40(2) and 40(3)(a)(i) of FOIA. He also referred to the fact that much of the information in the request had been "provided in confidence" and also relied on section 41. He also referred to and relied upon section 18 of the Commissioners for Revenue and Customs Act 2005 which will be referred to below as CRCA which makes it an offence to release information held in connection with a "function" of HMRC about identifiable persons. This in turn entails the operation of section 44 of FOIA which provides for non-disclosure in the event that there exists a statutory prohibition. In relation to section 44, there is no requirement that the relative public interest involved for and against disclosure be considered. An internal review in June 2006 upheld HMRC's initial response.

The Decision Notice

12. The Notice first dealt with section 44 of FOIA. Although the relevant non-FOIA provisions will be set out fully below, it is appropriate here to set out the operative provisions of section 44 which by subsection 1 provides as follows, namely:

"*(1) Information is exempt if its disclosure (otherwise than under this Act) by the public authority holding it –*

(a) is prohibited by or under any enactment …"

13. In paragraph 26 of the Notice, the Commissioner set out a, if not the, critical question, namely whether the carrying out of the investigation and/or the Report represented or otherwise reflected the exercise of an "HMRC function". This contention has been revisited in depth in relation to this appeal. However, it can be seen even here that there is at least a query over whether the information in the Report as distinct from the investigation represented by the Report, can properly be described in terms of the carrying out and/or the exercise of one of HMRC's functions.

14. This apparent mischaracterisation can be said to find expression in paragraph 30 of the Notice which reads:

"*In determining whether an investigation into alleged serious misconduct by HMRC officers amounts to a "function" (i.e. 'power or duty') of HMRC, the Commissioner has had particular regard to two points.*"

15. The Commissioner then turned to an observation made in paragraph 83 of the NAO report which, as has been seen, did not regard the Report as a tax investigation. As again will be seen in further detail below, there exists a distinction as between, on the one hand the exercise of a function of HMRC, and on the other its "internal administrative arrangements". The Commissioner found such to be the case in the present circumstances, since he characterises the Report in terms of the latter type of arrangement.

16. At paragraph 35 and following of the Notice, the Commissioner turned to section 31(1)(g) and (2)(b) of FOIA on which HMRC had also placed reliance. The former section provides:

"*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice …*

(g) the exercise by any public authority of its functions to any of the purposes specified in subsection (2) …"

Subsection (2)(b) provides in relevant part:

"… the purpose of ascertaining whether any person is responsible for any conduct which is improper …"

17. The Commissioner agreed that section 31 was properly engaged and that HMRC had shown the requisite degree of prejudice. There is no issue in this appeal as to the latter conclusion. However, in relation to the competing public interests which remained in play by virtue of the qualified exemption set out in section 31, the Commissioner divided the information in question in the Report into four broad categories (see paragraph 44), namely:

(a) details of the allegations in and technical details of the investigation process;

(b) summaries of the evidence given by officials still employed by HMRC at the time of interview;

(c) summaries of evidence given by individuals other than officials still employed by HMRC, eg officials who had left HMRC's employment and employees of private companies, together with evidential documents provided by them; and

(d) the investigator's analysis and conclusions.

The Commissioner found that category (a) as well as (d) would not have the detrimental effect contended for by HMRC, namely a consequential failure to ensure the participation of parties in similar future investigations or proceedings of similar kind and where an undertaking or assurance of confidentiality had been given. The Commissioner stated in paragraph 44 with regard to categories (b) and (c) that in the light of the fact that HMRC would have had other avenues available to require its own current employees to cooperate with the investigator's questions, the public interest in disclosure outweighed the public interest in favour of maintaining the exemption.

18. The Tribunal is somewhat confused about the finding in paragraph 44 of the Notice since category (c) addresses summaries of evidence given by those other than those who were current HMRC employees. However, it may be that the Commissioner meant to include in the class of information to be disclosed those who had been employed by HMRC at the time of the investigation who, along with retained staff, could have been required to cooperate. On further consideration, it seems to be the case that the Commissioner meant to exclude category (c) completely from disclosure since in paragraph 45 he stated in express terms that with regard to summaries of evidence from third parties and former, i.e. at the time of interview, employees of HMRC, no disclosure should be ordered.

