



NCN: [2024] UKFTT 00294 (GRC)

Appeal Number: EA/2022/0410

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

**Heard: Remote hearing by CVP
Heard on: 5 July, 8 & 9 November 2023
Panel deliberations on: 15 March 2024
Decision given on: 12 April 2024**

Between

Kieran Foster

Appellant

and

The Information Commissioner

First Respondent

and

His Majesty's Revenue and Customs

Second Respondent

Date and type of Hearing: 5 July, 8 & 9 November 2023 – GRC Remote CVP

Panel: Brian Kennedy KC, Specialist members Rosalind Tatam and Stephen Shaw.

Representation:

The Appellant: as a Litigant in person.

The First Respondent: Sapna Gangani of the ICO in a written response.

For the Second Respondent: Matt Lewin of Counsel.

Date of decision: 10 April 2024.

1. Original Decision Notice: IC-158032-G4H1 of 8 November 2022.

2. **Decision:** The Tribunal find that regulation 12(5)(d) of the Environmental Information Regulations 2004 is not engaged, but even if it was, we find the public interest lies in favour of disclosure of the withheld information and accordingly in either event the appeal is allowed.

Substituted Decision Notice: The Tribunal direct that the Second Respondent release the withheld information, subject of the Appellants request dated 30 December 2021 i.e. “ - - copies of the heritage management plans (“HMP’s”) for Bolton Abbey; Chatsworth; Alnwick Castle, and Firle Estate, subject to redaction of personal contact information.

Introduction:

3. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as modified by regulation 18 of the Environmental Information Regulations 2004 (SI 2004/3391) (“EIR”), against the Information Commissioner’s Decision Notice of 8 November 2022 Ref. IC-158032-G4H1 (“the DN”) which is a matter of public record.
4. The Information Commissioner (“the Commissioner”) issued his Decision Notice (“DN”) Ref: IC-158032-G4H1 on 8 November 2022.

Background and Chronology:

5. The Appellant requested information on 30 December 2021 from His Majesty’s Revenue and Customs (“HMRC”) as follows:
 - a. *“I am writing to request, under environmental information regulations, copies of the “heritage landscape management plans” or “heritage management plans” for the following properties (names of five properties).*

“I make this request subject to the following additional comments:

- 1) *I note that guidance identifies that the conditionally exempt heritage assets scheme applies only where the property falls within the below criteria: “The assets must be one of the following:*
 - *buildings, estates or parklands of outstanding historical or architectural interest- land of outstanding natural beauty and spectacular views*
 - *land of outstanding scientific interest including special areas for the conservation of wildlife, plants and trees*
 - *objects with national scientific, historic or artistic interest, either in their own right or due to a connection with historical buildings”*

All the estates I have requested information on fall, I believe, within the 'outstanding natural beauty' or 'outstanding scientific interest including special areas for the conservation of wildlife, plants and trees.' I therefore believe that the information requested, including the management of these natural heritage assets, qualifies as environmental information under the appropriate legislation. Existing guidance states that: "If information is environmental then the request must be handled under the Environmental Information Regulations (EIR). There is no equivalent of section 44 in the EIR. Instead, regulation 5(6) of the EIR says that "any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply". Therefore, a statutory bar in other legislation cannot prevent the disclosure of environmental information under the EIR. The information must be disclosed unless it is exempt by virtue of an exception in the EIR themselves."

2) I note, additionally, that: "Natural England offers up to 50% grant funding towards the eligible cost of preparing an HMP for land of outstanding scenic, historic or scientific interest in England" I therefore contend that the use of public money in preparation of these management plans signifies an issue of public interest that justifies disclosure of the information.

3) Further, the basis of the heritage assets conditional exemption scheme qualifies estates for significant financial benefits through exemption from inheritance taxes. It is therefore clearly a matter of public interest that such plans are available to the public to allow the public to understand what undertakings have been made in return for tax exemption and how these heritage assets will be managed.

4) A further important consideration is that a common undertaking in conditionally exempt agreements is one of public access to the relevant heritage assets, there is, therefore, a clear public interest in identifying both the assets to which access has been granted and the nature of how they will be managed and made accessible, for the public to assess both value for money in return for ram exemption and compliance with both formal undertakings and agreed management plans. Without access to the heritage management plan, the public has little or no way of applying transparency and public oversight to decisions made on their behalf by Natural England and HMRC.

5) I confirm that I am happy for redactions of personal information that would otherwise have any bearing on release."

6. On 20 January 2022, HMRC refused to provide the requested information citing regulation 12(5)(d) of the EIR as its basis for doing so and on 8 February 2022, HMRC maintained this position at internal review.

7. The Appellant complained to the Commissioner who investigated and ultimately provided the DN.
8. An HMP is a non-statutory document i.e. it is not expressly required by the Inheritance Tax Acts 1984 (“ITA”) which records the statutory undertakings agreed by the asset owner with HMRC in return for the property’s conditional exemption under the Heritage Relief Scheme: - (para 6 of 2nd HMRC Response). Natural England’s Guidance states that the HMP's should be: - *“a policy and priorities statement under which day-to-day management will operate and a frame of reference against which detailed working decisions will be taken by those managing the property”*. It describes the special features and conditions for which exemption is granted. Their preservation is a primary objective of the plan. It states the management operations and their relationship to the undertakings." (para 6 HMRC Response to the Grounds of Appeal). The Tribunal notes that the HMPs do not contain any information on the tax exemptions that have been agreed in return for the statutory undertakings.

The Commissioner’s Decision Notice:

9. The Commissioner considered the scope of the complaint in relation to the request for information. On foot of this, he decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) was therefore found to have been engaged as it was the Commissioner’s view that the three requisite conditions were met. The Tribunal believe it is best to cite verbatim the Commissioners comprehensive reasoning at this stage:

“Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law. The Commissioner argues that engagement of the exception rests on three conditions being met. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance the Commissioner states; ‘Confidentiality of proceedings (regulation 12(5)(d)), the Commissioner interprets ‘proceedings’ as possessing a certain level of formality. They will include but are not limited to formal meetings to consider matters that are within the authority’s jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings. The Commissioner is satisfied that regulation 12(5)(d) of the EIR is engaged because the information is held for statutory decision-making powers, namely, HMRC’s statutory duty to assess and collect Inheritance Tax and Capital Gains Tax. Second, this confidentiality must be provided by law. HMRC argue in this case that the confidentiality of the proceedings is provided by a specific statutory provision – the Commissioners for Revenue and Customs Act 2005 (“CRCA”). Section 18(1) of the CRCA provides a prohibition on disclosure. Further, section 19(1) of the CRCA states that it is an offence to disclose revenue and customs information relating to an identifiable

person. 'Person' is defined in the CRCA and includes both living persons and legal entities, such as companies, charities and trusts. In a previous decision made under the EIR, the Commissioner has recognised that the CRCA can act as statutory prohibition on disclosure in respect of tax information. Similarly, in this case, the Commissioner considers that the information contained in heritage management plans is acquired in connection with HMRC's function to assess tax liability. Further, he is not aware of any exceptions contained in section 18(2) of the CRCA that would permit the disclosure of the taxpayer specific heritage management plans.

The Commissioner is therefore satisfied that the confidentiality of the proceedings to which regulation 12(5)(d) relates is provided by section 18(1) of the CRCA. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings. The Commissioner recognised that the purpose behind the inclusion of sensitive information that was only received by HMRC to allow it to discharge its tax functions. The Commissioner also accepts that HMRC's position is reasonable when it states that it is not possible to redact content to anonymise the information as that would require removing all references to the estates themselves, and that would render the information meaningless. It is noted that, unlike section 44 of the Freedom of Information Act, the EIR does not contain a specific provision under which information is exempted where its disclosure is prohibited by prior legislation. This ensures that potentially significant environmental information is not automatically placed outside the possibility of the public viewing this information. Nevertheless, the Commissioner also accepts the importance that HMRC has placed on the issue of trust between taxpayer and tax authority. In the view of the Commissioner, one unintended consequence of disclosing information that would otherwise be barred under the CRCA is to weaken the trust in HMRC's ability to protect the confidentiality of sensitive tax information. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged. The Commissioner must next consider the balance of the public interest.

