



Neutral citation number: [2024] UKFTT 931 (GRC)

Case Reference: FT/EA/2024/0172

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

**Heard by: Cloud Video Platform
Heard on: 17 September 2024
Decision given on: 28 October 2024**

Before

**JUDGE HAZEL OLIVER
MEMBER KATE GRIMLEY-EVANS
MEMBER JO MURPHY**

Between

GEORGE GREENWOOD

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: In person

For the Respondent: Did not attend

Decision: The appeal is Allowed in part.

Substituted Decision Notice:

1. HM Revenue and Customs was not entitled to withhold some of the withheld information under section 31(1)(d) of the Freedom of Information Act 2000.
2. HM Revenue and Customs are to disclose the additional information set out in the Closed Annex to this decision within 35 days from when this decision is sent to them. They were entitled to rely on section 31(1)(d) for the remainder of the withheld information.
3. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules, and may be dealt with as a contempt of court.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 2 May 2024 (IC-264933-T7L0, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about management of the R&D tax credit programme requested from HM Revenue and Customs (“HMRC”).

3. Companies can claim research and development (“R&D”) tax relief for qualifying activities. The aim of this tax relief is to incentivise research and development. There has been a large increase in R&D tax relief claims and recently the system has been the subject of fraud, abuse and criminal attacks.

4. On 20 July 2023, the Appellant wrote to HMRC and requested the following information (the “Request”):

“Please could you provide a copy of any lessons learned reports, or other internal department performance summary reports, in relation to HMRC’s management of the R&D [Research and Development] tax credit programme produced from 1st January 2022 to date.”

5. HMRC responded on 20 September 2023 and provided a redacted copy of a report, “R&D: Lessons Learned from the Recent Criminal Attacks” (the “Report”). The redactions were made under section 31(1)(d) FOIA, on the basis that release of the information would prejudice the assessment and payment of tax credits. On internal review HMRC disclosed slightly more information but maintained its reliance on section 31(1)(d) for the withheld information.

6. The Appellant complained to the Commissioner on 18 October 2023. The Commissioner decided that section 31(1)(d) was engaged. Having viewed the withheld information, he accepted that it would be useful to those looking to abuse the scheme, it would give significant insight into HMRC’s policing of R&D tax relief which would be of considerable assistance to those seeking to break the rules, and this would be likely to make it more difficult for HMRC to fulfil its functions in terms of assessing and collecting tax effectively. He also found that the balance of the public interest favoured withholding the information.

The Appeal and Responses

7. The Appellant appealed on 7 May 2024. His grounds of appeal are:

- a. The Commissioner erred in accepting HMRC’s argument that there was a meaningful chance of serious prejudice to its revenue raising powers. A four page “lessons learned report” is unlikely to contain detailed technical information about the operations of HMRC or the scheme, and is likely to be somewhat historic.
- b. The Commissioner failed to give the public interest in transparency and accountability in the case adequate weight.

- c. The information that is already in the public domain adds little to the public interest balance.
8. The Commissioner's response maintains that the Decision Notice was correct:
- a. He was entitled to accept HMRC's informed view that there was more than a hypothetical or remote possibility of the prejudice claimed, and that such prejudice would be likely to result from the disclosure.
 - b. He had comprehensive submissions from HMRC and has reviewed the disputed information.
 - c. The Report was produced in April 2022 and will have remained useful to those seeking to abuse it on the statutory response date.
 - d. The weight given to transparency and accountability for HMRC for the billions of pounds lost to fraud was fully appropriate. This was significant, but not such as to outweigh the prejudice caused by the disclosure.
 - e. Having considered the relevant information in the public domain concerning the issues associated with R&D tax relief misuse/fraud and what the government and HMRC are doing to tackle this issue, the public interest balance favours maintaining the exemption.
9. The Appellant submitted a reply which makes the following points:
- a. The Tribunal must look afresh at the issues he has raised in terms of the public interest.
 - b. All public bodies have to some extent a vested interest in information on policy failures not being disclosed, and it is disappointing that the ICO seems to adopt HMRC's position, rather than testing their claims more sceptically.
 - c. He asks the Tribunal to test carefully the claims made by HMRC on the actual chance of material prejudice.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
 - (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

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—*

....