19. The Commissioner then turned to section 40. The Commissioner again made a four-fold classification as to the information sought to be disclosed, namely:

(a) names and employment position of individuals in HMRC, the accountancy firm and the tobacco industry;

(b) opinions or recollections of these individuals, including speculation about and comments on character contained within their evidence to the investigator;

(c) a reference to a separate disciplinary matter relating to an HMRC employee; and

(d) a reference to an aspect of an HMRC's employee private life.

All the above constituted personal data.

Section 40(2) of FOIA provides an exemption for information that constitutes personal data and provides, in particular that:

"*Any information to which the request for information relates is also exempt information if –*

(a) it constitutes personal data which do not fall within subsection (1); and

(b) either the first or the second condition below is satisfied."

20. The first and second conditions referred to are set out in section 40(3) and (4). The applicable condition here is in section 40(3)(a)(i), i.e. where disclosure would breach any of the so-called Data Protection Principles. Those Principles are set out in Schedule 1 to the Data Protection Act 1998. HMRC has invoked the First Data Protection Principle which provides:

"*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

(a) at least one of the conditions in Schedule 2 is met; …"

21. The relevant condition is in Schedule 2, paragraph 6(1), namely:

"*The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed,*

except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

22. The Commissioner referred to another decision of the Tribunal, namely *House of Commons v Information Commissioner and Leapman Brooke and Thomas* (EA/2007/0060, 0061, 0062, 0063 0122, 0123 and 0131). There, the Tribunal expressed the view that consideration of these conditions was reduced to a two-part enquiry, namely first, was the disclosure for any legitimate public interest, and second, did it cause unwarranted prejudice to the rights and freedoms and interests of the data subject?

23. The Commissioner considered each of the categories (a) and (b) set out above in turn. With regard to (a), since the information there addressed related to professional lives in connection with fairly senior individuals, disclosure was found not to be unfair.

24. With regard to (b) insofar as the same related to (a) referred to in connection with section 31 (see paragraph 47 of the Notice), i.e. opinions etc from non-HMRC officials, these therefore remain non-disclosed. The Commissioner noted that (at paragraph 56 of the Notice): "*only one of the officials appears to have still been employed by HMRC at the time of interview*". Since that individual had given evidence in his professional capacity and the theme of the Report was one of exoneration, the Commissioner found it would not be unfair to disclose the information despite the provision of a prior assurance of confidentiality.

25. As for (c), since the fact of suspension was already in the public domain, disclosure was not unfair; as for (d), it was held to be unfair to disclose the information in question.

26. Finally, the Commissioner dealt with section 41 which provides that:

"*Information is exempt information if –*

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise and under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

27. Only the information provided by a single individual was here in issue. The Commissioner found that disclosure should take place presumably on the basis, and in the Commissioner's words: "*HMRC would have had avenues available*" to require its own current employees to cooperate with the investigation, eg as part of their employment obligations as a whole.

The evidence

28. Mr Hartnett's open witness statement is dated 12 December 2008. As at that date he was (and remains) Permanent Secretary for Tax in HMRC, having occupied that position since 10 November 2008. He was appointed a Commissioner of HMRC on 18 April 2005 and has remained a Commissioner since then. The Sunday Times article appeared in February 2005. From November 2007 to August 2008, Mr Hartnett was the Acting Chairman of HMRC and thereafter Acting Chief Executive to November 2008.

29. As has been indicated in the first section of this judgment headed "General", the Sunday Times story named a number of parties. Mr Hartnett was asked to look into what had happened in 1999 and 2000 "*around the time of the alleged events and to establish the facts, as far as I was able*." His enquiries ran from February to September 2005 which straddled the time at which HMRC was created. The merger by which HMRC was formed, created as it was by the passage of the CRCA, preceded the production of the Report. As will be seen this particular chronology is significant. It has already been noted that one key consideration in the context of section 44 of FOIA is to consider what "functions" or "function" HMRC was engaged in directly or otherwise in producing the Report. The Report was produced in late September 2005. It was provided to the then Chairman and Deputy Chairman of HMRC.

