



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: GIA/1668/2019
[2020] UKUT 92 (AAC)**

**GORDON V INFORMATION COMMISSIONER AND HER MAJESTY'S
REVENUE AND CUSTOMS**

Decided following an oral hearing on 11 March 2020

Representatives

Mr Gordon	Represented himself
Information Commissioner	Leo Davidson of counsel
Her Majesty's Revenue and Customs	Ben Silverstone of counsel

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	EA/2019/0047
Decision date:	15 July 2019
Venue:	Field House, London

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

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REASONS FOR DECISION

1. I like to begin a decision by setting out the question I had to answer and saying what that answer was. That is difficult in this case, because I first had to decide what the correct question was; the alternatives are set out in paragraphs 10 to 14.

2. Put in a general way, the issue was the extent to which information held by Her Majesty's Revenue and Customs about the cost of litigation with a taxpayer is exempt from disclosure under the Freedom of Information Act 2000 (FOIA) when read with the Commissioners for Revenue and Customs Act 2005 (CRCA).

A. History and background

3. Mr Gordon is a barrister specialising in tax. He represented three members of the Gardiner family in relation to their tax affairs and the costs of that litigation. On the day that he won their cases, he made a request under FOIA:

In view of the decision today from the High Court, please advise me of the total costs incurred by HMRC in this litigation, to include (but not necessarily limited to):

1. The internal costs of contesting the original appeal to the First-tier Tribunal in April 2014.
2. The internal costs of resisting the costs application made later that year.
3. The totality of costs (internal, external legal and costs awards payable to the other side) in relation to the procedures before the Senior Courts Costs Office (provisional and final assessment).
4. The totality of costs (court fees, internal, external legal and costs awards payable to the other side) in relation to the appeal to the High Court.
5. The final costs payable as a result of the High Court's decision in relation to the original hearing in April 2014.

4. Her Majesty's Revenue and Customs confirmed that it held the information, but refused to disclose it on the ground that it was exempt under section 44(1)(a) of FOIA. On complaint, the Information Commissioner decided that the request had been dealt with in accordance with FOIA. That decision was confirmed on appeal by the First-tier Tribunal, but only by a majority. The tribunal gave Mr Gordon permission to appeal to the Upper Tribunal. Following an exchange of

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written submissions, I directed an oral hearing. I am grateful for the skeleton arguments, which were commendably short, and the oral arguments from all parties.

B. The legislation

FOIA

5. Section 44(1)(a) provides:

44 Prohibition on disclosure

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

(a) is prohibited by or under any enactment; ...

This is an absolute exemption (section 2(3)(h)), and as such is not subject to a balance of public interests test.

CRCA

6. The prohibition relevant to this case is in this Act. Section 23 provides:

23 Freedom of information

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

(1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.

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

7. Section 23(1) refers to section 18:

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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.
- (2) But subsection (1) does not apply to a disclosure—
- (a) which—
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,
 - (b) which is made in accordance with section 20 or 21,
 - (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (e) which is made in pursuance of an order of a court,
 - (f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,
 - (g) which is made to the Director General of the Independent Office for Police Conduct, or a person acting on the Director General's behalf, for the purpose of the exercise of a function by virtue of section 28,
 - (h) which is made with the consent of each person to whom the information relates,
 - (i) which is made to Revenue Scotland in connection with the collection and management of a devolved tax within the meaning of the Scotland Act 1998,
 - (j) which is made to the Welsh Revenue Authority in connection with the collection and management of a devolved tax within the meaning of the Government of Wales Act 2006, or
 - (k) which is made in connection with (or with anything done with a view to) the making or implementation of an agreement referred to in section 64A(1) or (2) of the Scotland Act 1998 (assignment of VAT).

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(2A) Information disclosed in reliance on subsection (2)(k) may not be further disclosed without the consent of the Commissioners (which may be general or specific).

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(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, ...

8. CRCA sets out a number of functions of the Commissioners and officers of Her Majesty's Revenue and Customs. Section 5(1)(a) will suffice as an example. This provides that 'The Commissioners shall be responsible ... for the collection and management of revenue'. Section 9(1) provides:

9 Ancillary powers

(1) 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.

And 'function' is defined in section 51(2)(a):

51 Interpretation

...

(2) In this Act-

(a) 'function' means any power or duty (including a power or duty that is ancillary to another power or duty), and

(b) a reference to the functions of the Commissioners or of officers of Revenue 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.

