



Case Reference: EA/2022/0237
NCN: [2023] UKFTT 00644 (GRC)

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

Heard on GRC - CVP

Heard on: 24 July 2023.

Decision given on: 03 August 2023.

Before:

Tribunal Judge: Brian Kennedy KC

Tribunal Judge: Melanie Carter

Tribunal Member: Dave Sivers

Between:

STEPHEN CAMPBELL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Stephen Campbell as a Litigant in Person.

For the Respondent: Gemma Garvey, Legal Executive within the Information Commissioners' Office in writing in the Response dated 3 October 2022.

Decision: The appeal is dismissed

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as, against the Commissioner’s decision notice 31 August 2022 with reference number IC- 84555-F9D9 (the “DN”), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. In short, the complainant requested information relating to the Independent Loan Charge Review. HM Revenue and Customs (HMRC) provided most of the requested information but stated that it did not hold a draft version of the Review report and in the DN the Commissioner found on the balance of probabilities, HMRC does not hold the draft version of the Review report. Accordingly, the Commissioner held no further steps were required.
- [3] In September 2019, the Chancellor of the Exchequer commissioned Sir Amyas Morse (now Lord Morse) to lead an independent review into the disguised remuneration loan charge (the Review). Lord Morse was asked to consider whether the policy is an appropriate response to the tax avoidance behaviour in question, and whether the changes the government has announced to support individuals to meet their tax liabilities have addressed any legitimate concerns raised. The Review was completed, and a report published in December 2019. On 3 December 2020 HMRC published a report on the actions it had taken in response to the accepted recommendations arising from the Review.

History and Chronology:

- [4] The complainant submitted the following request to HMRC on 23 November 2020:

"I am asking HMRC to publish any and all communications (Email, SMS text, WhatsApp, and other written correspondence) between any of HMRC, HMT the Sir Amyas Morse LCR team that relates to the selection of members of the "expert panel" that would act as a sounding board for the review findings. Specifically, I would ask for the following information to be shared, noting that individual names can be redacted whilst enabling the substance of the debate around their suitability or otherwise to be published:

- 1. Please share all Email and other written correspondence involving any and all of HMRC, HMT and the Amyas Morse Loan Charge Review team that discusses the selection of expert panel members.*
- 2. Please share ALL information held by HMRC or HMT that makes clear the qualifications held by the selected individuals who ended up on the expert panel*
- 3. Please share ALL minutes of meetings held to discuss the composition of the expert panel that involved some or all of HMRC [sic] HMT and LCR staff.*
- 4. Please share ALL minutes of meetings held between expert panel members and Sir Amyas Morse*
- 5. Please share copies of any and ALL written submissions provided to Sur [sic] Amyas Morse and his team by members of the expert panel, including any drafts of such submissions that may have been shared with HMRC and or HMT staff and subsequently amended prior to submission to Sir Amyas Morse and his team.*
- 6. Please share all drafting changes to submissions made by expert panel members that were sent to HMRC and/or HMT staff prior to submission to [sic] Sir Amyas Morse and his team [sic]*
- 7. Please share information HMRC, HMT or LCR hold that confirms how much each of the participants in the expert panel was remunerated for their participation in this process*
- 8. Please share all Emails and other written correspondence between Sir Amyas Morse and his team on draft versions of the Loan Charge Review report which were shared with HMRC and HMT staff for comment in advance of the initial drafting. Please include any and all marked-up versions of the report that went back and forth between any and all parties involved.*
- 9. Please share copies of all witness statements (or minutes of meetings with witnesses) which were shared with Sir Amyas Morse and his team" [sic]."*

- [5] HMRC responded on 14 December 2020. It stated that it held some of the requested information, and that this was exempt from disclosure under section 21 of FOIA because it was reasonably accessible to the complainant. HMRC provided the complainant with a link to relevant information that had been disclosed in response to a separate request.³
- [6] HMRC further explained that it did not hold *“any information relating to minutes of meeting, witness statements, information provided by the expert panel or information relating to the appointment or the arrangements made with the expert panel.”*
- [7] On 15 December 2020 the complainant requested an internal review of HMRC’s response. He stated:
- “All that is required is the release of interim draft A, which MUST have been maintained and backed-up on whatever IT systems the Loan Charge Review Secretariat was using. I am happy to review that alongside the published version of the review and I can then deduce the amendments myself.”*
- [8] HMRC provided the complainant with the outcome of the internal review on 15 January 2021. The review explained that records relating to the Review were not stored on HMRC systems. Therefore, HMRC maintained that it did not hold any further information relevant to the request.
- [9] On 27 January 2021 the complainant contacted the Commissioner to complain about HMRC’s response to his request. The complainant set out his view that HMRC *“MUST hold the data I am requesting in electronic form”*.
- [10] The complainant confirmed to the Commissioner on 9 July 2021 that he was content for the scope of the investigation to focus on the outstanding information specified in his request for internal review, *i.e., “interim draft A” of the Review report*⁴ as referred to at [7] above.