30. In his open witness statement at paragraph 14, Mr Hartnett confirmed that the NAO did not start its own early enquiry. At paragraph 16 he stated:

"*In my opinion, Chapter Two of the NAO Report which considers the tobacco strategy illustrates the ways in which the then HMCE and now HMRC carry out their functions, other than by use of compulsory formal powers. Strategies are developed using a mix of legislative tools and voluntary strategies. Cooperation of the tobacco companies in the success of the tobacco strategy was (and is) vital.*" [***Emphasis added***]

31. At paragraph 17 he adds:

"*As the NAO Report also illustrates, the then HMCE and now the HMRC Commissioners were and are obliged, in effect, to protect the revenue and were and are given considerable latitude in deciding how best to achieve this. Any suggestion that because a particular requirement is voluntary in terms of compliance, it might therefore fall outside of our responsibility or function, is not right. The assistance provided may be voluntary but nonetheless we are obliged to pursue and develop systems or schemes that protect the revenue and aid its collection. This extends not only to voluntary cooperation from tobacco companies designed to combat tobacco smuggling and decrease fraud on the excise duty on tobacco, but also the voluntary cooperation in enquiries designed to maintain confidence in HMCE's and HMRC's role in collecting the revenue by identifying any wrongdoing.*"

32. Later on in his open statement, he deals with the prejudice which would result from disclosure, a matter already noted in the Decision Notice. Although framed in terms of prejudice, the factors stressed by Mr Hartnett in effect address the public interest content claimed by him to be in play in favour of maintaining the qualified exemption in section 31, namely the detrimental effect upon the willingness of organisations and individuals in future to participate "voluntarily" in investigations where the HMRC cannot otherwise compel cooperation. Mr Hartnett also admits that although FOIA had come into force during the conduct of his enquiry, he did not bring to the attention of the interviewees the fact that disclosure of their evidence, etc might occur. He said it was his "*understanding that this type of information would be protected from disclosure*" (paragraph 20 of witness statement). The Tribunal pauses here to note that on the basis of that evidence taken alone, it is by no means clear that any formal undertaking as to confidentiality, let alone any

assurance with regard thereto, were given. Nonetheless, for reasons given in the next paragraph, overall the Tribunal is satisfied that the evidence shows that the outside interviewees at least expected a suitable degree of confidentiality with regard to their exchanges with the investigator.

The closed evidence

33. The impression created by the facts and matters set out in the preceding paragraph is however, in the Tribunal's view, sufficiently dispelled by the contents of Mr Hartnett's witness statement provided on a closed basis. The latter statement extends among other things to exhibiting the Report itself. The Tribunal will however make specific observations about the Report in due course without, of course, in any way disclosing, directly or indirectly, its contents.

34. The Tribunal is persuaded by all the evidence that:

(1) the third parties were willing to cooperate voluntarily without the need for HMRC to compel the production of evidence and documents;

(2) the resultant disclosure ordered by the Decision Notice would result in an "unbalanced" disclosure overall since the content of the material ordered to be disclosed would necessarily contain, directly or indirectly, many references by HMRC staff to non-HMRC personnel and their evidence, opinions or recollections;

(3) in any event, the evidence provided by current and former HMRC employees to a large extent comprised and/or reflected the submissions, evidence, etc of other persons who were otherwise not the subject of the investigation;

(4) reverting to the lack of balance referred to above in (2), once it became generally known that the consequences of cooperation from non-HMRC sources led or might lead to what was in effect an "unbalanced" picture being disclosed under FOIA, it was probable that any third party in the future would in such circumstances need carefully to consider its voluntary involvement in similar future enquiries; and

(5) it was difficult to reconcile on the one hand the Commissioner's maintenance of the exemption with regard to third party evidence with on the other the apparent contention also advanced by the Commissioner that if the third party considered itself prejudiced by what was disclosed, it could place the otherwise non-disclosed information into the public domain; this is a point made by the Commissioner at paragraph 34 of the Decision Notice. The Tribunal is persuaded that if the third party's only remedy, should it consider itself prejudiced by partial disclosure of information it had volunteered, would be to place more material in the public domain, this would mean in particular terms that in all probability future voluntary cooperation would be refused.