In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability concerning heritage properties. The complainant has also advanced that the importance of the requested information is such that in this situation the case for disclosure is particularly strong. However, the Commissioner is mindful of the fact that a legal barrier suggests there is a strong public interest in maintaining an exception. The CRCA imposes a statutory duty on HMRC not to disclose taxpayer information. This creates an expectation of confidentiality. Disclosing the information requested would undermine this expectation and could adversely affect HMRC's ability to carry out its statutory functions. The Commissioner also notes that three of the named properties have already published or make available anonymised undertakings detailing the steps the owner must take to (a) maintain, preserve and repair the heritage property and (b) provide a measure of public access to it through the legal gateway provided

by the Inheritance Tax Act 1984. Because this information is already available, this reduces the public interest in disclosing the withheld information. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure, the statutory bar to disclosure in the CRCA was to protect potentially sensitive information that was only received by HMRC to allow it to discharge its tax functions. The Commissioner also accepts that HMRC's position is reasonable when it states that it is not possible to redact content to anonymise the information as that would require removing all references to the estates themselves, and that would render the information meaningless. It is noted that, unlike section 44 of the Freedom of Information Act, the EIR does not contain a specific provision under which information is exempted where its disclosure is prohibited by prior legislation. This ensures that potentially significant environmental information is not automatically placed outside the possibility of the public viewing this information. Nevertheless, the Commissioner also accepts the importance that HMRC has placed on the issue of trust between taxpayer and tax authority. In the view of the Commissioner, one unintended consequence of disclosing information that would otherwise be barred under the CRCA is to weaken the trust in HMRC's ability to protect the confidentiality of sensitive tax information. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.

The Commissioner then considered the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability concerning heritage properties. The complainant has also advanced that the importance of the requested information is such that in this situation the case for disclosure is particularly strong. However, the Commissioner is mindful of the fact that a legal barrier suggests there is a strong public interest in maintaining an exception. The CRCA imposes a statutory duty on HMRC not to disclose taxpayer information. This creates an expectation of confidentiality. Disclosing the information requested would undermine this expectation and could adversely affect HMRC's ability to carry out its statutory functions. The Commissioner also notes that three of the named properties have already published or make available anonymised undertakings detailing the steps the owner must take to (a) maintain, preserve and repair the heritage property and (b) provide a measure of public access to it through the legal gateway provided by the Inheritance Tax Act 1984. Because this information is already available, this reduces the public interest in disclosing the withheld information. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure."

The Legal Framework:

10. Reg. 5(3) EIR: To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
11. Regulation 12(5)(d) of the EIRs provides:
 - a. *A public authority may refuse to disclose information to the extent that its disclosure would adversely affect: –*
 - b. *(d) - - the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.*
12. The Commissioner's guidance states that: *"EIR present a clear presumption in favour of such disclosure, except in specific, identified, circumstances where disclosure may be withheld, in this case for example, a Public Authority("PA") can refuse to disclose information if this would adversely affect the confidentiality of proceedings. 'Proceedings' means your organisation's formal meetings and procedures – it's unlikely to include every meeting you hold or every procedure you have. The proceedings may be those of your PA or any other PA and the confidentiality of those proceedings must be provided by law. This includes common law or a specific piece of legislation. If the law does not provide confidentiality of the proceedings, Reg.12(5) (d) EIR will not apply. Types of proceedings will include (but are not limited to): legal proceedings; formal meetings where attendees deliberate over matters within a PA's jurisdiction; and circumstances where a public authority exercises its legal decision-making powers."*
13. Reg 5 (6) EIR: - Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply. (It is not an issue between the parties that EIR is just such an enactment and is therefore engaged in this case.) The Commissioners' guidance further outlines *"This contrasts with section 44 of FOIA, which says that information is exempt if other legislation prohibits disclosing it. The existence of another legal bar cannot prevent disclosure under EIR. However, if there is such a bar, this may indicate that there is a public interest argument for maintaining the exception"*.
14. Section 18 of the Commissioners for Revenue and Customs Act 2005 (the CRCA) (as an enactment relevant within the provision of reg.5(6) EIR) is relevant and states as follows: -

15. Section. 18(1) CRCA: - *“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”*.
16. Section 18(2) CRCA: *“But subsection (1) (e) does not apply to a disclosure –(e) which is made in pursuance of an order of a court”*. (Which will include an order from this Tribunal for disclosure.).
17. Section: 18(3)(1) CRCA: Subsection (1): *“- is subject to any other enactment permitting disclosure”* (in this case reg. 5(6) EIR).
18. Section 18(3) CRCA – *“S. 18(3) Subsection (1): “- is subject to any other enactment permitting disclosure.”* (which presents the consideration of separation of a document/or documents to which the subject matter of the instant request relates).
19. Para 6(2), Sch 25 to the Finance Act 1998:-*“ The effect is that, from 1 August 1998 new undertakings must include steps involving the publication of the terms of the undertaking and other information relating to the asset”*.

The Issues:

20. The substantive issues for this Tribunal are therefore whether the purpose of the application and engagement of the exception under Reg. 12(5)(d) EIR 2004 in the DN is correct, and if so, was the Commissioner correct in finding that the public interest balance test lies in favour of non-disclosure of the withheld information.

The First Hearing:

21. The appeal was listed by consent between the parties as a paper hearing before this Tribunal on 5 July 2023. The Panel had considered the papers and after deliberation the Tribunal found it difficult to determine, with any definitive accuracy, or at all, the full nature and extent of the withheld information within the scope of the request; what may be, or is already in the Public Domain; and/or the full nature and extent of any adverse effect that could be demonstrated would arise, and of course in such circumstances the public interest test arguments for and against disclosure. We were not in a satisfactory position to hear the appeal or carry out our own independent investigative scrutiny on all the material facts and relevant legal issues. Accordingly, we adjourned the hearing joining the Public Authority as a Second Respondent with appropriate Case Management Directions for an oral hearing.

HMRC’s dealing of the request:

22. Prior to the oral hearing the Tribunal received the following message from the Commissioner: *“HMRC originally applied 12(5)(d) EIR to the Heritage Management Plans of all 5 properties subject to the Appellant’s request. The Commissioner in good faith assumed HMRC checked it held all 5 named properties’ Heritage Management*

*Plans before invoking the exception, and upheld HMRC's reliance on it in the DN. However, it has now been confirmed by HMRC that they do not hold information in scope for 1 of the named properties. Whilst the Commissioner maintains the DN was correct, as it would still uphold HMRC's reliance on 12(5)(d) EIR on the 5th property if it was held, for the reasons set out in the DN, the Commissioner would like to reiterate the following to HMRC, for all future requests it receives: the importance of identifying the requested information, and the extent to which this is held **before** it responds to a request/apply any exemptions/exceptions, otherwise, it risks breaching FOIA/EIR". In light of this indication from the Commissioner, it now appears to be undisputed that Raby Estate does not have an HMP.*

Grounds of Appeal:

23. The Appellant, in his grounds of appeal, argues that the entirety of a HMP cannot be protected as confidential proceedings for the purposes of regulation 12(5)(d). Further, the Appellant contended that the confidentiality is not provided by law as section 18(3) of the Commissioners for Revenue and Customs Act 2005 ("CRCA") removes the protection when considered in the light of EIR section 5(6). The Appellant further states that disclosure would not have an adverse effect on the confidentiality of proceedings or weaken trust in HMRC's ability to protect sensitive information. The Appellant argues that it is not for HMRC or the Commissioner to decide if redacted information or the release of that information would adversely affect the statutory duties of HMRC in the absence of demonstrable evidence to that effect. Therefore, concerns over confidentiality cannot be used as a blanket refusal for disclosure. The Appellant further details how the public interest in disclosing the information outweighs the public interest in maintaining the application of regulation 12(5)(d). Finally, the Appellant argues that HMRC and the Commissioner are duty bound to have regard to National Park purposes in their decision making.

