



Case Reference: FT/EA/2023/0201

Neutral Citation Number: [2024] UKFTT 001048 (GRC)

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard : Determined on the papers

Heard on: 2 January 2024

Decision given on: 4 November 2024

Before

TRIBUNAL JUDGE JACQUELINE FINDLAY

TRIBUNAL MEMBER DAVID COOK

TRIBUNAL MEMBER EMMA YATES

Between

MARK TULLY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

1. The appeal is dismissed.

## REASONS

### Background and Request

2. This appeal is brought under section 57 of the Freedom of Information Act 2000 (FOIA) against the Commissioner's Decision Notice (DN) dated 13 March 2023 ("the DN") with reference IC-156772-D2G0 which is a matter of public record.
3. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended (the Rules). The Tribunal determined, also, Mr Tully's appeal with reference FT/EA/2023/0316 for which a separate Decision has been issued.
4. In reaching its decision the Tribunal took into account all the evidence before it in an open bundle and a closed bundle and made findings on the balance of probabilities.
5. The full details of the background to this appeal, Mr Tully's request for information and the Commissioner's decision are set out in the DN.
6. On 29 August 2021, Mr Tully made a FOIA request (the Request) to HM Treasury in the following terms:

"Please supply the following information, relating to all meetings between Jesse Norman and external stakeholders about the Loan Charge between 01 June 2019 and 31 August 2019:

-all briefings/ documents (received from HM TREASURY and/or HMRC)

-all minutes of such meetings

-all follow-up correspondence to/from HM TREASURY and/or HMRC officials

-all memoranda (for file and/or as sent to other individuals including any retained drafts) from Mr Norman or members of his office.”

7. HM Treasury responded on 27 September 2021 to advise that it was unable to comply with the Request within the cost limit (section 12 FOIA).
8. Mr Tully submitted the following refined Request on 4 October 2021:

“Thank you for confirming that HM Treasury does hold information within the scope of my request, and that ten meetings in total were held within the date range I specified in that request.

I understand that it is your view that section 12 of the FOIA is engaged due to the limit on costs. You suggested that by narrowing the number of meetings that I am interested in, you may be able to comply with a future request, so I have reduced this subsequent request to three of those ten meetings, which has presumably decreased any estimate on the commensurate costs by approximately 70%.

Please therefore provide:

- all briefings/ documents (received from HM TREASURY and/or HMRC)
- all minutes of such meetings
- all follow-up correspondence to/from HM TREASURY and/or HMRC officials
- all memoranda (for file and/or as sent to other individuals including any retained drafts) from Mr Norman or members of his office for these three meetings only: 5th June 2019: Chartered Institute of Taxation and ICAEW  
6th June 2019: Keith Gordon 12th June 2019: Lord Forsyth Of Drumlean”

9. HM Treasury responded on 29 November 2021 and advised it was refusing the Request under section 14(1) of FOIA.
10. On 1 December 2021 Mr Tully refined his Request further to only include information on the meetings between Keith Gordon and Lord Forsyth of Drumlean as follows:

“Please therefore exclude any information which relates to the first entry on my revised submission (5<sup>th</sup> June 2019 – Chartered Institution of Taxation and ICAEW) and only include/provide the second (6<sup>th</sup> June 2019 – Keith Gordon) and the third (12<sup>th</sup> June – Lord Forsyth of Drumlean).

11. HM Treasury responded on 31 December 2021 to advise that section 14(1) still applied.
12. Mr Tully requested an internal review on 7 January 2022 and HM Treasury upheld the decision on 4 February 2022.
13. Mr Tully expressed dissatisfaction with that response on 7 January 2022 .
14. During the Commissioner’s investigation, HM Treasury advised that it had reconsidered its position and would disclose the requested information to Mr Tully. It also advised that Mr Tully had made another request concerning the meeting with Keith Gordon and it had already released the information it held concerning that meeting in its response to the later request.
15. HM Treasury provided its revised response on 11 November 2022 (D142 to D150) disclosing the requested information about the meeting with Lord Forsyth of Drumlean. It withheld some of the requested information under section 40(2) of FOIA, specifically the names of junior staff and all email addresses and phone numbers contained within the disclosure.
16. Mr Tully expressed dissatisfaction with the amount of information disclosed and stated he believed that more information within the scope of the request was held.
17. Mr Tully contacted the Commissioner on 18 February 2022 to complain about the way his Request for information had been handled.

18. The Commissioner considered whether, on the balance of probabilities, HM Treasury held further recorded information within scope of the Request and whether it had complied with section 1(1) of the FOIA. The Commissioner considered, also, whether HM Treasury was correct to apply section 40(2) of FOIA to the Request.