- [11] The Commissioner maintains the position set out in the DN. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

Legal Framework:

- [12] A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether It holds the information (s.1(1)(a) the FOIA) and to have that information communicated to him, if the public authority holds it. (s.1(1)(b) the FOIA).
- [13] When determining whether or not the information is held the Commissioner and Tribunal applies the normal civil standard of proof, on the balance of probabilities. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007)* held that in determining a dispute as to whether information is 'held' at [13] :

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported by the Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies before this Tribunal in which the Commissioner's findings of fact are reviewed. We think that this application requires us to consider a number of factors including the quality of the public authority's initial analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed"

- [14] The Tribunal has repeatedly confirmed that the relevant test is whether the information is held on the balance of probabilities; see, for example, *Malcolm v Information Commissioner in EA/2008 at [24]*; & *Dudley v Information Commissioner and London Borough of Lambeth EAA/2011/0190 at [21] – [22]*.
- [15] Section 3(2) of the FOPIA states that information is held by a public authority if it is held by the authority, otherwise than on behalf of another person, or it is held by another person on behalf of the authority.

Commissioner’s Decision Notice:

- [16] The Commissioner considered the scope of the complaint in relation to the request for information and decided his investigation was to establish whether the public authority (HMRC) holds the “*interim draft A*” of the Review Report (as referred to above).
- [17] The Commissioner carefully considered the submissions of both the Appellant (see DN 16 -17) and HMRC (see DN 19 -21). Having done so, he accepted that in the circumstances of this case, on the balance of probabilities, the “*interim draft A*” of the Review Report is and was not at any material time held by the HMRC.

Grounds of Appeal:

- [18] The Grounds of Appeal were summarised by the Appellant thus;

“The grounds for my appeal to this can be summarised as follows:

The idea that Loan Charge Review team is separate from HMT and/or HMRC for the purposes of complying with FOI requests is clearly fanciful. Staff tasked to work on the review team were seconded from both organisations and remained as employees of both during the time of the review and beyond. The only difference was that they operated using Email alias for a domain that was established specifically for the purpose of managing the review comms. They did not become employees of a separate Gov entity that somehow isn’t subject to FOIA. This secondment cannot absolve both HMT and HMRC from their responsibilities for publishing data created and stored by their employees at that time. If this interpretation stands, what is to prevent the Gov from creating pop-up entities and second staff simply to avoid scrutiny?

The Gov operates using standard data retention policies for Email and other data. It is reasonable to expect that, as the Gov provided the IT infrastructure to support the seconded staff (including Email accounts), the services the staff used would be subject to standard Gov data retention policies.

The ICO was informed of the fact that the mailboxes (and IT equipment) provided to the seconded staff were being managed by a Gov IT department. Further, I confirmed that the Email accounts used by seconded staff were still operational and I successfully sent an Email in Feb 2022 that was received by a user called "Siobhan.Jones@loanchargereview.org.uk" to prove my point that the data in these mailboxes still existed, including all mailboxes that would have been used to exchange and share drafts of the Morse review document. Since that time, and presumably as a result of this ICO compliant highlighting the fact that these mailboxes were still operational, the same Emails' now result in an error message of "access denied". This is a mail gateway security message that prevents message delivery; it doesn't mean the mailbox itself has been deleted and as someone who works in IT (and has expertise in this area), I can confirm that on the balance of probability, the mailboxes still existed then and may well exist no.

Having Government establish what can perhaps best be described as "pop-up entities" (such as the Loan Charge Review Secretariat), which exists for a specific period and is then disbanded, cannot and should not be used as a reason for both Gov bodies whose staff were seconded to that Review team (HMT & HMRC) to avoid ANY FOIA obligations.

Point 10 in ICO report states "The review explained that records relating to the Review were not stored on HMRC systems. Therefore, HMRC maintained that it did not hold any further information relevant to the request. " I would respectfully suggest that all IT systems used by seconded staff were operated and managed by UK GOV on behalf of HMT and HMRC and should therefore be subject to FOI requests in the same way that any systems managed by Government Digital Services (GDS) is.

Point 17 in ICO decision states "The complainant also provided the Commissioner with further arguments in support of his position. He advised the Commissioner that he had sent an email to a member of the Review team via their email address ([named individual]@loanchargereview.org.uk) and had received an automatic response stating that the email account was no longer monitored. The complainant interpreted this as evidence that the email account was still live. ". This is evidence that the email account still existed at that time; if it didn't, I would have received a different message from the IT system supporting the Email service. This interpretation by ICO suggests a fundamental lack of understanding of Internet Email standards and conventions on the part of the person dealing with the complaint. This is not a criticism; merely a fact that's led to an incorrect conclusion.