The Commissioner's Response:

24. The Commissioner resists the appeal and relies upon his DN and findings therein. The Commissioner argues that the Appellant's grounds of appeal do not disturb his decision, stating that there are no valid reasons for overturning the DN and has invited the Tribunal to dismiss the appeal.

Appellant's Reply:

25. The Appellant stated he was frustrated that the Commissioner failed to provide a substantive Response despite the detailed argument he proffered in reply. Further the Appellant has identified what he believes to be the pertinent issues as follows:

*"Is the entirety of the Heritage Landscape Management Plan (HLMP) protected as confidential 'Proceedings' for the purposes of regulation 12(5)(d)
Is the confidentiality provided by law?"*

Would the disclosure have an adverse effect on the confidentiality of the proceedings? Should concerns over confidentiality lead to blanket refusal of release or partial release with redaction?”

26. In relation to the duty of both HMRC and the ICO to have regard to National Park purposes in their decision making the Appellant is asking the Tribunal to consider releasing these Heritage Management Plans (“HMPs”) in part-redacted form. The details in the Hearing Bundle [C53] as to what goes into the plans are only an overview. The Tribunal have extracted the following information from a section of a link provided by the Second Respondent.
27. Excerpt – “For land of outstanding scenic, historic and scientific interest and outstanding buildings you should include:
- a map of at least 1:10,000 scale showing your property’s boundaries and access.
 - a survey that will act as a benchmark from when exemption is granted any management priorities and potential issues, including anything that needs early attention.
 - a general summary of the property covering its history and significant features essential for the conditional exemption, your works programmes and how you’ll monitor progress;
 - How many tenants fit into the plan.
 - New and existing access for the public and how you’ll manage it.
 - How you’ll consult others on changes to the heritage property
 - Review the heritage management plan.
 - Let agencies inspect the site maintain these features and your general approach to management - You should also include for land of outstanding scenic, historic or scientific interest - how you will maintain the land and preserve its character for buildings of outstanding historic or architectural interest –
 - how you will maintain, repair and preserve the buildings, amenity land and historically associated objects.”
28. The Appellant suggests preparing an HMP can cost between £6,000 and £16,000... and must get comments on their draft HMP from the correct advisory agencies and then ask the agencies to approve the HMP before sending it to HMRC. The agencies usually need 6 weeks to comment.” - *e.g. ‘agencies’; Historic England or Natural

England – The Tribunal note the Appellant has also asked Natural England to provide the withheld information, but they refused to do so.

Discussion on the Commissioner’s Decision:

29. The Commissioner considered engagement of Regulation 12(5)(d) of the EIRs where the exception rests on three conditions being met: *“First - there must be a “proceeding” of that or any other public authority; Second - that proceeding must be confidential, and the confidentiality must be provided by law; and Third - disclosure of the requested information would adversely affect the confidentiality of the proceeding.”*
30. Taking the first limb, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance ‘Confidentiality of proceedings (regulation 12(5)(d))’, the Commissioner interprets ‘proceedings’ as possessing a certain level of formality. They will include but are not limited to formal meetings to consider matters that are within the authority’s jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings. The Commissioner was satisfied that regulation 12(5)(d) of the EIR is engaged because the information is held for statutory decision-making powers, namely, HMRC’s statutory duty to assess and collect Inheritance Tax and Capital Gains Tax.
31. Taking the second limb the Commissioner was mindful of the fact that a legal barrier suggests there is a strong public interest in maintaining an exception. The CRCA imposes a statutory duty on HMRC not to disclose taxpayer information. This creates an expectation of confidentiality. The Commissioner determined that disclosing the information requested would undermine this expectation and could adversely affect HMRC’s ability to carry out its statutory functions.
32. In respect of the third limb the Commissioner decided that disclosure would have an adverse affect on the confidentiality of proceedings.
33. The Commissioner therefore found Regulation 12(5)(d) to have been engaged as it was the Commissioner's view that the three requisite conditions were met.
34. The Commissioner noted that three of the named properties have already published or made available anonymised undertakings detailing the steps the owner must take to (a) maintain, preserve and repair the heritage property and (b) provide a measure of public access to it through the legal gateway provided by the Inheritance Tax Act 1984. Because this information is already available, this reduced the public interest in

disclosing the withheld information and overall on balance found the public interest favoured non-disclosure of the withheld information..

The Hearings:

35. As stated above, the Tribunal sat in the first instance on 5 July 2023 and were not satisfied we had sufficient information before us to reach a conclusion on the issues before us and served Case Management Directions including the joinder of the Second Respondent. The appeal was then listed for hearing on 8 & 9 November 2023.
36. At the Hearing on the 8 November both the Appellant and the 2nd Respondent, HMRC, presented evidence which was carefully examined by the Tribunal. The Commissioner was not represented, relying on their written Response to the Grounds of Appeal.

Submissions:

37. The Tribunal here provide a summary of what we have determined to be the most significant material submissions from the parties which led us to our unanimous conclusions on the issues to be determined.
38. The Appellant argues that in the present case, the confidentiality of the proceedings could extend to the confidential taxpayer information provided as part of the negotiations and assessment of taxes, which could rightly be called proceedings, and to minutes of meetings or communication between the estate and HMRC, but not necessarily to a document, the end result, (whether part of the proceedings, or product) as in this case the HMP, subsequently produced which in the words of HMRC, - “- *is intended to be a comprehensive framework for the day-to-day management of the asset*”, rather than anything to do with the assessment of the taxes payable by the owners of the estates involved. The Appellant also notes (as stated above) that the HMPs have been partially funded from the public purse; Natural England offers up to 50% grant funding towards the cost of preparing an HMP (a matter, he argues which is of significant public interest).
39. The Appellant acknowledges the list of properties is already published in that HMRC maintains a freely searchable list of all land, buildings and their contents that have been granted conditional exemption from taxation under the heritage relief scheme (“*anonymised undertakings*” see Para. 34 above). However, he submits on the facts of this appeal that the Second Respondent, in seeking to elevate a qualified exemption from disclosure under EIR (limited in its extent to withholding information that could reasonably be seen as confidential), effectively into an absolute exemption by simply relying on everything provided to HMRC by a taxpayer being ‘*confidential taxpayer information*’.

40. HMRC submit that they rely on regulation 12(5)(d) EIR- namely that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
41. HMRC argue that taxpayer confidentiality, as the case law has acknowledged emphatically over many decades, is a fundamental aspect of the taxation system of this country. The proceedings which result in the agreement of an HMP require careful, detailed and sensitive negotiation between the asset owner, the HMRC and the statutory agencies. Given the principle of taxpayer confidentiality, they argue, the asset owner has no expectation that any of this information (– save for the post-1998 undertakings, the terms of which (only) are publicised) will be made public. Therefore, they argue disclosing this information would undermine trust in HMRC’s ability to protect the confidentiality of sensitive tax information.
42. In the present case, the Commissioner and HMRC rely on regulation 12(5)(d) - namely that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
43. The Appellant suggests that the intent of parliament in enacting regulation 12.5(d) was to allow the withholding of information where other existing legislation or common-law duty created a duty of confidentiality, but in a manner that was strictly limited to those circumstances identified within the EIR regulations. The Appellant accepts that one of those circumstances is where release of such information would (as opposed to could) have an adverse effect on the functioning of the public authority, but contends that this protection does not extend to the withholding of the entirety of environmental information held by the authority, or environmental information of a more general nature that may be held by the public authority but only loosely connected with their primary functions.
44. The Appellant submits the EIR regulations present a clear presumption in favour of such disclosure except in specific, identified, circumstances where disclosure may be withheld.
45. This, the Appellant submits is further supported by the decision, in later enacting the CRCA 2005, (in section 18.3) - to make any duty of confidentiality in that Act subject (in section 18.3) to “*any other enactment permitting disclosure.*”
46. The Appellant submits that EIR is just such an enactment. The Appellant also submits that a brief reminder of the origin of the Environmental Information Regulations is worthy of consideration here – and argues the EIR were brought in by Parliament to implement European Council Directive 2003/4/CE in turn delivering a commitment

under international treaty, the ‘Aarhus Convention’, which includes commitments on signatories’ duties to provide public access to environmental information. As well as originally being a party to the Convention through former membership of the European Union, the United Kingdom is also an independent signatory of the Convention. The Appellant argues this regulation, and its purpose, needs to be seen in light of those binding international commitments. The Appellant argues they are an enactment permitting disclosure as per s18(3) of the CRCA.

