



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0047**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**

Malcom Clarke  
Anne Chafer

**Heard at Field House on 1 July 2019**

**Between**

**Keith Gordon**

Appellant

-and-

**(1) The Information Commissioner  
(2) Commissioners for Her Majesty's Revenue and Customs**

Respondents

**Attendances:**

For the Appellant:	In person
For the 1st Respondent:	No appearance
For the 2 <sup>nd</sup> Respondent:	Mr Ewan West

## DECISION AND REASONS

### INTRODUCTION

1. This is an appeal against the Commissioner's decision notice dated 14 February 2019 (reference FS50780764). The Commissioner upheld the refusal of the 2<sup>nd</sup> Respondent (HMRC) to provide certain information requested by the Appellant in reliance upon the exemption in section 44(1)(a) FOIA. By a majority, the Tribunal dismisses the appeal. Dr Clarke's dissenting view is included at the end of the judgment.

### KEY STATUTORY PROVISIONS

2. Section 44(1)(a) of FOIA ensures that a request under FOIA cannot bypass prohibitions in other legislation: -

#### 44 Prohibitions 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,
- (b)...
- (c).....

3. By section 2(3)(f)(i) FOIA this exemption is an 'absolute' exemption where it applies.
4. Relevant to the application of s44(1)(a) FOIA in this case is section 23 Commissioner for Revenue and Customs Act 2005 (CRCA 2005) which, materially, provides:

(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 (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.

(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.

5. We will come back to s23 CRCA 2005 later in this decision, and also to the other sections referred to in s23 CRCA 2005.

## BACKGROUND

6. On 5 July 2018 the Appellant submitted a request for information to the public authority in the following terms:

"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."
7. HMRC responded on 27 July 2018. It noted from the subject line of the Appellant's email which contained the request, that the request related to the case of "HMRC v Gardiner".
8. HMRC confirmed that it held the requested information. HMRC stated that it considered the information exempt from disclosure on the basis of section 44(1)(a) FOIA, and applying the provisions in sections 18(1) and 23(1) CRCA 2005.
9. The Appellant requested an internal review of the decision and on 28 August 2018 HMRC confirmed that the review upheld the decision to rely on section 44(1)(a) FOIA. The Appellant contacted the Commissioner on 29 August 2018 to complain "about the refusal of HM Revenue & Customs to provide information concerning the amounts of money they have spent pursuing a case involving three taxpayers through the First-tier Tribunal (Tax) and Civil Courts."
10. By way of context, and as explained by the Appellant before us, the Appellant is a barrister who has represented three parties in a number of hearings relating to tax issues and the costs incurred in those hearings. We have been provided with the reference for the High Court case described as *HMRC v Gardiner* and it can now be found reported at [2018] 4 Costs LO 451, as well as online with neutral citation [2018] EWHC 1716 (QB). In the judgment three individuals with the surname 'Gardiner' are referred to by their full names, and collectively called 'the Gardiners'.
11. The Commissioner's decision notice agrees with the approach adopted by HMRC and can be summarised as follows: -

(a) Section 18(1) CRCA 2005 states:

‘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.’

(b) The information is held in connection with HMRC’s function relating to the general management and collection of tax.

(c) As can be seen from s23(1A) CRCA 2005 (set out above), the exceptions to s18(1) CRCA 2005 (set out in s18(2) and (3) CRCA 2005), do not apply when considering disclosure of revenue and customs information relating to a person, in response to a FOIA request

(d) S23(1) CRCA 2005 specifically designates such information for the purposes of exemption under s44(1)(a) of FOIA, where disclosure ‘would specify the identity of the person to whom the information relates’ or where disclosure ‘would enable the identity of such a person to be deduced’.

(e) The requested information ‘clearly relates to identifiable persons’: paragraph 26 of the decision notice.

(f) Section 23(3) CRCA 2005 states that in subsection (1) of s23 CRCA 2005 “revenue and customs information relating to a person” has the same meaning as in section 19.

(g) Section 19(2) CRCA 2005 reads: -

...“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 HMRC, officers or others).”