In point 19 ICS states "These individuals were provided with their own IT equipment and email addresses for the purposes of the review by the Review Secretariat. They did not use HMRC systems or equipment for the Review and did not store any relevant records on HMRC systems. " This is playing with semantics. The equipment and "IT systems" were provided by the UK Gov and the staff were and, in many cases, still are, employees of HMT & HMRC. Calling an Email domain that an employee has access to and uses whilst still a staff member something that isn't an "HMRC system" is stretching credulity. The same centralised Gov Digital Services team manages all of these systems on behalf of HMT and

HMRC; it is therefore, for all intents and purposes, an HMT/HMRC "system" for the purposes of FOIA.

Point 20 states "HMRC further confirmed that a small number of HMRC officials had viewed the draft report, under controlled conditions. These officials were provided with hard copies of the draft report in a reading room, and they in turn provided verbal comments to the Review team. The hard copies of the draft report were given back to the Review team and HMRC officials did not retain any of the information. HMRC confirmed that, in response to the complainant's request, it had searched these officials' electronic records and had not located the outstanding information. " I have no interest in whether those reviewing hard copies kept a paper or electronic copy and I am not disputing that these people don't have a copy of the draft. However, the Secretariat staff most certainly did have the draft as they presumably printed it off and handed it to these individuals. It is therefore not disputed that a draft copy exists and it is further reasonable to assume that "verbal amendments" to "correct facts" would have been logged and acted upon to create the final draft. The ICO seems to be accepting the premise that the ToR of the Morse review, which confirmed that all "witness evidence" would be destroyed, somehow means that drafts of the official report reviewed and amended by unnamed HMT/HMRC staff counts as "witness evidence". It clearly doesn't. This is purely HMT/HMRC direct interference in what was meant to be an "independent review". One man's "correcting factual errors" is another mans "replacing facts with alternative facts to suit a narrative". This is one reasons that it's important to understand exactly what the draft report said before changes were made.

Point 23 is clearly incoherent. "Section 3(2) of FOIA states that information is held by a public authority if it is held by the authority, otherwise than on behalf of another person, or it is held by another person on behalf of the authority. The Commissioner is satisfied that the Review Secretariat was not part of HMRC as a public authority, and information that was held at any time by the Secretariat would not have been held by or on behalf of HMRC. The Commissioner notes that the Review was commissioned by the Chancellor, not by HMRC, and it was not commissioned on behalf of HMRC. " In this case the UK Gov IT services team operated systems on behalf of HMRC and HMT. They are therefore the party who hold the information "on behalf of" HMRC and/or HMT staff seconded to the LCR secretariat. The person who commissioned the review is irrelevant in the context of Gov bodies being responsible for liaising with the service provider org (which is also a Gov body) who operated these systems on their behalf. It's purely wordplay to avoid scrutiny!

Point 24 fundamentally misses the crucial point. "The Commissioner is also mindful that Lord Morse was tasked with conducting an independent review. Accordingly, the Commissioner accepts HMRC's explanation that HMRC officials were given strictly controlled access to the hard copies of the draft report. The Commissioner has seen no evidence to indicate that these, or any other HMRC officials, would have been allowed to retain a copy of the draft report. " I wasn't suggesting anyone had retained a copy from this cohort of reviewers; I was asserting that the IT systems (and specifically the mailboxes and file stores which remained active) would have stored within them copies of the draft concerned. The Gov also has an overarching obligation from its own record keeping policies to maintain a copy of what is a crucial draft of a document of this nature.

Point 25 provides no supporting evidence that any such searches took place and cannot be accepted at face value based on other examples of HMRC mishandling potentially embarrassing FOI requests over the last few years.

Point 26 ignores the fact that evidence was provided that mailboxes for staff seconded to the LCR secretariat were still operational in Feb 22 and were therefore operational for the year prior to that point and would have contained copies of all Emails', including emails with draft review docs attached in all probability.

On the balance of probabilities and in recognition of blatant and repeated attempts by HMT and HMRC to avoid any and all scrutiny of Loan Charge and related matters, the balance of probability is clearly that HMRC DOES (via the UK Gov service provider it used) have a copy of the draft report and should be compelled to release it.