47. In regard to HMRCs argument otherwise, at paragraph 34 of their submissions “*Nor are there other enactments which permit disclosure (section 18(3) of the CRCA)*” the Appellant reiterates his previously submitted points (Open Bundle A18) over the impact of Regulation 5(6) as being just such an enactment.
48. The Appellant argues, it seems HMRC seeks to elevate a qualified exemption from disclosure under EIR, limited in its extent to withholding information that could reasonably be seen as confidential, into an absolute exemption by simply relying on everything ever provided to HMRC by any taxpayer *being ‘confidential taxpayer information’*. The Appellant suggests that would amount to an abuse of the regulations and is not in the spirit of the law.
49. HMRC sets out (at para 23. of their submissions) caselaw identifying what they view as amounting to “*the longstanding principle of taxpayer confidentiality*”, i.e....matters relating to income tax are between the commissioners and the taxpayer concerned. In consequence no other person is given any right to make proposals about the tax payable by any individual - he cannot even inquire as to such tax. The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the workings of the Tax system.
50. The Appellant notes that while relevant in 1982, and under the Inheritance Tax Act 1984 (the regime under which conditional exempt heritage assets tax regime operates) both significantly predate the introduction of the FOIA and EIR.
51. The Appellant refers to the dicta of Mr Justice Burton in *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) [2009] 3 WLR 627 commented, (at Para 68) that “*It was formerly generally thought that there was a culture of confidentiality, if not secrecy, in the administration of public authorities, and in particular central government*”.
52. The Appellant submits that the climate has changed and in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses*. [10982] (See, e.g., s 31 Inheritance Tax Act 1984,) the climate however has been changing in favour of greater transparency. It was reflected, he argues, in the

willingness of the Courts to require disclosure of relevant documents for the purpose of litigation, heralded by the decision of the House of Lords in *Conway v Rimmer*. FOIA, and he maintains introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities. Thus, the Appellant submits that this “*longstanding principle of taxpayer confidentiality*”, and the value placed on it, needs to be viewed very differently in light of the radical change to our law, and the rights of the citizen to be informed.

53. HRMC also make reference to *R (Ingenious Media Holdings plc) v HMRC* [2016 UKSC 54]. The Appellant argues this case can be distinguished in that this was a case focused on the duty of confidentiality owed by HMRC under s18(1) and the release of information to journalists in ‘*off the record*’ briefings without any statutory justification for doing so, rather than the very different situation where Parliament had specifically provided for release of information under statutory provisions. Indeed, he argues, the judgement specifically comments, at para 18, that: “*The Marcel principle may be overridden by explicit statutory provisions*” In *In re Arrows Ltd (No 4)* [1995] 2 AC 75, 102, Lord Browne-Wilkinson said: “*In my view, where information has been obtained under statutory powers the duty of confidence owed on the Marcel principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure.*”
54. The Appellant contends that the effect of s18(3) and regulation 5(6) EIR is just such an explicit statutory provision that overrides the general duty of confidentiality, an interpretation which he believes is further supported by the decision of the upper tribunal in *Department for Environment Food and Rural Affairs v The Information Commissioner & Anor (Information rights : Environmental information - general)* [2014] UKUT 526 (AAC) (28 November 2014).
55. The Appellant invited the Tribunal to question the extent to which the contents of the HMP’s are, in themselves, ‘*matters relating to income* [or in this case inheritance] *tax*’ or, indeed, ‘*assessments and of negotiations between individuals and the revenue*’ - contending that while it is undoubted that some information within the HMP’s may fall within this definition, it cannot realistically be extended to the entirety of the information contained in a plan which HMRC identifies (at para 7 of the HMRC submissions) as being a policy and priorities statement under which day-to-day management will operate and a frame of reference against which detailed working decisions will be taken by those managing the property. The HMP he argues, describes the special features for which exemption is granted, since their preservation is a primary objective of the plan. It states the management operations and their relationship to the undertakings.

56. The Appellant further submits that the difference between these two things - matters directly relating to the tax affairs of individuals versus information appertaining to the day to day management of the heritage assets - is clearly envisaged and encompassed in the EIR regime through its inclusion, at regulation 12.(5), of the rule that: a public authority may refuse to disclose information to the extent that its disclosure would adversely affect — (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law; The clear limitation of this exemption from disclosure, allowing information to be withheld only to the extent that its disclosure would adversely affect the confidentiality of proceedings, the Appellant submits, is an important caveat that removes the sort of *'blanket'* withholding of information that HMRC appears to support in this case.
57. The Appellant argues that release of this information about the day to day management of the estate and heritage tax assets cannot realistically be seen as contravening the principles set out in the caselaw relied upon by HMRC, herein in that :-*"As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed: indeed, there is a strong public interest that he should not"* – in effect he argues, even absent the radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities identified above, this information has little or nothing to do with the assessment of taxes payable - only in how those assets which have been designated by HMRC as being important information for the benefit of the nation are being managed.
58. The Appellant repeats his submission that it is also of note that these plans have been partially funded from the public purse - Natural England offers up to 50% grant funding towards the cost of preparing an HMP for land of outstanding scenic, historic or scientific interest.
59. The Appellant contends that no reasonable person could view the type of information identified by Natural England as being relevant for the preparation of a HMP (see the booklet preparing a heritage management plan, issued by Natural England) as being covered by any realistic definition of assessments and negotiations between individuals and the revenue. The Appellant argues that the correct approach here would be to release the HMP's and make appropriate redactions to remove any confidential taxpayer information.
60. At para 35 of their submissions, HMRC comment that taxpayer confidentiality, as the case law has acknowledged emphatically over many decades, is a fundamental aspect of the taxation system of this country. The proceeding which results in the agreement of an HMP requires careful, detailed and sensitive negotiation between the asset owner, HMRC and the statutory agencies. Given the principle of taxpayer confidentiality, the asset owner has no expectation that any of this information – save

for the post-1998 undertakings, the terms of which (only) are publicised – will be made public.

61. The Appellant's response to that is simple; - firstly - the position presented by HMRC that Taxpayer confidentiality, as the case law has acknowledged emphatically over many decades, is a fundamental aspect of the taxation system of this country has been substantially changed by the radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities that was brought about by the introduction of the FOI/EIR regime, and which provides a statutory regime for disclosure which overrides that general duty of confidentiality, and that secondly - he confirms he is not directly seeking the release of confidential taxpayer information, or of the assessments or negotiations between HMRC and the taxpayer (indeed, he has said from the outset that he was more than happy for redactions to be made in order to remove genuinely sensitive personal data) – he is seeking only information about the agreed steps by which those assets which HMRC have been designated as being of importance to the Nation and for which the taxpayer will receive substantial tax benefits, will be managed, now and in the future - information which he argues is not comprehensively currently available in the published undertakings.
62. The Appellant (and as previously submitted at Open Bundle A25) notes, the statement previously made by HMRC in their letter of 8th February 2022 is crucial here, and that publishing the terms of an undertaking do not necessarily equate to publishing the HMP. Those plans, he points out, sometimes in great detail, the steps owners need to take to maintain, preserve and repair their heritage property. They are not exclusive to conditionally exempt properties or to properties supported by a maintenance fund but over the years they have been adopted as a useful tool for recording what steps owners have to take for those purposes. Until recently, the steps were included in the anonymised undertaking document itself, but as the amount and level of detail grew that became impractical. In addition, the maintenance, preservation and repair requirements constantly change, especially for large, landed estates, so undertakings given many years ago increasingly failed to reflect the current position. It was better, he argues, to have these details in a separate document (whether part of the *'proceedings'* or otherwise) which could be reviewed and updated as necessary, and simply to refer to this separate document in the undertaking. That has become standard practice and is the document he considers carries a significant public interest in publication.
63. The admission that information contained in the HMP was previously made available to the public in the published anonymised undertaking but for administrative ease was moved into the separate HMPs which strongly points, the Appellant argues, away from the position now put forward by HMRC that; Given the principle of taxpayer confidentiality, the asset owner has no expectation that any of this information – save for the post-1998 undertakings, the terms of which (only) are publicised – will be made public.