In other words, when CRCA refers to functions, that includes powers relevant to those functions.

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9. Section 23(3) adopts the definition of 'revenue and customs information relating to a person' from section 19:

19 Wrongful disclosure

(1) A person commits an offence if he contravenes section 18(1) or (2A) 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).

C. The preliminary question

10. I said at the beginning that I had to decide what the correct question was. I set out below the competing forms of the question. The difference is whether the phrase 'in respect of a person' qualifies 'information' or 'the exercise of a function'.

Mr Gordon's argument

11. Mr Gordon argued that the phrase had to qualify 'information':

Does the information requested consist of or include information *in respect of a person* that

- (1) (a) is about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs
- (b) but not about internal administrative arrangements
- (2) and specifies the person's identity or allows it to be deduced?

12. This formulation has the result of limiting the nature of the information that would be exempt from FOIA.

Information Commissioner and Her Majesty's Revenue and Customs

13. Mr Davidson and Mr Silverstone argued that the phrase had to qualify 'the exercise of a function':

Does the information requested consist of or include information that

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- (1) (a) is about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs *in respect of a person*
- (b) but not about internal administrative arrangements
- (2) and specifies the person's identity or allows it to be deduced?

14. This formulation is the one that reflects the grammatical structure of section 19(2). I accept the argument that it is the correct formulation.

D. How CRCA works

15. Section 18 prohibits disclosure of information held by Revenue and Customs 'in connection with a function of the Revenue and Customs.' Note the words 'in connection with' and 'function.' It provides the internal control on disclosure by officials, and is subject to the restrictions in section 18(2) and (3).

16. Section 19 provides the criminal control on disclosure by officials. It creates an offence based on section 18. The offence is not aligned completely with section 18, because it is limited by two elements. For convenience, I call them the information element and the identification element. The information element is that the offence applies to 'revenue and customs information relating to a person', as defined in section 19(2). Notice that the definition does not use the word 'relating'. It is part of the label, but that is used for convenience, just as I have used information element and identification element; it is not part of the meaning that is attributed to the label. It is not unusual for a definition not to use some of the words that are used in the definition; in theory, it need not use any of them. There is, therefore, no need to reconcile the use of 'relating to' in the label and 'in respect of' in the definition, a point which troubled the dissenting member of the First-tier Tribunal. The identification element of the definition is that the information must specify the person's identify or allow it to be deduced (section 19(1)(a) and (b)).

17. The terms of the section 19 offence cannot be wider than the scope of section 18. Why then does the definition of 'revenue and customs information relating to a person' refer to information 'about, acquired as a result of, or held in connection with'? Is that not wider than information 'held ... in connection with a function'? The answer is that it is not. The reason is that section 18 refers to 'a function', whereas section 19 refers to 'the exercise of a function'. Section 18 does not prohibit disclosure 'about' a function, because the functions are statutory and there is no need for them to be confidential. And it makes no sense to refer to information 'acquired as a result of' a function, because information is only acquired as part of the exercise of a function. On this analysis, the information covered by the definition of 'revenue and customs information relating to a

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person' is a subset of the information covered by section 18. To put it another way, information that is 'about, acquired as a result of, or held in connection with the exercise of a function' (section 19(2)) is always part of the information that is 'held ... in connection with a function' (section 18(1)). That is the only way to make sense of sections 18 and 19 together.

18. Section 23 provides the link with FOIA. It does so through a combination of references to sections 18 and 19. It refers to section 18, but without the restrictions in section 18(2) and (3), so in that sense the exemption from FOIA is wider than the internal control on officials. But, by adopting the definition from section 19(2), it is narrower than section 18, as is the exemption from FOIA.

19. Despite Mr Gordon's argument in his skeleton – he did not repeat it at the hearing – there is no conflict between FOIA and CRCA. Each regime deals with different information in a different way.

E. 'In respect of' qualifies 'the exercise of a function'

20. Does 'in respect of the person' in section 19(2) qualify 'information' or 'the exercise of a function'? Mr Gordon made alternative arguments. First, he argued that, on the proper interpretation of the statutory language, the phrase qualified 'information'. Second, he argued in the alternative that the language was unclear or ambiguous so that resort should be had to a statement in Hansard. I reject both arguments.

First argument – the proper interpretation of the statutory language

21. Mr Gordon argued that legislation had to be made for a purpose and that section 18 was intended to protect information about taxpayers, both individuals and companies, from disclosure. He then argued that this would be undermined and there would be anomalies if 'in respect of a person' qualified 'the exercise of a function' rather than 'information'.