The Report

35. Mindful of the facts and matters which have been addressed above, the Tribunal turns now to the disputed information, namely the Report. A number of non-contentious observations should be made. First, the Report on its face accepts, as by definition it needed to, that it was not in any sense an inquiry about unpaid taxes and that it depended on the voluntary cooperation of third parties. Secondly, as the earlier passages in this judgment clearly show, the problem of tobacco excise and duty evasion was a government priority for a number of years before the publication of the Sunday Times article. Third, the proposed and actual measures which had been set out hardly allowed for any form of amnesty with the tobacco companies, or indeed, with others. This point is entirely in keeping with the terms of paragraphs 84 and 85 of the NAO report set out above. Fourth, a key finding of the Report was reflected in the three bullet points at paragraph 84 of the NAO report, principally that the use of the concept of an amnesty did not emanate from HMRC despite the statement to the contrary in the press article. The Tribunal does not feel it is in any way trespassing upon whether disclosure should be ordered in observing that a principal, if not the most significant, section of the Report deals with an explanation of the facts underlying this particular aspect of the investigation. Finally, the Tribunal was provided with a further copy of the Report, redacted save for the portions ordered to be disclosed by the Commissioner. The Tribunal has little hesitation in saying that in its view there remain sufficient references to third parties which either would lead, or might help lead, an informed observer to piece together

other facts in the chain of events constituting the investigation and/or possibly to draw possibly adverse and incorrect inferences as to those matters even though it is clear that what is intended to be left should be largely, if not wholly, uncontentious. Overall, the Tribunal agrees that the Report, as redacted, would leave an unbalanced picture which would reflect unfairly on third parties.

Section 44

36. The material statutory prohibition, section 44, applied to section 18(1) CRCA which provides as follows, namely:

"***18 Confidentiality***

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs

***

(4) In this section –

(c) a reference to a function of the Revenue and Customs is a reference to a function of –

(i) the Commissioners, or

(ii) an officer of Revenue and Customs …"

37. Section 23 CRCA provides as follows, namely:

"***23 Freedom of information***

(1) Revenue and customs information relating to a person, the disclosure which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure –

(a) would specify the identity of the person to whom the information relates, or

(b) would enable the identity of such a person to be deduced.

(2) Except as specified in subsection (1), the disclosure which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of [FOIA].

(3) In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19."

38. Section 19 CRCA deals with wrongful disclosure and provides as follows, namely:

"***19 Wrongful disclosure***

(1) A person commits an offence if he contravenes section 18(1) or 20(9) by disclosing revenue and customs information relating to a person whose identity –

(a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) "revenue and customs information relating to a person" means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others)"

The essential finding of the Commissioner in the Decision Notice that the investigation into which the Report related was not, or did not, reflect a "function" of HMRC has already been referred to above. HMRC contends that the Commissioner's analysis was erroneous. This Tribunal respectfully agrees. The critical question is whether the "information" is held "in connection with" a "function" of HMRC and more particularly whether that information was:

(a) information about, acquired as a result of or held in connection with (s.19),

(b) the exercise by HMRC of one or more of its functions (s.19),

(c) relating to a person (s.18 and s.19), and

(d) the disclosure of which would specify the identity of that person or would enable that identity to be deduced (s.18).

39. Questions (a), (b) and (d) answer themselves clearly in the affirmative. (Question (c) is dealt with at paragraphs 52-53, below.) With regard to (d), the Tribunal feels bound to repeat and amplify the observation about the Report made in the preceding section of this judgment that it is conceivable that even if the redacted version of the Report which the Commissioner presently directed should be disclosed, this might, at least to the informed observer, allow that person to infer or deduce the identity or identities of the companies concerned.