64. The Appellant continues to question whether disclosure would adversely affect trust, confidentiality or the public interest, and how this has been demonstrated. HMRC argues that; Taxpayer confidentiality, as the case law has acknowledged emphatically over many decades, is a fundamental aspect of the taxation system of this country. The proceeding which results in the agreement of an HMP requires careful, detailed and sensitive negotiation between the asset owner, HMRC and the statutory agencies. Given the principle of taxpayer confidentiality, the asset owner has no expectation that any of this information save for the post 1998 undertakings, the terms of which (only) are publicised will be made public. Therefore, disclosing this information would undermine trust in HMRC's ability to protect the confidentiality of sensitive tax information.
65. The Appellant recognises and respects the importance that HMRC places on the principle of taxpayer confidentiality, and that Taxpayer confidentiality, as the case law has acknowledged emphatically over many decades, is a fundamental aspect of the taxation system of this country. But again, the Appellant argues, FOIA introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities. It is also possible that appropriate redactions could entirely mitigate any adverse impact and it is accordingly in the public interest for the public authority to act accordingly.
66. HMRC, in their letter of 8th February 2022 commented that: *"We consider publishing undertakings through the legal gateway provided by the Inheritance Tax Act 1984 satisfies the public interest in disclosing undertakings agreed with conditionally exempt properties."*
67. In their appeal submission of 14th September, HMRC comment (at para 37) that:
- "HMRC acknowledges that there are public interest arguments in favour of disclosing the HMPs. In particular, HMRC acknowledges that the Heritage Relief Scheme enables designated assets to qualify for conditional exemption from what could otherwise be a substantial tax liability in return for, among other public benefits, public access to the asset."* and (at para 38(d)) that: - *"the fact that the terms of post-1998 statutory undertakings are required to be made public does reduce the public interest in favour of disclosure. This enables the public to be aware of the broad requirements – in particular with regards to public access – which must be satisfied in order to maintain the asset's conditional exemption under the Heritage Relief Scheme. In other words, for these assets, the essential information is already in the public domain. This according to the Appellant means there is less need for the detailed management framework in the HMP for which HMRC and the other statutory agencies hold the owner accountable by regular oversight and review processes – to be made public."*

68. Similarly, the Appellant submits, if in seeking to understand the commitments entered into as part of the published undertaking, one is forced, as a matter of standard practice to refer to a separate document which could be reviewed and updated as necessary, then the value of the aforesaid published undertaking/s in fulfilling the public interest is, he contends, severely diminished - and even then, the existence of a published undertaking is relevant to only three of the five estates under discussion (*para 13 of HMRCs submission*). The fact that HMRC relies on the ability of the public to access a document which they accept that, as a matter of standard practice, is likely to no longer reflect the current position - or indeed, it is accepted that until recently, the steps were included in the undertaking document itself, but as the amount and level of detail grew that became impractical, resulting in a decision to remove information from the published undertaking that would, previously, have been in the public domain, and place it in a separate unpublished document, suggests that in reality little weight can be placed on the value of these published hitherto relied upon anonymous undertakings in fulfilling the public interest.
69. The Appellant further submits that a public authority essentially saying: - *'ah, well, the information is available to the public in a published undertaking'*, whilst at the same time making any useful analysis of that undertaking impossible by placing all the detail in a separate document that then refusing to release it on the basis that the information has already been made public is somewhat "Kafkaesque".
70. This, the Appellant argues is further borne out in HMRCs submissions (*para 38(e)(iii)*) that: *"the map made available on HMRC's website which indicates the location of the designated asset is not intended to be a definitive record of the public's right of access to the asset"* and that *"the existence of permissive (as opposed to public) rights of way is a matter for the landowner. They are typically created by a formal agreement with the local authority (or national park authority) or some clear indication on the ground that access is permitted by the landowner. In other words, to the extent that the Appellant has identified a genuine concern on the part of cyclists and horse riders, there are other means of addressing them than by disclosure of the HMP."*
71. The Appellant points out that information may technically be available, but it's hardly accessible to the public, particularly if the public are forced to physically visit the site to view the undertakings document or to look for some clear indication on the ground that access is permitted. The Appellant argues that this a long way from being adequate justification for refusing to provide that detailed information to the public where there is an established presumption in favour of disclosure. In any event, the EIR regulations do not require that disclosure through EIR is the only viable method of accessing the requested information, nor do the EIR regulations contain an exemption for information that is already reasonably accessible, as exists under section

Paragraph 4(1) of the regulations sets out that:

“...a public authority shall in respect of environmental information that it holds progressively make the information available to the public by electronic means which are easily accessible; and

(b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information”.

72. Thus, the Appellant argues the defence that the information is *“typically created by a formal agreement with the local authority (or national park authority) or some clear indication on the ground that access is permitted by the landowner.”*, is irrelevant, as this would fail to fulfil the authority’s duty to make such information available to the public by electronic means themselves. Indeed, he argues, the duty to make information available to the public by electronic means would also apply to the statement and justification previously put forward in their letter of 8th February 2022 stating that: *“We do not publish heritage management plans on our website as it would be administratively burdensome to do so (some run to several volumes hundreds of pages and include many photographs and large maps).”*
73. HMRC comments (at para 38(e)(i)) of their submissions, that: by virtue of being required to be open to the public, asset owners are *“service-providers”* for the purposes of the Equality Act 2010 and are therefore subject to their own duties of non-discrimination, including a duty to make reasonable adjustments for persons with disabilities. Therefore, the asset owners can be held accountable in their own right for the quality of their disabled access arrangements.
74. The Appellant says that this misunderstands and misstates the key public interest argument that we are making on this point (at Open Bundle A25) - the issue is that the Equality Act duties differ between the asset owner as *“service-provider”* and HMRC as a public authority. The Public Sector Equality Duty (“PSED”) responsibilities that lie on the public authority are significantly more advanced, and more onerous, than those that would otherwise lie on the asset owner as service provider.
75. The Appellant argues that HMRC, unlike the asset owner/service provider, is under a statutory duty to advance equality of opportunity between people who share a protected characteristic and those who do not, and must also exercise their powers in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.
76. The Appellant submits that it is therefore a matter of great public importance that conditionally exempt taxation agreements entered into by HMRC, as an exercise of their statutory powers, should comply with this higher PSED standard, rather than the lower standard which applies to the asset owner - and, in order to ascertain whether and how this duty has been fulfilled, we need to see the details contained in an HMP.

77. In response to the “*double counting*” question (A23 & 24), HMRC submits (at Para 38 (a)) that: “...*the existence of section 18(1) of the CRCA is a clear indication of the strong inherent public interest in maintaining taxpayer confidentiality*” and that:

“...It is frequently the case that factors relevant to the question of whether an exception (under the EIRs) or a qualified exemption (under the Freedom of Information Act 2000) is “engaged” ; s 29, Equality Act 2010; s 149, Equality Act 2010; s 1, Equality Act 2010. are also relevant to the public interest test and therefore whether it should be applied.

78. The Appellant disagrees and argues that the position is more akin to the existence of a class-based exemption under FOIA where the existence of an exemption acts only as a ‘*trigger*’ of the public interest test - attention is drawn to the view expressed by the Information Tribunal in *The Department for Education and Skills v the Information Commissioner and the Evening Standard*, Appeal no. EA/2006/0006 (“the DFES8 case”) at paragraphs 60 to 65 - subsequently approved by the High Court in the case of *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) (11 April 2008).