22. As examples, he mentioned a taxpayer's duty to notify any information relevant to their tax liability and a request by a taxpayer to be sent a self-assessment form. Neither of these, he argued, was in connection with a function, although they would be in connection with a function when it was exercised after receipt of the information or request. As he put it, a function could not be exercised passively. The result would be that an officer could disclose this sort of information with impunity, undermining the evident purpose of section 18.

23. I do not accept that argument. It overlooks the broad definition of 'function' in section 51(2)(a), which covers all powers and duties, including powers and duties that are ancillary to others. It also overlooks section 9, which includes power to do anything that is necessary or expedient in connection with the

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exercise of functions or that is incidental or conducive to their exercise. Receiving information or a request for a form is permissible as the exercise of a power that is expedient in connection with the 'collection and management of revenue', which is a function of the Commissioners under section 5(1)(a), or conducive to the exercise of that function.

24. Mr Gordon also argued that when CRCA referred to 'function' it always did so at a higher level of generality than their exercise in respect of an individual taxpayer. As a result, relating 'in respect of the person' to function was not consistent with the way the Act was structured and worded. That may well be true of the Act generally, but the definition refers to the exercise of a function, rather than just to a function, and that does bring in the lower level operation of a function at the individual level, which it is appropriate to qualify with 'in respect of the person'. The point I have already made about the broad definition of 'function' taken with section 9 is again relevant here.

25. In his skeleton – but not in oral argument at the hearing – Mr Gordon relied on the presumption against doubtful penalisation, as discussed in *R v Dowds* [2012] 1 WLR 2576. I do not accept that argument, for two reasons. The first reason is that, whatever may be the case when section 19 is used in a criminal context, it is not so used in relation to FOIA. It is relevant to FOIA only because section 23 adopts the definition from section 19(2); FOIA does not involve any penal element. And, having adopted the definition, it applies it only to section 18(1) without the restrictions in sections 18(2) and (3), which are part of the definition of the criminal offence. The use of a criminal definition is purely for convenience. I consider that there is no scope for the presumption to arise. The second reason is that the presumption is just that, a presumption. It is not a rule and may have to give way to other principles, and is only applied as a last resort (at [37]). In this case, given my analysis of the definition, I consider that there is no scope for the presumption given the clear meaning of the legislation.

Second argument - Hansard

26. Mr Gordon argued in the alternative that the language of section 19(2) was unclear and ambiguous so as to satisfy the criteria in *Pepper v Hart* [1993] AC 593. He then referred to this passage from Hansard to show that section 23 was limited to information about taxpayers. I have retained his italics to show how often the minister used the expression 'taxpayer confidentiality'.

Dawn Primarolo: On Second Reading and in Committee, I made it clear that the new department, Her Majesty's Revenue and Customs, would take *taxpayer confidentiality* every bit as seriously as its predecessors. The new clauses underline our commitment to *taxpayer confidentiality*, and I hope that as such they will be uncontroversial.

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Let me remind Members briefly of our high standards of confidentiality. The issue is taken seriously by everyone: staff, Members in all parts of the House and, indeed, taxpayers. The Bill contains provisions for safeguarding *taxpayer confidentiality* that strengthen those previously available. That includes, in clause 17, a civil sanction for unauthorised disclosure of any information held by Her Majesty's Revenue and Customs which is binding on appointment, and in clause 18, in relation to customer confidential information, the additional safeguard of a criminal sanction. That too applies to all functions of Her Majesty's Revenue and Customs.

Let me deal first with new clause 3. On Second Reading and in particular in Committee, Members—particularly the hon. Members for Chichester (Mr. Tyrie) and for Sevenoaks (Mr. Fallon)—expressed concern that the Inland Revenue oath was being superseded. They said they accepted that the Bill provided for enhanced enforcement of *taxpayer confidentiality*, but considered the oath not only symbolic but important to remind members of the new department of their obligations.

Both my hon. Friend the Economic Secretary and I consider it a great honour to be Ministers in charge of both the current department and the new one. We know that the staff, operating to the very highest standards, accept the concerns as well, and we have every confidence in them; but, having considered carefully, my hon. Friend and I still believe that the statutory duty in the Bill as it stands strengthens the provisions safeguarding *taxpayer confidentiality*. The duty included in the Bill is immediately binding on staff on appointment and covers all functions of the department. All members of staff currently employed in the department adhere to that, and understand their obligations.