40. Irrespective of the latter consideration however, the notion of "function" is further addressed by CRCA, in particular section 51(2), which provides:

"*In this Act –*

*(a) "function" means any power or duty (including a power or duty that is ancillary to another power or duty) [**emphasis added**], and*

(b) a reference to the functions of the Commissioners or of officers of Revenue and Customs and customs is a reference to the functions conferred –

(i) by or by virtue of this Act, or

(ii) by or by virtue of any enactment passed or made after the commencement of this Act."

Section 9(1) CRCA provides as follows, namely:

"*The Commissioners may do anything which they think –*

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions."

41. In a nutshell, HMRC contends that:

    (1) the information in the Report concerns the issue of whether an amnesty had been offered regarding alleged or possible smuggling or tax evasion related activities;

    (2) a major HMRC function comprises the administration and enforcement of duty regarding tobacco;

    (3) any dealings between such companies as might be involved in the manufacture and/or distribution of tobacco and HMRC would comprise in whole or in part the discharge of that function;

    (4) even if it did not, section 9(1) CRCA empowered HMRC to do anything it thought necessary or expedient; and

    (5) in such circumstances such information was information about, acquired as a result of, or held "in connection with" a function within the meaning of section 19(2) CRCA.

42. The Tribunal accepts those propositions. The Tribunal also agrees with the further contention made by HMRC that even if the information in the Report could not properly be viewed as information reflecting direct dealings with the companies concerned (in the light of the conclusion that no amnesty was proposed by HMRC), information which established there had not been such an arrangement or any discussion regarding that possibility or topic could equally be characterised as information about, acquired as a result of, or held in connection with a HMRC function.

43. Moreover, it is clear that the source of the information is not an element within the definition of the phrase "Revenue and Customs information relating to a person" in section 19(2) CRCA.

44. The Commissioner contends in the words of his written submissions that, "*It is necessary to take account of the purpose and focus of the Report.*" That focus, it is contended, concerns the "alleged maladministration of its own staff". The focus is therefore not on the administration and/or enforcement of the payment of tobacco

duty, but on the actions of HMRC staff and those of the accountancy firm. Furthermore or in the alternative, it is claimed that any connection between the Report and the administration and enforcement of duties too remote.

45. The Tribunal again, with respect, disagrees with the Commissioner's contention. Section 18(1) uses a series of what can be called extended descriptive phrases, eg "in connection with". Clearly, the statutory context is all important when construing such phrases. On the other hand, there seems to be nothing in the present statutory context to suggest that the phrase should not be given its normal meaning to the effect that "connection" suggests a relationship of some kind, or at least, an involvement, see, eg *Claremont Petroleum v Cummings* (1992) 110 ALR 239, especially at paragraph 142. See in this country judicial observations to similar effect in *Coventry & Solihull Waste Disposal Co v Russell* [2000] 1 All ER 91, especially at 114 and 105 and *Clark Chapman v IRC* [1975] 3 All ER 701, especially at 704 and 705.

46. The Tribunal also agrees with HMRC that the Commissioner, by suggesting as he apparently does at paragraph 30 of his Decision Notice, that carrying out the investigation did not constitute one of the HMRC's "functions" within the meaning of section 18, adopted a mistaken analysis of the position. (cf his Decision Notice reference no FS50068023 at paragraphs 72 and 73, section 51(2) CRCA has already been set out above). Section 5 CRCA describes what are called the Commissioners "central functions". It provides as follows, namely:

"*(1) The Commissioners shall be responsible for –*

(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,

(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and

> *(c) the payment and management of tax credits for which the Commissioner of Inland Revenue were responsible before the commencement of this section.*
>
> *(2) The Commissioners shall also have all the other functions which before the commencement of this section vested in –*
>
> *(a) the Commissioners of Inland Revenue … or*
>
> *(b) the Commissioners of Customs and Excise …*"

47. HMRC in its written submissions explains that prior to CRCA 2005, responsibility for the collection of certain revenue including indirect taxes and duties was vested in HM Customs & Excise principally under the Customs and Excise Management Act 1979. In substance, the Commissioners were charged with the duty of collecting and accounting for and otherwise managing the revenues of customs and excise. Those functions were then vested in HMRC by virtue of section 5(1) and (2) CRCA. Section 9(1) CRCA which has already been set out above, dealt with and provided for the Commissioners to enjoy and exercise ancillary powers.