- (h) ‘The fact the complainant considers that the requested information is about the public authority’s internal processes is immaterial to the test set out in section 23(1) CRCA’: paragraph 26 of the decision notice
- (i) ‘The test it should be noted is not whether the information sought is taxpayer confidential. It is whether the information would specify the identity of a person to whom it relates or would enable their identity to be deduced’: paragraph 26 of the decision notice.

12. On that basis the Commissioner found that the requested information was subject to the exemption in s44(1) FOIA.

### THE APPEAL

13. The Appellant produced a skeleton argument for the hearing and made oral submissions. His case was that s23 CRCA 2005 did not apply to the information he sought and therefore it should be disclosed. His case was that the information sought was not ‘revenue and customs information relating to a person’ for the purposes of s23(1) CRCA 2005. The Appellant also submitted that the information itself did not identify a person or enable any person’s identity to be deduced, which is necessary under s23(1) CRCA if the s44(1) FOIA exemption is to apply.

14. The Appellant submits that the relevant sections of the CRCA 2005 are part of a set of provisions in CRCA whose concern is to ensure that sensitive data relating to taxpayers is, as a general rule, kept confidential within HMRC. To support this the Appellant refers to repeated emphasis on

'taxpayer confidentiality' as espoused by the sponsoring Minister in Parliament when what became section 23 CRCA 2005 was inserted into the relevant Bill. The Appellant took us to a long passage from the relevant Hansard debate on 26 January 2005 (Hansard, col.394), in which 'taxpayer confidentiality' was referred to on a number of occasions by the then Minister, Dawn Primarolo, and of which the following extract provides a flavour in the context of what is now s23 CRCA 2005: -

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 disclosable under the Freedom of Information Act. That was always the intention, but the new clause puts that beyond doubt—that information will not be disclosable 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.

15. The Appellant points out that there was a clear distinction in this passage between 'taxpayer confidential' information and information which relates to matters such as the department's internal processes.
16. The Appellant submits that the approach of the Commissioner and HMRC fails to recognise the purpose of the legislation which is to protect taxpayer confidential information, rather than other information, from disclosure.
17. The Appellant further argues that the information sought will simply be a 'series of numbers' relating to amounts spent on the litigation, and will not specify the identity of a person or allow a person's identity to be deduced.
18. Next, the Appellant notes that s23(3) CRCA 2005 states that for the purposes of s23(1) CRCA 2005 "revenue and customs information relating

to a person” has the same meaning as in section 19 CRCA 2005. He points out that s19 CRCA 2005 provides for a criminal offence if there is disclosure of information which relates to an identifiable person. As criminal provisions should be construed narrowly, he says, therefore the definition in s19 CRCA – of “revenue and customs information relating to a person” - should be construed narrowly. As s23 CRCA 2005 says that this phrase will have the ‘same meaning’ as in section 19 CRCA 2005, the same narrow interpretation must be incorporated into s23 CRCA.

19. The Appellant points out that, pursuant to s19(2) CRCA 2005 for ‘revenue and customs information’ to relate to a person it must be ‘information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs... in respect of the person’, but also must not be ‘information about internal administrative arrangements of Her Majesty's Revenue and Customs...’.
20. He suggested that there might be information which would fall within first definition but, having done so, would then be excluded by the application of the second definition (concerning ‘internal administrative arrangements’).
21. The Appellant argued that, effectively, a correct reading of s19(2) CRCA 2005 dovetails with the meaning of ‘personal data’ in the Data Protection Act, and as interpreted in the case of *Durant v Financial Services Authority* [2004] FSR 28. The Appellant took us specifically to paragraph 28 of Auld LJ’s judgment:-

28 It follows from what I have said that not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser



degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity....