### **The Decision Notice**

19. On 13 March 2023 the Commissioner issued the DN finding that, on the balance of probabilities, HM Treasury does not hold any further information within the scope of the quest. The Commissioner found that HM Treasury was entitled to rely on section 40(2) of FOIA to withhold some of the requested information.
20. The Commissioner required no steps to be taken as a result of the decision.
21. Mr Tully lodged an appeal dated 10 April 2023.

### **Legal Framework**

22. The powers of the Tribunal in determining this appeal are set out in section 58 of the FOIA 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.

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

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

public authority is likely to be holding relevant information beyond that which has already been disclosed.”

26. The Tribunal has confirmed on a number of occasions that the relevant test is whether the information is held on the balance of probabilities: for example, in the cases of *Malcolm v Information Commissioner* EA/2008/0072 at [24], *Dudley v Information Commissioner* EA/2008/008 at [31], and *Councillor Jeremy Clyne v the Information Commissioner and London Borough of Lambeth* EA/2011/0190 at [21]-[22]).
27. In *Oates v IC and Architects Registration Board* EA/2011/0138 at [11] the Tribunal recognised that: “As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.”
28. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

### **Grounds of Appeal**

29. Mr Tully submits that the Commissioner has failed to properly understand the complaint and as a result has come to a flawed and inaccurate conclusion.
30. His complaint had absolutely nothing to do with section 40(2) of FOIA. He would accept the redaction of individual names when disclosing information under FOIA,

unless the names are of those who are senior civil servants, when it is expected they would be unredacted.

31. He sent Keeley Christine full details of HM Treasury's response to her internal review request, dated 4 February 2022. In this response, HM Treasury confirmed that there were over 100 documents and emails, many of which contain attachments and which related to the meeting of 6 June 2019 (Keith Gordon) and the meeting of 12 June 2019 (Lord Forsyth of Drumlean). HM Treasury used this reason to claim engagement of section 14(1) of the Act - and not section 14(2) as it states in its later response dated 10 October 2022.
32. In this same response dated 10 October 2022, HM Treasury also makes reference to a separate FOI request which he had raised asking for information it holds relating to the meeting with Keith Gordon. This was sent to HM Treasury in an attempt to specifically extract this information in isolation, knowing that his existing complaint to the ICO would not even be allocated to a case officer for many months.
33. HM Treasury stated to the Commissioner that it complied with this request and responded to him on 27 June 2022 under reference FOI2022/03927. This gives a false impression, as this response was also subject to an internal review request following the exclusion of information which HM Treasury claimed was 'out of scope', with no reference to any statutory exemption listed under the FOIA.
34. His internal review request listed the 11 specific omissions which HM Treasury had refused to provide, with substantive and detailed reasoning for their immediate disclosure. The annex containing the information which HM Treasury released was demonstrably titled 'FOI2022/03927: information in scope' and Keith Gordon had already given his approval to disclose as clearly stated in HM Treasury's response. In addition, he asked for other missing information to be disclosed, which he described in further detail. HM Treasury's response, made on 25 July 2022, refused this request. This is now subject to a separate complaint to the Commissioner under



case reference IC-198579-P1Y0. The part-disclosure made by HM Treasury under FOI2022/03927 contained 12 emails (with redactions) alongside 1 document. The response by HM Treasury dated 10 October 2022 contained only 8 emails, which have been redacted. In total, this amounts to 20 emails and 1 document, meaning that 21 'items of information' have been partly disclosed when HM Treasury previously claimed there were over 100, many containing attachments relating to the meeting of 6 June 2019 (Keith Gordon) and the meeting of 12 June 2019 (Lord Forsyth of Drumlean).

35. It is a straightforward exercise to conclude that a large and significant proportion of the information requested has deliberately been withheld from the Commissioner as well as from him and it does not take a quantum mathematical leap to confirm that these figures do not match up in any way, shape or form.
36. In this most recent part-disclosure from HM Treasury, there are 18 instances of information which have also been classified as 'redacted - out of scope'. He does not accept that any of this information contained in the emails and documents from either request should be considered out of scope, and he put this to the Commissioner in his letter of complaint that HM Treasury have no grounds under legislation to withhold these entries and should now be instructed to disclose all information.
37. The DN clearly failed to consider any of the above facts and the decision is unjustified on the basis of the evidence. This raises questions about the Commissioner's competence and impartiality.
38. A number of paragraphs in the DN require correction and/or clarification. HM Treasury responded on 29 November 2021 and not 27 November 2021. This followed an interim response from HM Treasury on 1 November 2021 where it claimed an extension on time to respond as it was considering the public interest test under section 35(1)(a), which he immediately challenged and rebutted as it was not applicable to this information.