48. In the Tribunal's judgment, there can be no doubt that the prevention, detection and deterrence of fraud constitutes a "function" of the Commissioners as does the appointment and suitable disciplining of appointed officers. It follows that the investigation into HMRC activities is, at the very least, covered by the ambit of the ancillary powers. The Tribunal entirely accepts that in the present case, the investigation was necessary to safeguard public confidence in the integrity of HMRC and if necessary to identify any disciplinary or other steps that might need to be taken against any member of staff.

49. Equally, it follows that were the investigation not to constitute the exercise of a function in the extended sense referred to, HMRC could be said to have acted *ultra vires*. Such a possibility cannot have been in the mind or contemplation of the Commissioner. As HMRC rightly points out in its written submissions, the Commissioner specifically recognised the breadth of the powers which HMRC enjoys by the Commissioner's recognition of the application of section 31(1)(g) (as well as section 31(2)(b)) of FOIA. This is because section 31(1)(g) covers

information the disclosure of which would, or would be likely, to prejudice "*the exercise by any public authority of its functions for any other purposes specified in subsection (2)*" (emphasis added). Nor does the Tribunal regard the absence of any specific statutory power directly addressing the fact or conduct of the type of investigation here in question as relevant. As Mr Hartnett quite rightly pointed out, HMRC is well used to conducting such investigations and similar forms of investigation where voluntary disclosure is utilised. (See also Decision Notice FS50068023 at paragraphs 35 to 38 dealing with the red and yellow card systems referred to at the outset of this judgment).

50. The Commissioner also claimed that the investigation and the Report constituted "internal administrative arrangements" within the meaning of section 19(2) CRCA. The Tribunal accepts the contention of HMRC, that the proviso in the latter part of section 19(2) merely defines the scope of the criminal offence set out in section 19. It does nothing in terms of helping to define the term or notion "function" under section 18(1).

51. It does not follow that the "internal administrative arrangements of" HMRC are not therefore a "function" within the meaning of section 18(1). In the words of the written submissions of HMRC, it is only because such matters are still "functions" that section 18(1) would be contravened and the offence under section 19(1) would be committed. Section 19(2) narrows what would otherwise be an offence and ensures that such information is not "caught".

52. The Commissioner further contended that the information was not, and could not, constitute "information relating to a person" within the meaning of section 23(1) when read together with section 19(1) CRCA.

53. Admittedly the effect of section 19(2) is that information about "internal administrative arrangements" is not exempt information for the purposes of FOIA. However the Tribunal rejects the Commissioner's determination that the information comprised in the Report constituted information in any shape or form "about internal administrative arrangements" of HMRC. At the very least, it rejects any such contention to the extent of excluding the exercise of a function in the extended sense referred to above. The overall object of the investigation was to assemble

information relating to, or held in connection with, the exercise of HMRC's functions in relation to the collection of excise duty and in relation to certain specified tobacco companies. The Tribunal does not regard the word "internal" as any form of suitable description with regard to an investigation which in substance dealt with contacts with third parties. Moreover, the term or expression "administrative arrangements" is not an apt description of the investigation which dealt with the extremely serious issues concerning allegedly improper conduct by HMRC officers or officials.

54. For all the above reasons, the Tribunal adopts HMRC's contentions regarding section 44 and for that reason alone it is sufficient to allow the appeal.

Other exemptions

55. Should the Tribunal be wrong in relation to section 44, then the Tribunal must consider as it now proposes to do the application in part, or in whole, of section 31(1)(g). Prior to dealing with the issues, it is important to set out the terms of the provision. Section 31(1)(g) provides as follows:

"***31 Law enforcement***

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

***

(g) the exercise by any public authority of its functions for any of the purpose specified in subsection (2) …

***

(2) The purposes referred to in subsection (1)(g) to (i) are –

***

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper …"

56. The Commissioner confirmed that section 31(1)(g) was not engaged save for information provided on a confidential basis by non-serving HMRC staff. As has been shown, he held that the public interest in withholding the information outweighed the public interest in disclosure.