22. The Appellant argued that HMRC's legal costs in the *HMRC v Gardiner* were not 'about' or 'in respect of' any members of the Gardiner family, but were at most 'information about HMRC's internal administrative arrangements' arising from the pursuit of a case against the Gardiners.
23. Finally, the Appellant argues that, if his arguments are wrong then, by stating that it holds the information, HMRC has effectively disclosed information contrary to section 18 CRCA 2005, and thus potentially committed an offence: HMRC should have relied on the exemption in s44(2) FOIA to neither confirm nor deny (NCND) whether it held the information.
24. The Commissioner was not represented at the hearing but supported the decision notice in written submissions. Mr Ewan West for HMRC made both written and oral submissions in support of the decision notice. His central submission was that, if words of the statute are given their natural meaning, then there is no need to look beyond the legislation itself for any 'asserted purpose'. By considering the words of the statute it is clear that the exemption in s44(1) FOIA applies.

## DISCUSSION

25. It seems to us that we should start by applying the plain words of the statute to the facts of this case.
26. Applying the definition in s19(2) CRCA it seems clear to us that the requested information is information 'held' in connection with the exercise of a function of HMRC 'in respect of the person'. Thus, HMRC accept that information about litigation costs is 'held'. Information about litigation costs arising from tax cases must be, we find, held 'in connection with' the exercise of an HMRC function. That function is 'in respect of the person' (or persons) namely the individuals who were the other parties in the litigation. As Mr West explained, and as must be the case, HMRC litigation costs will be different in each taxpayer's case, depending on the nature and course of proceedings.
27. If all that is right, and we so find, then the information must be 'revenue and customs information relating to a person' for the purposes of s23(1) CRCA 2005.
28. Turning to the second part of the section 19((2) CRCA 2005, on the ordinary meaning of the words, information about the legal costs incurred in a particular case is not 'information about internal administrative arrangements' of HMRC. Thus, importantly, the information does not relate to 'arrangements' at all, but to the figures generated in an individual case. It would also be very difficult to consider the requested information as relating to 'administrative' matters, as that word suggests some link to the way HMRC is organised and run. The information might be 'internal' but this does not assist the Applicant as that word is attached to 'administrative arrangements' and not to anything else.
29. The Appellant suggested that s19(2) CRCA 2005 should be read such that there might be 'revenue and customs information relating to a person' which was also 'information about internal administrative arrangements'

and that information would then be excluded from the first part of the definition in the subsection. Even if this is the right interpretation (which we do not decide), it cannot assist the Appellant if the requested information does not, as we have found, come within the definition of 'information about internal administrative arrangements'.

30. It also seems to us that, as the words in s19(2) CRCA 2005 are clear, then even if a 'narrow' interpretation of the definition is attempted then the same conclusion is reached. Indeed, the Appellant did not really explain what a 'narrow' interpretation of the first part of the definition would lead to. It might entail a finding that the exercise of the HMRC function (in connection with which the information is held) was not 'in respect of the person' but even on the narrowest construction it is impossible to conclude other than that the function exercised in this case must have been 'in respect of' the taxpayers who were the other parties in the litigation.

31. In respect of the second part of the s19(2) CRCA 2005, as described above, what the Appellant must be arguing for is, in fact, a 'wide' interpretation of 'internal administrative arrangements' to include information about legal costs in an individual case. But even applying a wide definition, in our view, for the reasons set out above, it cannot be said that the requested information could ever fit into that definition.

32. Having concluded that, for the purposes of s23(1) CRCA 2005, the information requested is 'revenue and customs information relating to a person', we then have to decide whether its disclosure would either 'specify the identity of the person to whom the information relates' , or 'would enable the identity of such a person to be deduced' for the purposes of s23(1)(a) and (b) CRCA 2005.

33. The Appellant's case is that the requested information does not need to specify the name of the person to whom the information relates, because

all he wants is the figures relating to expenditure. However, even if that is right in our view disclosure would enable the identity or identities of the person or persons to whom the information relates and therefore disclosure would be covered by the section 44(1)(a) FOIA exclusion.

34. This is because the requested information must be read in conjunction with the request itself. The request itself provides the name and date of the case about which the Appellant is interested. The name of the case is HMRC v Gardiner. Although individual members of the Gardiner family are not referred to in the request, it would be possible to identify their full names from the transcript of the judgment which is readily available online. Thus, the disclosure when read with the request would enable the identity of the persons to whom the information relates to be deduced and known.