39. HM Treasury's claim to the Commissioner that it had already released the information related to the meeting with Keith Gordon failed to inform the Commissioner that it had made numerous 'out of scope' redactions in that disclosure, none of which it explained or justified under FOIA. The information it released for the meeting with Lord Forsyth was subject to the same 'out of scope' redactions with again no explanation or justification.
40. HM Treasury provided its revised response on 11 October 2022 and not 11 November 2022. He wrote a response to Keeley Christine on 22 October 2022 which he has submitted.
41. The scope of the case has focused on the wrong section of the FOIA. The Commissioner has ignored his calls to investigate HM Treasury's use of section 14(1) and its use of section 35(1)(a) and has failed to acknowledge that HM Treasury definitely do hold more information within the scope of his request as it has admitted so itself. This is an oversight he does not understand.
42. The Commissioner refers to HM Treasury's searches for the information requested - at no point in the DN does the Commissioner acknowledge or consider his repeated concerns about the way those searches were conducted. Three whole months after first receiving the Request, HM Treasury made a claim that more information had 'come to light' in the form of emails between HM Treasury staff, which it then used as the reason for refusing his request under section 14(1).
43. The Commissioner states that it is satisfied no further information within the scope of the request is held by HM Treasury and has not been provided with any evidence that HM Treasury would hold further information. This completely ignores the evidence offered by HM Treasury itself in its internal review response of 4 February 2022 and is baffling in the extreme. The ICO also states that it is satisfied that HM Treasury conducted appropriate and diligent searches for the information - but again

ignores the fact that three months after the request was received, it suddenly found 'new' information which it then used to justify its refusal to disclose.

44. Mr Tully seeks an order that the Commissioner has failed to properly understand and investigate the complaint as it has focused on section 40(2) and not section 14(1) and section 35(1)(a) of FOIA.
45. Mr Tully seeks an acknowledgement by the Tribunal that HM Treasury withheld a large proportion of the 100 + emails and documents it has publicly confirmed it holds in relation to the separate meetings between the FST and Keith Gordon and Lord Forsyth.
46. Mr Tully seeks an order of the Tribunal to disclose all the 100+ emails and documents confirmed as held by HM Treasury and for all previous disclosures (which only amounts to a total of 21 emails and documents) to be supplied with all redactions categorised as 'out of scope' by HM Treasury removed. All section 40(2) redactions to remain in place as already explained and accepted.
47. Mr Tully asks the Tribunal to investigate the Commissioner's failure to verify HM Treasury's claim that, three months after receipt of the original request, 'new' information had suddenly come to light which, in HM Treasury's view, was the basis of its use of section 14(1) of FOIA, and to re-evaluate and investigate the evidence of those internal searches undertaken by HM Treasury when the request was first received, as well as its use of section 14(1) and section 35(1)(a) to delay its responses.
48. Mr Tully asks that the Tribunal to consider and examine in detail the inconsistencies in HM Treasury's response.

### **The Commissioner's Response**

49. The Commissioner submits that the appeal should be dismissed.

## Ground 1

50. The difference in the amount of information potentially in scope as suggested at the time of the internal review dated 4 February 2022 and the amount of information that has subsequently been disclosed is due to the fact that the original request developed and was refined and was scoped by different staff members during that process. The Commissioner remains satisfied that HM Treasury's latter responses to the refined request during his investigation were accurate as it had repeated its searches as part of providing its submissions to the Commissioner and had found no further information held. Noting the case of *Oates v IC and Architects Registration Board* EA/2011/0138 the Commissioner submits that his decision was correct that on the balance of probabilities no further information is held by HM Treasury other than that which has been identified and provided in redacted format.

## Ground 2

51. The Commissioner notes that HM Treasury's submissions to the Commissioner dated 10 March 2023 (which was provided following service of an Information Notice dated 14 February 2023), provided the Commissioner with a copy of the information disclosed with the section 40(2) redactions marked up relating to the relevant Lord Forsyth of Drumlean meeting (pages A8 to A23 of the closed bundle). Annex A contained within these submissions makes clear that "Green highlights indicate where we have redacted third party personal data under section 40(2) of the FOI Act." All other information has been released. However, the disclosure made to Mr Tully within HM Treasury's correspondence dated 10 October 2022 contained further redactions to 'out of scope' material (pages D126 to D135 open bundle). The Commissioner contacted HM Treasury to ask it to clarify whether the 'out of scope' material marked up in the 10 October 2022 disclosure had in fact been provided to Mr Tully. HM Treasury has confirmed to the Commissioner that the material marked as 'out of scope' in the 10 October 2022 disclosure has not been provided to Mr Tully.