57. HMRC agrees, but claims the exemption had a wider application and should have included and protected the following, namely:

(1) the names of non-HMRC personnel caught up in the investigation;

(2) any discussions of actions of non-HMRC personnel contained in the accounts given by serving HMRC staff; and

(3) the investigator's analysis and conclusions, namely category (d) to the extent not published in the NAO report.

58. HMRC contends in effect that the overall effect and nature of the disclosure should have been taken into account by the Commissioner. This is a revisiting of the "unbalanced" argument referred to above with regard to the submissions made under the statutory prohibitions covered by section 44. Two points are, in effect, made as already outlined. First, to reveal what serving HMRC staff said or did without revealing what the staff of the accountancy firm and/or other witnesses might have said on the same subject, presented a suitably unbalanced picture. Second, there would be a resultant deleterious effect upon future non-statutory investigations of a similar kind if the future interviewees felt there was a risk of partial, and therefore possibly unbalanced, disclosure.

59. The risk of this kind of detriment was articulated by Mr Hartnett in his open witness statement. In his closed witness statement he gave examples of information provided through voluntary cooperation the disclosure of which might be detrimental in terms of voluntary participation in the future. The Commissioner submitted in his written submissions that Mr Hartnett's evidence should be accepted "with some caution". The point is made by the Commissioner that it would be likely that any

individuals caught up in another investigation whose comments had been "drawn upon" would have expected that publication of conclusions would occur given the nature of the investigation, the profile of HMRC and the fact that the allegations had been made in a national newspaper. In effect, this is tantamount to a suggestion that any third parties otherwise affected could, as HMRC put it in written submissions, "*speak up about their role and put rebuttals into the public domain*." The Tribunal agrees with the short and robust rejection of such a suggestion by HMRC. HMRC points out that the Commissioner has held that it would be contrary to the public interest to require evidence of third parties to be disclosed under FOIA and therefore it would be totally inappropriate, as well as unfair, and not in the public interest to force them by indirect means to make such disclosure. The Tribunal respectfully agrees.

60. The Commissioner also makes the point that any assertions about an unbalanced report are "overstated". This is on the basis that, in effect, the Commissioner at least took the view that the Report essentially "exonerated" those about whom allegations were made. For reasons already sketched out above, the Tribunal respectfully disagrees. The Tribunal has concluded that the issue of whether or not a report or investigation such as the present Report results in exoneration, has no bearing upon the apprehension that would be felt by third parties about disclosures that might result from their cooperation with conduct of future investigations of a similar type.

Section 40

61. Section 40(2) of FOIA provides that:

"*(1) Any information to which a request for information relates is exempt information if it constitutes personal data and which the applicant is the data subject.*

(2) Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or second provision below is satisfied."

62. The Tribunal feels it is not necessary to refer further to the statutory language regarding the relevant conditions: enough has been said by way of summary above.

63. Overall, and in brief, HMRC contended that the Commissioner had failed to identify what legitimate interest of the public would be served by disclosure of the personal data in the Report. The Commissioner responded by saying that there was such an interest by virtue of understanding the steps that had been taken by HMRC to investigate the allegations. The Tribunal agrees that such a response does not go any way towards explaining what the public interest would be which would be served by disclosure, specifically by dint of the names and positions of the individual or individuals consulted, or indeed why such disclosure could be said to be "necessary" with regard to that public interest. Nor did the Commissioner properly take into account the confidential setting in which exchanges took place.

64. With regard to names and employment positions, the Commissioner found as indicated above, that HMRC related personnel, the personnel in the accountancy firm involved, as well as those in the tobacco industry should expect to have their names and employment positions revealed.