My hon. Friend the Economic Secretary and I felt that the House should have an opportunity to convey a united view, from all parties, of the great importance that we attach to *taxpayer confidentiality*.

Therefore, while appreciating that the staff already employed by the departments understand that, the new clause requires new staff joining the department once the Bill has received Royal Assent to sign a declaration. That is recognised as bringing a ceremonial quality to the equivalent of the oath. We would not want to give the appearance of diminishing the high and excellent standards that those fine departments have adhered to for *taxpayers' confidentiality*. I hope that the House will take the view from all the parties represented here that we are sending a clear message. Although I am satisfied with the safeguards on *taxpayer confidentiality*, the new clause will require new staff to acknowledge the duty of confidentiality under the Act, before a witness.

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New clause 4 similarly deals with *taxpayer confidentiality* and how the Bill relates to the Freedom of Information Act 2000. It is a technical clarification that aims to make it clear how the Bill will interact with that Act. Compliance with the Act is, of course, Government policy.

Taxpayer confidentiality remains of paramount importance in the new department. As I have said, for that reason, the Bill ensures that information connected with a taxpayer is not discloseable under the Freedom of Information Act. That was always the intention, but the new clause puts that beyond doubt—that information will not be discloseable under that Act. However, much of the information that Her Majesty's Revenue and Customs will hold is not *taxpayer confidential*—for example, information about the department's internal processes. The new clause clarifies that such information will be subject to the Freedom of Information Act. Therefore, if a person requests information that is not *taxpayer confidential*, that request will be considered under the Act.

I hope that the House will feel confident in these two new clauses and confident in the management and staff of the new department, who will be committed to the principles of *taxpayer confidentiality*. There will be no reduction in the exceptionally high standards that they have always followed. I hope that, in agreeing these new clauses, all hon. Members will not only acknowledge the professionalism and dedication of the staff, but agree that we have a role in supporting them in the discharge of the duty on *taxpayers' confidentiality* and that that is well served by the new clauses.

[*Hansard*, House of Commons, 26 January 2005, col. 394]

27. I reject this argument. For a start, I do not find the language ambiguous or unclear. The grammatical meaning is clear and, as I have explained, it does not produce the anomalies suggested by Mr Gordon. Even if *Pepper v Hart* did apply, the passage would not help Mr Gordon for two reasons. First, the minister did not say precisely what 'taxpayer confidentiality' meant, so her statement merely substitutes one uncertainty for another. Second, her statement did not say that section 23 only covered taxpayer confidentiality, whatever that might mean. That just happened to be the concern she was addressing in her statement.

F. The information requested was not about internal administrative arrangements

28. Mr Gordon's fall back argument was that the information he had requested was not exempt because it related to internal administrative arrangements. I do not accept that.

29. There is an issue about the meaning of

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'but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).'

Is this a freestanding exclusion or a carve out from the preceding part of the definition? Does it only exclude information about internal administrative arrangements that would otherwise be 'about, acquired as a result of, or held in connection with the exercise of a function'? I do not have to decide which is correct, as the information that Mr Gordon requested is not about 'internal administrative arrangements'.

30. I am not going to attempt to provide a definition or even a description of what that phrase means. As a general description, it is apt to cover the internal organisation of the offices of the Commissioners and the officers. The phrase covers how they are organised, not the decisions that they actually make or the transactions that they undertake. The decisions relating to the Gardiner litigation, the actions and decisions taken to give effect to those decisions, and the costs incurred in the process are not internal administrative arrangements, even if the costs were incurred and disbursed internally. The decisions were made and the costs incurred as a result of action within Her Majesty's Revenue and Customs, but they are not of themselves internal administrative arrangements.

G. The Durant case is not relevant or helpful

31. Mr Gordon relied on the decision of the Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. I have not found this decision or the reasoning in it helpful. The case arose under FOIA but concerned the interpretation and application of the Data Protection Act 1998. Apart from the use of similar words, there is no relevant similarity in the subject matter, statutory context, or policies and purposes of the legislation.

H. The dissenting view

32. An appeal to the Upper Tribunal lies against a decision, not against the reasons given for it. There is no appeal against the views of a dissenting member. I have, though, dealt with each of the points he made, as a courtesy to the time and care he devoted to analysing the legislation and explaining his conclusions.

Signed on original
on 16 March 2020

Edward Jacobs
Upper Tribunal Judge