79. The Appellant rejects the inherent damage argument advanced by the DFES as the rationale underlying qualified exemptions applicable to information caught by such provisions as s.35(1)(a). FOIA, in s.1, he argues, conferred an important new fundamental right to information held by public bodies. It is a right subject to exceptions, or conditions as they were termed by Lord Turnbull. Where such an exception is relied on by a public authority, it is for that authority to justify such reliance. If it says there is an absolute exemption, it must demonstrate it. If prejudice is a requisite factor, it must prove it.

Submissions on the Public Interest Test:

80. HMRC acknowledges that there are public interest arguments in favour of disclosing the HMPs. In particular, HMRC acknowledges that the Heritage Relief Scheme enables designated assets to qualify for conditional exemption from what could otherwise be a substantial tax liability in return for, among other public benefits, public access to the asset. However, in agreement with the Commissioner, HMRC maintains that the public interest arguments in applying the exception strongly outweigh the arguments in favour of disclosure:

(a) although (by virtue of Regulation 5(6) of the EIRs) not an absolute barrier to disclosure, the existence of section 18(1) of the CRCA is a clear indication of the strong inherent public interest in maintaining taxpayer confidentiality. In enacting the CRCA, Parliament demonstrated a clear intention in framing section 18(1) deliberately broadly, so that it protects all information held by HMRC in connection with its functions.¹¹ This is not double counting, as suggested by the Appellant. It is frequently the case that factors relevant to the question of whether an exception (under the EIRs) or a qualified exemption (under the Freedom of Information Act 2000) is “engaged” are also relevant to the public interest test and therefore whether it should be “applied”;

(b) as the Commissioner’s guidance recognises, breaching a duty of confidence “undermines the relationship of trust between the confider and confidant ... For this reason, the grounds on which confidences can be overridden are normally limited.” HMRC argue that is very much true in this case: disclosure of this information would not otherwise be permitted because none of the exceptions to section 18(1) apply;

(c) there is a strong public interest in enabling the Heritage Relief Scheme to operate effectively. Although the Appellant is correct to point out that the scheme is voluntary, in the sense that asset owners are not compelled to participate in it, this does not in any way qualify or weaken the principle of taxpayer confidentiality. The underlying policy of the Heritage Relief Scheme is to conserve and protect national heritage for the benefit of the public. If asset owners were discouraged from participating in the scheme by the release of information held by HMRC relating to their tax affairs, that policy would be undermined, to the detriment of the public;

(d) the fact that the terms of post-1998 statutory undertakings are required to be made public does reduce the public interest in favour of disclosure. This enables the public to be aware of the broad requirements – in particular with regards to public access – which must be satisfied in order to maintain the asset’s conditional exemption under the Heritage Relief Scheme. In other words, for these assets, the essential information is already in the public domain. This means there is less need for the detailed management framework in the HMP – for which HMRC and the other statutory agencies hold the owner accountable by regular oversight and review processes – to be made public;

(e) the specific examples given by the Appellant of why it is important for the public to be able to carry out more detailed scrutiny of the content of the HMPs are not persuasive [A25]:

(i) by virtue of being required to be open to the public, asset owners are “service-providers” for the purposes of the Equality Act 2010 and are therefore subject to their own duties of non-discrimination, including a duty to make reasonable adjustments for

persons with disabilities.¹³ Therefore the asset owners can be held accountable in their own right for the quality of their disabled access arrangements;

(ii) by section 31(1)(b), land (including land within National Parks) may only be designated for conditional exemption under the Heritage Relief Scheme if it is of “outstanding” scenic, historic or scientific interest. Therefore, there is an overlap between this criterion and the target duty to have due regard to the statutory National Park purposes in section 11A of the National Parks and Access to the Countryside Act 1949. In these circumstances, section 11A (which only applies to land assets located within National Parks) adds little to the public interest arguments for disclosure;

(iii) the map made available on HMRC’s website which indicates the location of the designated asset is not intended to be a definitive record of the public’s right of access to the asset. For instance, the undertakings for Alnwick Castle include an obligation to “advertise the opening arrangements in at least one national publication and in the Northumbrian Tourist Board brochures”.¹⁴ In any case, the existence of permissive (as opposed to public) rights of way is a matter for the landowner. They are typically created by a formal agreement with the local authority (or national park authority) or some clear indication on the ground that access is permitted by the landowner. In other words, to the extent that the Appellant has identified a genuine concern on the part of cyclists and horse riders, there are other means of addressing them than by disclosure of the HMP.

- 81.** The Appellant does not accept that the inclusion of information within such a class as s.35(1)(a) reflects the inevitability of damage to the public interest, in some degree, if it is disclosed. On the contrary he submits, the wider such a provision as s.35(1)(a) is drawn, in accordance with the DFES argument which we have accepted, the more unreal such a contention becomes. The ready and entirely proper acceptance by the DFES that much of such material can be and is disclosed by the Department demonstrates the, at best, hypothetical nature of this argument. The inclusion within such a class of information simply indicates the need and the right of the public authority to examine the question of the balance of public interests when a request under s.1 is received. Often, he argues, such examination will be very brief because disclosure poses no possible threat to good government.
- 82.** The Appellant argues Section 2(2)(b) is clear: the authority must disclose unless the public interest in withholding the information outweighs the public interest in disclosure. If the scales are level, it must disclose. Such an equilibrium may not be a purely theoretical result there may be many cases where the apparent interests in disclosure and in maintaining the exemption are equally slight.
- 83.** The Appellant properly submits that the weighing exercise begins with both pans empty and therefore level. Disclosure follows if that remains the position.

84. The Appellant refers to the DN in paragraph 19 (Open Bundle A5) that: *“However, the Commissioner is mindful of the fact that a legal barrier suggests there is a strong public interest in maintaining an exception. The CRCA imposes a statutory duty on HMRC not to disclose taxpayer information. This creates an expectation of confidentiality. Disclosing the information requested would undermine this expectation and could adversely affect HMRC’s ability to carry out its statutory functions.”*
85. This, the Appellant argues, fails to reflect this *“both pans empty”* principle and presupposes that the fact that statutory exemption justifying qualified exemption indicates the existence of an inherent public interest in non-disclosure. It is opposite to the principle set out in the judgement that the Appellant does not accept that the inclusion of information within such a class as s.35(1)(a) reflects the inevitability of damage to the public interest, in some degree, if it is disclosed.
86. The Appellant submits that in the present case, in order for the public to have access to land which has been made accessible as part of a conditionally exempt tax arrangement with HMRC, it is imperative that the public should be able to identify both the boundaries of the land to which they have access, and the means by which they are entitled to enjoy that access, along with any conditions placed upon that - If they cannot access that information, then they cannot exercise their rights under those commitments, or, crucially, know when those commitments are not being fulfilled. It is also right and fair he argues that they are able to understand, where relevant, the justification for any restrictions on that right and the potential impact of such use (for example on protected species), along with other information, e.g. such as any conditions placed in the agreement on the design and construction of gates and bridges so as to be suitable for disabled access.
87. HMRC places weight on the public interest in maintaining trust in the tax system, but the Appellant contends that equal weight lies in the public interest of knowing that the tax system is being fairly and equally applied. He argues that public trust in the tax system cuts both ways, and trust can only be upheld if the public believes they are getting a fair deal. The principle that a taxpayer can make an agreement with HMRC in order to absolve himself of very substantial tax liabilities, by promising to keep and maintain heritage assets for the benefit of the nation, but that the public have no right to know, or even ask, the nature or detail of that agreement, how long it lasts, or how those assets will be maintained, is, in itself, a matter which risks undermining public trust in the tax system.
88. The Appellant argues that there is always value in openness and transparency, especially on issues within the scope of EIR. He accepts, and it was not disputed that there is a public interest in disclosure to both opponents and supporters of e.g. the policy relating to the culling of badgers of the approach taken by the decision maker and thus of the risks identified and assessed in the decision-making process. The

controversy relating to the policy is an additional factor in support of this public interest to the extent that a policy that gives rise to very divergent views implies a need to carry out a proper analysis of the rival contentions, the evidence and arguments they are based on and the risks they give rise to.