It has explained that the 'out of scope' information should not be released as it is not directly related to the meeting information Mr Tully requested and concerns other matters that were mentioned in the readout emails.

52. In relation to the information disclosed on 27 June 2022 regarding the Keith Gordon meeting (pages D101-D113 of the open bundle), the Commissioner notes that in addition to section 40(2) redactions, some material has been redacted as 'out of scope'. HM Treasury is not obliged to provide information which does not fall within the scope of the request. However the Commissioner has not been provided with an unredacted copy of this information. If the Tribunal would be assisted in its decision-making on this matter by input from HM Treasury.

### **Ground 3**

53. HM Treasury initially applied section 35(1)(a) FOIA (the formulation or development of government policy,) to the 4 October 2021 Request however this was subsequently withdrawn and replaced by the application of section 14(1) FOIA. Section 35(1)(a) FOIA was therefore effectively withdrawn by HM Treasury. In any event the DN is limited to addressing HM Treasury's handling of the final refined Request in this series dated 1 December 2021 and section 35(1)(a) FOIA was never applied to this request. Section 14(1) (vexatious or repeated requests) was applied to the 1 December 2021 request however this was effectively withdrawn during the Commissioner's investigation and so was not addressed in the DN.
54. For the reasons above, the Commissioner submits that Mr Tully has not provided any evidence which demonstrates on the balance of probabilities any further information is held which has not now been identified and therefore invites the Tribunal to uphold his DN and dismiss this appeal.

### **Conclusions**

55. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.
56. Mr Tully does not dispute the redactions made under section 40(2) FOIA as he accepts the reasons for withholding the person data of junior officials.

### **Ground 1 of Mr Tully's appeal**

57. Mr Tully challenges the Commissioner's findings that on the balance of probabilities no further information is held (other than that which has already now been provided with redactions). Mr Tully submits that in the internal review dated 4 February 2022, when HM Treasury was relying upon section 14 FOIA, it stated that:

“There are over 100 documents and emails, many of which contain attachments relating to the meeting of 6 June 2019 (Keith Gordon) and the meeting of 12 June 2019 (Lord Forsyth of Drumlean).”

58. Mr Tully submits that only 21 items have been disclosed.
59. The Tribunal found that the information disclosed in response to the refined Request was likely to be accurate and the Tribunal accepted that HM Treasury undertook thorough investigations when repeating the searches as part of providing submissions to the Commissioner. The difference in the number of documents disclosed has arisen because by the time of disclosure on 11 November 2022 the Request had been substantially refined and the information in scope had decreased.
60. Mr Tully asserts that the information designated as out of scope information and relating to more general discussion about the FST's appearance at the Lords Economic Affairs Committee (LEAC) that as Lord Forsyth was the Chair of LEAC this information should be within the scope of the Request.

61. The Tribunal found that 'out of scope' information is not directly related to the meeting information requested by Mr Tully.
62. The Tribunal are concerned with the Request as drafted and with the information asked for in the Request not with any request for information that Mr Tully could have made or which he thinks he should have made.
63. The Tribunal found that the HM Treasury is not obliged to provide information which does not fall within the scope of the Request. Unredacted copies of the information it is asserted is not in scope is not before the Tribunal. The Tribunal considered whether it should adjourn to obtain this information and decided it was not proportionate to do so and there was sufficient evidence to determine the appeal.
64. The Tribunal found that that on the balance of probabilities no further information is held by HM Treasury other than that which has been identified and provided in redacted format on the basis of the explanation provided by HM Treasury in the open and closed bundles.

### **Ground 2 of Mr Tully's appeal**

65. Mr Tully raises the point that redactions have been made to the information provided as 'out of scope' which he disputes. The Tribunal found that the information referred to is 'out of scope' in relation to the refined Request for the reasons as stated above.

### **Ground 3 of Mr Tully's appeal**

66. Mr Tully questions why the DN has not addressed HM Treasury's application of section 35(1)(a) and section 14(1) FOIA.
67. Reliance on section 35(1)(a) FOIA was effectively withdrawn by HM Treasury. The Commissioner in the DN limited his findings and decision to HM Treasury's

handling of the final refined request in this series dated 1 December 2021 and section 35(1)(a) FOIA was never applied to this Request. Section 14(1) (vexatious or repeated requests) was applied to the 1 December 2021 request however this was effectively withdrawn during the Commissioner's investigation and so was not addressed in the DN.

68. The Tribunal found that on the balance of probabilities HM Treasury does not hold the requested information and did not do so at the time of the Request and was entitled to rely on section 40(2) of FOIA and there is no error of law in the Commissioner's DN.

Signed: *Judge J Findlay*

Date: 4 November 2024