(d) *the assessment or collection of any tax or duty or of any imposition of a similar nature...*

11. Section 31 is a qualified exemption. The approach to be taken prejudice-based exemptions was set out in the First Tier Tribunal decision of *Hogan v Information Commissioner* [2011] 1 Info LR 588, as approved by the Court of Appeal in *Department for Work and Pensions v Information Commissioner* [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.
- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. Whether disclosure “would” cause prejudice is a question of whether this is more likely than not. To meet the lower threshold of “would be likely to” cause prejudice, the degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

Issues and evidence

12. The issue in this case is whether HMRC was entitled to rely on section 31(1)(d) FOIA to withhold information from the redacted version of the Report disclosed to the Appellant.

- a. Is section 31(1)(d) engaged?
- b. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

13. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information (an unredacted version of the Report), and an unredacted version of correspondence from HMRC to the Commissioner (a redacted version is in the open bundle). The unredacted correspondence includes a table which explains the application of the exemption to each section of the Report that has been withheld.
- c. Oral submissions from the Appellant at the hearing.

Discussion and Conclusions

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

15. **Is section 31 engaged?** We need to decide whether disclosure under FOIA would, or would be likely to, prejudice the assessment or collection of any tax or duty or of any imposition of a similar

nature. We have considered the elements of the prejudice test in turn, taking into account the Appellant's submissions.

16. ***What are the applicable interests within the relevant exemption?*** The applicable interests are ensuring the effective assessment and collection of taxation, in this case the proper operation of the R&D tax relief scheme and prevention of tax fraud.

17. ***Is there some causal relationship between the potential disclosure and the prejudice, and is that prejudice "real, actual or of substance"?*** We have considered the information from HMRC as provided during the Commissioner's investigation, and accept that there is a causal relationship between the potential disclosure and the prejudice. We can see that a "lessons learned" report in relation to abuse and fraud in the tax system may provide information that is useful for those wishing to abuse the system in the future. Information about how HMRC polices this scheme could assist individuals to break the rules. We also accept that this prejudice is real and of substance. Tax abuse and fraud is a serious matter, which costs the taxpayer considerable amounts of money, and HMRC carries out a vital function in assessing and collecting tax in accordance with the rules.

18. ***If the information is disclosed, would this cause the prejudice, meaning this is more likely than not? Alternatively, would it be likely to do so, meaning there is a "real and significant risk" of prejudice even if this falls short of being more probable than not?*** The Appellant says that release of the information would not be likely to cause this prejudice. His position as explained at the hearing is that the Report is likely to be high level. It will not provide detailed information or a "how to" guide for potential fraudsters. He says that there has already been widespread fraud anyway, so release of this type of report is unlikely to make matters worse. The Appellant also says that the Commissioner has failed to be sufficiently critical of HMRC's position, taking into account HMRC's vested interest in not having policy failures disclosed.

19. The Appellant has asked us to review the withheld information critically. We have done so. We have considered each redacted item and the explanations provided by HMRC in the table they provided to the Commissioner.

20. We find that the majority of the withheld information would be likely to prejudice the assessment and collection of tax, in relation to the operation of the R&D scheme and the ability of HMRC to prevent abuse and fraud. We are satisfied that this is a real and significant risk, even if it is not more probable than not. We can provide limited information about our reasoning in this open decision because it depends on the nature of the closed material. However, we have taken into account the Appellant's point that he believes this is a high-level report. We can confirm that, having viewed the withheld material, we are satisfied that the majority of it is sufficiently detailed to present a real risk that it could be used to assist those wishing to abuse the system or break the rules.

21. As explained by HMRC in their response to the Commissioner, tax repayment schemes are an attractive target for organised criminal gangs. These criminals are resilient and continually probe HMRC's repayment systems. Having viewed the withheld material, we accept HMRC's arguments that this would reveal where they have focussed their activities and make their current strategy apparent, and would enable judgments to be made about the likelihood of investigation and system vulnerabilities.