35. The Appellant might argue that he has no interest in broadcasting the names of the individuals, but the fact is that there is nothing to stop him, once he has the information, in saying (a) this is the request he has made I and the name and date of the case; (b) this is the information he has received as a result; and (c) the full names of those to whom the information relates can be deduced by reading the publicly available court transcript.

36. In our view, that is the reason why there is case law to the effect that a response to a FOIA request must be read in conjunction with the request itself. This was expressed as follows in *OP v ICO* (EA/2018/0095), 10 December 2018, where the FTT at paragraph 42 said that:

Where the request names any person, the answer, anonymised or not, inherently disclosed the information contained in the request. A recent reiteration of the point is to be found in the FTT decision in *Naulls v ICO* EA/2018/0022.

37. The *Naulls* case also contains an analysis of the general principle that disclosure under FOIA is effectively disclosure into the public domain or to the world at large, which underpins this reasoning.

38. Thus, in our view, on the plain words of the statutory provisions, the requested information comes with the definition in s23(1) CRCA 2005 of information to which the exemption in s44(1) FOIA applies.
39. As this is our conclusion, we do not find that the words of the statute are ambiguous, obscure or have led to absurdity, and therefore reference to Parliamentary material as an aid to statutory construction is not appropriate: *Pepper v Hart* [1992] UKHL 32; [1993] AC 593. However, as we were shown the material from Hansard as described above, we will make brief reference to it. It is true that the Minister made frequent reference to ‘taxpayer confidentiality’ when apparently introducing what became s23 CRCA 2005. However, what the Minister did not do in the passages we were shown was to identify exactly what she meant by that term. Indeed, at one point she states that ‘the Bill ensures that information connected with a taxpayer is not disclosable under [FOIA]. That was always the intention, but the new clause puts it beyond doubt...’.
40. The use of the phrase ‘connected with a taxpayer’ could justify a wide definition of what is covered by ‘taxpayer confidentiality’ rather than the narrower interpretation urged upon us by the Appellant.
41. As it is we have the definition set out in s23 CRCA 2005, which we have found is clear on its face and includes the information requested in this case.
42. Next, we do not find the passages referred to in *Durant*, and set out above, to be particularly helpful. Firstly, the definition of what is to be exempt information as set out in s23 CRCA 2005 is not the same as the definition of ‘personal data’ in the DPA. Secondly, although when discussing what constitutes personal data Auld LJ refers to information of a biographical nature, the judge goes on also to refer to information which has ‘the

putative data subject as its focus rather than some other person with whom he may have been involved.’ It seems to us that in this case the Gardiners are clearly the focus of the information (which relates to costs in a case to which they were parties), rather than some other person.

43. Lastly, as stated above, the Appellant argued that even if we were against him on everything else, then in fact HMRC should have relied on the exemption in s44(2) FOIA which allows them to NCND whether it holds the requested information, and to have said that it does hold some of the information requested amounts to a breach of s18 CRCA 2005.

44. In any event, it seems to us that it is obvious and common knowledge at the time of the request that HMRC must hold information in relation to the legal costs of the litigation in this particular case. As the Tribunal said in a case where a similar request was considered (*Waugh v IC & HMRC* (EA/2008/0091), ‘to confirm that there was information of the description specified in [the] request would not therefore have involved any disclosure at all and would accordingly not have been prohibited by section 18(1) of the 2005 Act and there would accordingly have been no basis for the application of section 44(2)’. We would apply that approach in this case in finding that the exemption in s44(1)(a) FOIA is the appropriate exemption to be relied upon by HMRC.