89. The Appellant also reminds the tribunal that there is already a presumption in favour of disclosure, thus the burden of proof is upon HMRC to demonstrate that withholding the requested information is of even greater public interest than lies in accessibility and transparency of the agreements entered into by HMRC on behalf of said public. It is this right of transparency that is as the core of the argument for the public interest weighing in favour of disclosure - HMRC have entered into an agreement with individual estates that they will manage an asset for the benefit of the nation, including the provision of public access to that asset, in return for a substantial reduction in their taxes - If the public cannot access the detail of that agreement then they have no way of telling what conditions apply to the management of that asset, no way of knowing if the estate is holding up their end of the bargain, and no way of holding them, or HMRC, accountable if they do not, even more so, the public is left with no way of holding HMRC accountable for its decisions through the democratic process. The citizen cannot go to his Member of Parliament and say e.g. *'this is unacceptable'* or claim that the deal is failing to provide value for money for the public purse when neither he, nor the MP, have a right to access any details of the agreement entered into on their behalf. The Appellant argues that this basic principle weighs overwhelmingly in favour of the disclosure of the requested information as being in the public interest. Fairness and value for money of the tax system is a fundamentally important issue of public interest, and the arrangements entered into for the management and day-to-day running of assets that are being managed for the benefit of the nation - are also of overwhelming public importance politically.
90. As detailed in the Appellant's submissions at (A22 & 25) where agreements and management plans may involve the continuation of contentious activities such as shooting and pest control, the public interest arguments are clear. Indeed, further to these examples of day-to-day management of the estate that may carry significant public interest arguments, the Appellant would suggest that where HMRC had entered into agreements that endorsed land management practices that potentially conflicted with government policy, including government targets on biodiversity or carbon offsetting, the public interest arguments would be overwhelming. Therefore, the Appellant argues which day-to-day management will operate as a frame of reference against which detailed working decisions will be taken by those managing the property and clearly carries very significant public interest, and this must weigh in favour of disclosure.
91. Further, the Appellant argues it is undeniable that public scrutiny of the fair and equitable operation of the conditional exemption scheme is in the public interest. The tax regime is from a political aspect, one of the great matters of state. The Appellant

reminds us that it is not for nothing that the Prime Minister is also First Lord of the Treasury, and the Chancellor of the Exchequer lives next door - matters of taxation affect all citizens, both personally and politically, in a way second only to crime and justice or public health issues.

92. The Appellant further submits that public scrutiny of such arrangements, made by a government department, avowedly for the benefit of the nation, and at significant cost to the public purse, is a matter of fundamental public (as well as political) interest - one political party might say that such arrangements are inequitable, unconscionable and serve to reinforce systemic wealth and power, another political party may even seek to cancel such agreements where they fail to deliver significant benefits for the public. Without transparency, that public debate is severely hampered.
93. The Appellant brings our attention to the decision in Information Tribunal Appeal references: EA/2008/0024 AND EA/2008/0029 Information Commissioner's Ref: FS50165372 (the 'cabinet minutes' case) , in which the tribunal discussed (at Para 70) the Commissioner's belief that: Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, by providing a flow of information which a free press could effectively use the Information. The Commissioner also maintained that the scrutiny that had occurred had not placed into the public domain sufficient information to enable the public to scrutinise the decision and that disclosure of the minutes was necessary to enable the public to understand it more fully. The Appellant says that this appeal concerns just such a case - where the issues of accountability and scrutiny of public policy in the realm of taxation, and value for money for the public purse, are an issue of profound and important public interest and significant political debate that weigh overwhelmingly in favour of disclosure, and that such disclosure would be entirely in accordance with the "*radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities*" that came about from the introduction of the FOI/EIR regime.
94. The Appellant also brings the Tribunals' attention to regulation 12(11) EIR- that: "*Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.* The phrase "*contained in or otherwise held with*" he argues is crucial - it indicates that even environmental information which is contained in information which may be withheld under the regulations should be subject to release if it can be reasonable separated (or, we would contend, if the other confidential data could reasonably be redacted).

The Tribunal's powers:

95. These have been set up out clearly in other decisions of the Tribunal. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in

wide terms. Section 58 provides as follows. *(1) If on an appeal under section 57 the Tribunal considers (a) that the notice against which the appeal is brought is not in accordance with the law, or (b) to the extent that the notice involved an exercise of discretion by the Commissioner; that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal. (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based. The question whether the exemptions in sections 33 and 35 apply is a question of law or alternatively of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision as to whether the exemption applies and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority. Our task is essentially one of fact finding and interpretation of the Law to apply on our determination of those facts."*

Conclusions:

96. As stated above, it was not an issue between the parties that the EIRs and specifically section 5(e) was engaged. The issues before the Tribunal were whether Regulation 12(5)(d) was engaged, and if so, the public interest factors arising.
97. The EIR set out a general duty on public authorities to disclose environmental information on request. This general duty is so expansive and important, that they further set out that any other enactment or rule of law that would otherwise prevent the disclosure of that information in accordance with the regulations shall no longer apply. Regulation 12 of the EIR then sets out a specific list of exceptions to that general duty to disclose environmental information.
98. The Respondents rely on regulation 12(5)(d) EIR- namely that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law. It seems the intent of parliament in enacting regulation 12.5(d) EIR was therefore to allow the withholding of information where other existing legislation or common-law duty created a duty of confidentiality, but in a manner that was strictly limited to those circumstances identified within the EIR regulations. We accept that one of those circumstances is where the release of such information would (as opposed to could) have an adverse effect on the functioning of the PA, but we do not accept that this protection extends to the withholding of the entirety of environmental information held by the PA, or environmental information of a more general nature that may be held by the PA but only loosely connected with their primary functions.

99. We accept the Appellant's submission that the effect of s.18(3)CRCA and reg. 5(6) EIR is just such an explicit statutory provision that overrides the general duty of confidentiality, an interpretation which is supported by the decision of the upper tribunal in *Department for Environment Food and Rural Affairs v The Information Commissioner & Anor (Information rights: Environmental information - general) [2014] UKUT 526 (AAC) (28 November 2014)* - (see paragraph 51).
100. The Tribunal have considered the extent to which the contents of the withheld information in an HMP are, in themselves matters relating to Income [*or in this case inheritance or capital gains*] tax or are in assessment and/or negotiations between individuals and the revenue, and accept that while some information within an HMP may fall within this definition, it cannot realistically be extended to the entirety of the information contained in a plan which HMRC identifies (at para 7 of their submissions). The clear limitation of this exception from disclosure, allowing information to be withheld only to the extent that its disclosure would adversely affect the confidentiality of proceedings is, as the Appellant argues, an important caveat that creates the sort of 'blanket' withholding of information that he maintains the HMRC appears to endorse and seek.

Engagement of the exception at Regulation 12(5)(d) EIR:

101. The Commissioner has properly identified the three limbs of the engagement of the exception at Regulation 12(5)(d). In respect of the first limb "*there must be a "proceeding" of that or any other public authority;*" the Tribunal accept that the withheld information, the HMPs', do constitute part of the requisite proceeding of HMRC.
102. In respect of the second limb "*that proceeding must be confidential and the confidentiality must be provided by law*"-: the Tribunal accept that such Undertakings, and the relevant HMPs, are negotiated in confidence and that HMRC regard such agreements as bound by Section. 18(1) CRCA: - "*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*".
103. Turning to the third limb: "*disclosure of the requested information would adversely affect the confidentiality of the proceeding*"; it is the Tribunal's finding that HMRC have not identified or demonstrated a significant material or meaningful evidence of disclosure adversely affecting or undermining of trust in relation to HMRC's ability to protect the confidentiality of sensitive tax-related information arising from disclosure of the relevant HMPs in this appeal.