22. This does not apply to all of the withheld information. Where the exemption does not apply the information must be disclosed, as set out below.

23. **If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** We have considered the public interest for and against disclosure as follows. This is on the basis of the public interest as at the time of the first response to the Request.

24. The Appellant's submissions focussed on the public interest in disclosure, against the background of his work as an investigative journalist. It is clear that the R&D system has been the subject of widespread fraud. He argues that it is in the public interest to look at the detail of what went wrong, including what checks were and weren't done of claims. He says that this is important for accountability. He also makes the point that companies are still being contacted in relation to R&D claims by unscrupulous agents, which suggests that fraud is continuing to happen. If past issues have not been fixed, this is also important for the public to know so that there is pressure to make reforms a priority.

25. HMRC and the Commissioner argue that there is already considerable information in the public domain which goes some way to meeting this public interest. The HMRC Chief Executive appeared at the Treasury Select Committee and provided information about a mandatory random enquiry programme. However, the Appellant says that he only answered two questions. The Lords Committee also published a report on R&D tax relief in January 2023. This report discusses the increase in error and fraud within R&D, and provides some detail about recent compliance activity. The Appellant acknowledges that this report is useful. However, he says that it still does not provide information about what actually went wrong.

26. We agree that there is a strong public interest in transparency around what has happened with the R&D system, why there was such widespread fraud, and what has been done to prevent this from happening. This is important for holding HMRC accountable for its actions. This is stronger than the usual general interest in transparency and accountability of public bodies, because of the high cost to the taxpayer of this tax fraud.

27. The public interest in withholding the information is also strong. We have found that disclosure of the majority of the withheld information would be likely to prejudice the operation of the R&D system, by assisting those who wish to abuse the system or break the rules. There was already widespread fraud. As the Appellant told us, there is evidence that unscrupulous agencies are still attempting to operate, and this indicates that abuse and fraud is a continuing problem. Tax evasion and avoidance is clearly against the public interest. It increases the tax burden for honest taxpayers. Compliance and enforcement actions by HMRC also cost public money. HMRC carries out an essential public role in operating and enforcing the tax system. Releasing information which undermines the fair operation of this system is not in the public interest.

28. We note that some information is publicly available on the problems with the R&D system and what has been done to rectify this, as set out in HMRC's response to the Commissioner. There are also a number of bodies that have looked into what has happened and are holding HMRC accountable, including the Public Accounts Committee, Treasury Select Committee and House of Lords Economic Affairs Finance Bill Sub-committee. We note the Appellant's point that this does not provide detail on what went wrong and how the widespread fraud was allowed to happen. It does, however, go some way towards ensuring HMRC is accountable for what has happened.

29. Having considered the arguments carefully, we find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information. The public interests on both sides are strong. We find that the public interest in preventing further abuse of the R&D system

and tax fraud is stronger than the public interest in transparency through disclosure of details from the “lessons learned” Report, in circumstances where there is some information already in the public domain. We acknowledge the point that the Appellant wants to ensure there is full scrutiny of failures by HMRC and why these happened. The publicly available information does not provide this level of detail. However, this is not a case where a public authority has attempted to hide the fact there was a major problem. Having viewed the withheld information, the detail that the Appellant is looking for is the type of information that would be likely to assist with further fraud. In all the circumstances, the damage likely to be caused by disclosure of the withheld information at the time of the response to the Request is sufficient to outweigh the public interest in disclosure.

30. We therefore uphold the appeal in part:

- a. HMRC was not entitled to rely on section 31(1)(d) in relation to some of the withheld information because the exemption is not engaged. We have specified the information to be disclosed in a closed annex to this decision. This is so that the information is not disclosed prematurely pending any appeal against this decision.
- b. HMRC was entitled to rely on section 31(1)(d) in relation to the remainder of the withheld information. The exemption is engaged because disclosure would be likely to prejudice the assessment and collection of tax, and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

31. We issue the Substitute Decision Notice set out at the start of this decision.

Signed Judge Hazel Oliver

Date: 11 October 2024