The Commissioners' Response:

- [19] The Commissioner opposes the Appeal and invites the Tribunal to strike out the appeal under 8(3) of the 2009 Rules because the Appellant's Grounds of Appeal appear to amalgamate two Government departments p HM Treasury and HMRC. The DN, he argues, relates only to whether the requested information is held on the balance of probabilities, by HMRC. The Commissioner argues that his thorough investigation came to the correct conclusion according to the applicable Law and the Appellant has failed to set out in the Grounds of Appeal as to why the DN is not in accordance with the law.
- [20] Furthermore, the Commissioner argues, should a member of HMRC staff go on secondment outside of HMRC this does not mean that HMRC would be deemed to hold information which the seconded staff had access to during their time on secondment for the purposes of the FOIA.
- [21] The Commissioner reminded the Tribunal that at Paragraph 23 of the DN he had acknowledged that section 3(2) of the FOIA states that information is held by a public authority if it is held by the authority, otherwise than on behalf of another person, or it is held by another person on behalf of the authority. The Commissioner explained that – *"he is satisfied that the Review Secretariat was not part*

of HMRC as a public authority, and information that was held at any time by the secretariat would not have been held by or on behalf HMRC". The Commissioner had carefully noted, and reminds the Tribunal, that the Review was commissioned by the Chancellor, not by HMRC, and it was not commissioned on behalf of HMRC.

[22] The Commissioner argues further, that while he does not dispute that the Loan Case Review Secretariat may have held information on behalf of the public authority and that this information may be subject to retention policies once the Review was disbanded, the evidence provided by HMRC in this case clarified that they were not the relevant authority in this regard on the facts pertaining to the information sought in this case and in any event the relevant and material time for holding the information is the time the request is made, and as the final Review Report was published in December 2019, it may be that draft versions will not have been retained by the public authority concerned or responsible for this information either by the time the request was made to HMRC on 23 November 2020 or indeed subsequently. It was suggested to the Tribunal that HMT had confirmed they did have a copy of the draft report at some stage.

[23] In the event the Tribunal is not satisfied with the evidence relating to the position of HMRC as the public authority concerned in this appeal, the Commissioner helpfully invited the Tribunal to seek written submissions from or join HMRC as a Second Respondent herein.

The Oral Hearing on 24 July 2023:

[24] The Tribunal heard and considered the detailed submissions from the Appellant and after careful deliberation announced their decision with reasons in the allotted time. The Tribunal explained the limitations of the FOIA as opposed to the

expectations of many Litigants in Person who make a request under the FOIA. We accept the bona fides of the Appellant as a conscientious Litigant in Person with a genuine and proper interest in transparency and accountability in public authorities and who properly addressed the points made. We explained the focus of the issue before us was any evidence that HMRC on the balance of probabilities, held the “*interim draft A*” of the Review Report on 23 November 2020. The Tribunal explained that the Commissioner argues that he can only investigate whether the requested information is held by a public authority at the time of the request and that the request was made in November 2020, some eleven months after the final report was published. The Commissioner sought but could find no evidence to suggest that HMRC held, or would have a business reason to hold, a draft version of the report so long after the final version had been published.

Conclusions:

[25] The Tribunal recognises that each case must be determined on its merits. Having considered the evidence before us we are persuaded that the Commissioner carried out a comprehensive investigation into the complaint and we accept and endorse the reasons provided for the findings in the DN as explained in detail at Paragraphs [19] to [22] above.

[26] We carefully considered the suggestion that we seek further submissions or suggestion that we join HMRC as a Second Respondent and carry out further inquiries ourselves. On careful reflection we decided this was not necessary. We refer to the letter at C37 & 38 of the Open Bundle before us. This letter dated 15 January 2021 to the Appellant from HMRC in response to his request for a Review of their original response to his information request which inter-alia states as follows:

“In this instance, HMRC has previously complied with the below request for information: “Please provide ALL correspondence including emails, letters, meetings, phone calls etc... between Sir Amyas Morse / The Loan Charge Review secretariat team and HMRC relating to the Loan Charge Review commissioned by the government.”

Information released in response to this request is available online, a link to which was

provided in HMRC's initial response. From this information it is clear that an electronic version of the information you seek was not transmitted to HMRC by the Review team.

I can advise that HMRC staff seconded onto the Review team had a clear remit to support Sir Amyas Morse in the conduct of the Review; their work on the Review team was separate from their role as HMRC officials before or after the Review.

HMRC staff seconded onto the Review team were provided with separate IT equipment and email addresses to be used while performing their duties on the Review. Records were not stored on HMRC systems and HMRC did not arrange the provision of IT equipment or infrastructure for the Review.

[27] In the circumstances we cannot envisage further submissions or evidence from HMRC taking us any further and we do not propose to seek any further information from the public authority.

[28] In addition to the above we also considered and accept the submissions made on behalf of the Commissioner by Ms. Garvey to the effect that the Appellants arguments, surrounding whether or not Review staff email accounts were still active in February 2022 are relevant to whether HMRC itself (as a public authority) held or had access to an “*interim draft A*” of the Review report, as the review was not commissioned by or on behalf of HMRC.

[29] For all the above reasons we find that on the balance of probabilities the public authority does not hold the requested information and did not do so at the time of the request in November 2020 and there is no error of Law in the impugned DN.

[30] Accordingly, we must dismiss this appeal.

Brian Kennedy KC

25 July 2023.

Promulgated

03 August 2023.