## CONCLUSION

45. For all these reasons this appeal is dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 15 July 2019

Promulgated date: 17 July 2019

## DISSENTING VIEW

46. This is entirely a matter of statutory interpretation, not of the FOIA but of CRCA 2005, to determine whether FOIA Section 44(1)(a) is engaged. I have adopted the approach urged on us by Mr. West, on behalf of the 2nd Respondent, namely to give words their natural meaning.
47. CRCA 2005 Section 23, defines what information held by HMRC is exempt information under section 44(1)(a) of FOIA. Exempt information has to be "relating to a person". We therefore have to consider what "relating to a person" means. CRCA 2005 section 19(2) tackles this by saying that it means "information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs....in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs....."
48. It is self-evident that the requested information is information about, acquired as a result of, or held in connection with HMRC functions. However, it also has to be information "relating to a person". I do not find S19(2) helpful in defining what "relating to a person" means because it only does so by saying that it means "in respect of the person", which seems to me have a very similar and equally vague meaning.
49. In normal usage I would say that the financial costs incurred by HMRC in legal proceedings does not fit comfortably as information "in respect of" the person(s) whose affairs are the subject of those legal proceedings because it tells you nothing whatsoever about that person(s). Rather it is information about HMRC itself, and the costs incurred as a result of its decisions to fight or defend the cases.
50. Whilst I accept that the statutory language used in CRCA 2005 is not the same as that used in the Data Protection Act, it seems to me that the intention

behind the legislation, namely to protect from disclosure confidential information about taxpayers' private financial affairs is very similar. For that reason, I think the judgement of Auld LJ in the *Durant* case is helpful. Applying it in this case, I do not think the requested information is biographical; has the Gardiners as its focus (because it is about HMRC costs not theirs); or in any way affects their privacy.

51. The alternative interpretation, that such costs are "in respect of the person" would also lead to the odd conclusion that HMRC holds information which is defined as being "in respect of", or "in relation to", a person, but which that person has not directly or indirectly provided to HMRC; does not relate to any characteristics of that person; of which the person has no knowledge; and to which the person has no access and cannot alter.
52. The statute also specifically clarifies that information about "internal administrative arrangements" of HMRC are not FOIA exempt. It appears that perhaps Parliament intended the two categories of (a) information in respect of a person and (b) information about internal administrative arrangements, to, between them, cover all types of information held by HMRC.
53. If so, and we have to make a choice, whilst I agree that information on legal costs does not sit comfortably within the normal usage definition of "internal administrative arrangements" I feel that it falls more appropriately within (b) than it does (a) for the reasons given above, in that it results from entirely internal decisions. Even if Parliament did not so intend, and there is a statutory lacuna, it still seems to me that information must fall within (a) for it to be FOIA exempt.
54. There are further reasons why I reach the conclusions I do. First, I think the statutory language is somewhat ambiguous, unclear and uncertain. It is therefore appropriate to have regard to the Hansard passage when the Minister was introducing the CRCA 2005, to which the Appellant drew our



attention. The Minister emphasises that the purpose of the legislation is to preserve "taxpayer confidentiality", a phrase which she uses no less than 14 times in nine paragraphs, whilst significantly also unambiguously asserting that " if a person requests information that is not taxpayer confidential, that request will be considered under the Act" (FOIA). I do not think that costing information of the type requested can reasonably be classified as "taxpayer confidential". The consequence of the HMRC position is that the legal costs incurred by HMRC in fighting any cases could never be revealed, which does not appear to have been Parliament's intention.

55. Second, I think there is some force in the Appellant's argument that if the information requested was considered to be "relating to" the Gardiners, and is not information about internal administrative arrangements, and is thereby exempt under Section 44, then HMRC could have declined to confirm or deny holding the information but did not do so, and may even have committed an offence by revealing that the information is held. His point was not that HMRC should have applied Section 44(2) a view which he obviously doesn't hold because he wants to see the information, but rather that, by confirming that they hold it, they have undermined the logic of their own case that the information relates to the Gardiners.

56. For the avoidance of doubt, I do not take a view at this stage on whether or not the requested information should be disclosed. Were my view that section 44 is not engaged to prevail, the Tribunal would need to make directions to HMRC decide whether they wish to claim any other exemptions and, if so, for these then to be assessed by the Tribunal under FOIA in the normal way.

57. For the above reasons I do not believe that Section 44 is engaged in relation to this request

**Malcolm Clarke**

Tribunal Member

Date: 15 July 2019