65. The Tribunal agrees with HMRC that it is difficult, if not impossible, to see what legitimate interest would be served in having disclosure of this information. Names as such without knowledge of the underlying content of the roles played by those individuals is of little, if any, use. There is, as a general proposition, an inbuilt prejudice given the fact that any inference, whether adverse or otherwise, can be drawn from the fact of the revelation of a name and position alone. For example, one adverse inference may be that such names as were revealed necessarily meant that those names were tarred by the brush of wrongdoing which was the subject matter of the Report. Moreover, with regard to non-HMRC related personnel, those individuals could not on any basis be regarded as individuals in public life. Reference to the *Leapman* decision referred to above was therefore misplaced since that decision dealt with public officials in the public eye.

66. HMRC claimed that insufficient consideration was given to the fact that an assurance of confidentiality was provided by Mr Hartnett. That at the very least

would include an expectation that identities, as well as subject matter of the evidence in question, would not be disclosed. It is not in the Tribunal's view for the Commissioner to counter this argument by submitting that the disclosure of this kind of information is fair and lawful since there is a legitimate public interest in understanding the steps the HMRC had taken. Each case is of course different, but on the facts of this case, the Tribunal is entirely satisfied that there is really no value attached to the revelation of names and identities *per se*. Admittedly, the fact that the information in question relates to professional life is one way of characterising the role played by the individuals in question insofar as they were non HMRC related, but that is only one, and certainly not a determinative factor.

67. With regard to opinions and recollections (see Decision Notice, paragraphs 55 to 57), the same related to only one individual who was employed by HMRC at the relevant time. In the Tribunal's view this question is more finely poised. On balance, the Tribunal accepts the overall contentions of HMRC that disclosure of this one employee's opinions and recollections has to be placed in context. It is difficult to see how the public could have been assisted in any sensible way by the disclosure of an isolated piece of evidence of this sort. Admittedly, the information related to a senior public official and his conduct in a professional capacity. The difficulty, in the context of this particular Report, is to segregate this one item from a background of almost complete non-disclosure and to see whether disclosure would contribute towards or detract from the unbalanced picture which has been referred to above. On balance, the Tribunal accepts HMRC's contentions and rejects the Commissioner's argument that the public had a legitimate interest in this case in understanding the steps that HMRC had taken so as to justify disclosure of this particular item of information.

68. Finally, the Commissioner ordered that a reference to a separate disciplinary matter should be disclosed. On balance the Tribunal accepts the contentions made by HMRC that the Commissioner in effect failed to identify a legitimate public interest in disclosing this information. It did not relate to the matter under investigation. It is therefore difficult to see how disclosure could add to a broad public understanding of the matter in dispute. To repeat what is said in the written submissions put in by HMRC, the information in question "*served only to create a vague impression of*

"suspicions" that was prejudicial to the individual concerned". Admittedly, again, the information could be said to have been in the public domain, but in the overall context of this case, disclosure was, in the Tribunal's view, not warranted. More particularly, the disclosure is unfair and not authorised by the condition contained in paragraph 6(1) of Schedule 2 to the Data Protection Act 1998.

Other matters

69. No issue exists between the parties with regard to the application or otherwise of section 41 and nothing further will be said on this point. The Tribunal notes in particular that with regard to section 41 in its written submissions, HMRC did not seek in terms to advance any separate argument or grounds in respect of this exemption.

70. Finally, the Tribunal notes a comment made by HMRC with regard to section 21 of FOIA. In exchanges between HMRC and the Commissioner, at one point HMRC stated that is was prepared to release some parts of the requested material, but that this material was already in the public domain, therefore, "technically section 21 applies". Section 21 deals with information already accessible in the public domain. In paragraph 20 of the Decision Notice, the Commissioner stated that the failure to inform the Complainant, i.e. Mr Brooks, that some of the information was otherwise reasonably accessible was a breach "of section 21 of the Act". The Tribunal notes that this finding was not the subject of an appeal in terms. However, it does respectfully adopt the observation made by HMRC to the effect that section 21 constitutes an exemption, not a requirement that can be the subject of any form of "breach". This issue, however, is not material for the determination of this appeal.

Conclusion

71. For all these reasons, the Appellant's appeal is allowed.

David Marks
Deputy Chairman

Date: 10 March 2009