104. The Tribunal refer to the precise wording of Regulation 12(5)(d), which states that: “- a public authority may refuse to disclose information to the extent that its disclosure **would** adversely affect – (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law” (our-Emphasis)
105. The Tribunal conclude on the evidence before us that no significant grounds to substantiate the assertion that disclosure of the withheld information adversely affects the conduct of their business in particular that disclosure of the HMP’s (subject to appropriate redaction) has been demonstrated. No evidence has been produced or made available to establish such adverse effect on their business by such publication of the HMPs other than general assertions as to unintended consequences of disclosing information that would weaken trust, public confidence or risk as asserted. No evidence has been provided that there is any such real risk of asset owners being deterred from engaging in the Heritage Relief Scheme if the HMPs are disclosed. (See paras 13, 14 & and 15 of their final submissions dated 8 November 2023). If this risk were to materialise, HMRC surmised that could put at risk assets which are of national heritage value, which would be contrary to the public interest (e.g. the dissipation of assets).
106. While the Tribunal accept some risk could exist, we are not persuaded there is any evidence before us that there is a significant or real risk and, in the circumstances, we assess any risk to be minimal. We are conscious that the material test is whether disclosure of the requested information *would* – as opposed to *could* - adversely affect the confidentiality of the proceeding.
107. When pressed by the Tribunal at the oral hearing to identify what such adverse effects claimed would specifically arise, Counsel for HMRC requested time to take more detailed instructions and finally submitted that on the particular facts of this appeal HMRC does not seek to rely on any harm that would be caused by disclosure of the HMPs, based specifically on their content (our emphasis).
108. As the Appellant has submitted in the course of this appeal: “- *this conclusion of weakened trust does not demonstrate the existence of an adverse effect. It would only do so if weakened trust could be subsequently shown to lead to people refusing to provide information to HMRC or some other identifiable adverse effect - which has simply not been evidenced or demonstrated. Without that, the assertion of significant adverse effects is simply speculative and non-specific. It does not fulfil the clear guidance issued by the ICO that “there must be an identifiable harm to or negative impact on the interest identified in the exception”* (our emphasis). The Tribunal accept and endorse the merits in this assertion.

109. The Tribunal has noted that the identity of heritage estates benefiting from inheritance tax benefits is already published on the internet, and relevant (post 1998) anonymised undertakings placed in the public domain, including information that HMRC themselves already accept has, in the past, been made available to the public as part of those undertakings, but has since been moved into the HMP. The Appellant has explained the difficulties that have arisen for public access to the detailed information that has been agreed between HMRC and the taxpayer and again the Tribunal accept the merits in these well-placed concerns. The Tribunal accept these as genuine and real concerns and further note that the HMPs do not contain any information on sensitive financial or tax arrangements.
110. The Second Respondent confirms the HMP is; *“a policy and priorities statement under which day-to-day management will operate and a frame of reference against which detailed working decisions will be taken by those managing the property”*. It describes the special features and conditions for which exemption is granted. Their preservation is a primary objective of the plan. (See para. 8 above.). HMRC describe the HMP as part of the overall proceedings that are in effect the specific agreement which require careful, detailed and sensitive negotiation between the asset owner, the HMRC and the statutory agencies. We agree but we can find, nor accept there is any evidence of materially adversely affecting confidentiality arising from disclosure of the content held within, subject any appropriate redaction that might arise.
111. On hearing all the evidence afresh in this appeal, and considering the above compelling submissions made by the Appellant, the Tribunal find that on the facts before us Regulation 12(5)(d) is not engaged, and we must allow the appeal. Accordingly, therefore we are also finding there is an error of Law in the DN in finding Regulation 12(5)(d) is engaged.

The Public Interest test:

112. In any event if the Tribunal is wrong and Regulation 12 (5) (d) were engaged, we have also considered all the evidence before us, including the DN and the significant material and compelling evidence and submissions presented by the Appellant (as summarised above) on the public interest issues. Our determination on the Public Interest balance is overwhelmingly that the balance on the public interest test favours disclosure of the withheld information.
113. The weight given by the Commissioner to the factors on Public Interest in withholding the HMP's (see Para. 80 above) are significantly undermined by our findings on the absence of material evidence of that disclosure would adversely affect confidentiality or trust of landowners or otherwise undermine public confidence.

114. Significantly, Natural England's guidance states that the HMP should be; *"a policy and priorities statement under which day-to-day management will operate and a frame of reference against which detailed working decisions will be taken by those managing the property. It describes the special features for which exemption is granted since their preservation is a primary objective of the plan. It states the management operations and their relationship to the undertakings. It will also reduce the number of occasions on which owners need to consult the Agencies and help reduce the possibility of dispute."* This we find, is clearly a matter of public interest of significant weight in favour of disclosure.
115. An HMP is prepared by the asset owner and their advisers with specialist input from the specialist statutory agencies. Once it has been finalised, the HMP is submitted to the HMRC which holds it as the agreed detailed steps for implementing the statutory undertakings. Typically, this HMRC practice is that the HMP is incorporated referentially into the statutory undertaking given by the assets' owner. The HMRC acknowledges that an HMP may also contain details of *"wider management work ... that goes beyond the 'mandatory' steps necessary for tax relief purposes. ... These additional steps would be non-mandatory and hence voluntary."* Again, we find this is a matter of significant public interest in favour of disclosure.
116. Once the HMP is in place, the HMRC requires the owner to submit an annual report to enable it to supervise the owner's compliance with the statutory undertakings. If the conditions for conditional exemption cease to apply at any time, a tax charge arises. This is in essence a reactionary punitive measure further to exposure of, and after the event of a compliance failure. It is also, a matter of significant public interest in disclosure so that the public can be well informed of the details of the requirements and obligations they are entitled to expect arising from material and significant concessions granted as a result of the HMT.
117. Further in this vein, the HMRC's practice has been to require the completion of an HMP before the asset is designated under section 31(1) of the Inheritance Tax 1984 ("ITA"). An HMP is a non-statutory document (i.e. it is not expressly required by the ITA) which records the statutory undertakings agreed by the asset owner with the HMRC in return for the property's conditional exemption under the Heritage Relief Scheme. The principal purpose of the HMP is to provide certainty for all parties so that it is clear what is required to retain the property's conditional exemption (i.e. the preservation of the scenic, scientific or historic qualities which justify its conditional exemption). It is this certainty that the Appellant argues requires transparency and accountability through disclosure to the public at large as he has explained. For example, the public is entitled to know the details of what access is to be provided and on what conditions so they or their representatives (such as a Member of Parliament) can record and challenge any non-compliance. This the Appellant argues has nothing to do with the financial tax affairs of the owner and is committed only to practical

conditions and obligations, (voluntary or otherwise), within an HMP. In these circumstances, the Tribunal finds the merits of significant public interest in disclosure of the withheld information.

118. HMRC maintain the importance of preserving national heritage has been a feature of our tax system for more than a century and maintained by successive governments of differing political persuasions and this should give significant weight to the risk of undermining the effectiveness of the Heritage Relief Scheme. They argue there will be a general detrimental effect and some owners of large areas of land within the UK, considered part of the National Heritage will cherish their privacy more than the advantage offered in “*substantial*” (as described by HMRC) tax savings through the scheme. The Tribunal see no evidence that disclosure of the HMP would adversely affect any such owners or undermine trust in HMRC’s ability to protect the confidentiality of sensitive tax information.
119. The public interest for owners of and visitors to the estates in question is the clear understanding and clarity as to the obligations, commitments, and limitations in providing access to the world at large.
120. Accordingly, the Tribunal issue a substituted Decision which only relates to the four named properties that hold an HMP and direct that the Second Respondent disclose the relevant HMPs to the Appellant.
121. We allow the appeal and direct accordingly as follows:

Substituted Decision Notice: The Tribunal direct that the Second Respondent, the Public Authority, His Majesty’s Revenue and Customs (“HMRC”) release the withheld information, subject of the Appellant’s request dated 30 December 2021 i.e. “ - - copies of the heritage management plans (HMP’s)” for Bolton Abbey; Chatsworth; Alnwick Castle, and Firle Estate, subject to redaction of personal contact information. HMRC must take these steps within 35 calendar days of the date of this decision.

Brian Kennedy KC

10 April 2024.