THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/3016/2010

PARTIES

The Information Commissioner (Appellant)

and

Her Majesty's Revenue and Customs (First Respondent)

and

Geraldine Gaskell (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Information Commissioner.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 11 October 2010 under file reference EA/2010/0090 involves an error on a point of law and is set aside. The Upper Tribunal re-makes the decision in the following terms:

> The Tribunal upholds the Commissioner's Decision Notice dated 23 March 2010 and dismisses the appeal.

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and section 58 of the Freedom of Information Act 2000.

REASONS

Introduction

1. It is a truth universally acknowledged, at least amongst lawyers, that many a case may start off being about one thing ("*X*") but by the time it has been through the appeals process it ends up being about something completely different ("*Y*"). This is one of those cases.

2. In this case *X* was Mrs Gaskell's request under the Freedom of Information Act 2000 (FOIA) that the Rent Service provide her with (i) the full list of the letting agents that they used to provide rental information in the South Devon area; and (ii) full details of the particular letting agent who supplied such information on two bungalows in the Dawlish area which were purportedly let at £38.50 a week in January 2008.

3. In this case *Y* was whether or not the Information Commissioner ("the Commissioner") (i) has a discretion when considering what steps to require a public authority to take under section 50(4) of FOIA; and (ii), assuming that he has, whether he exercised it properly in deciding that Her Majesty's Revenue and Customs (HMRC), which has since assumed responsibility for the Rent Service, need not disclose the requested information to Mrs Gaskell.

4. It follows that I have considerable sympathy for Mrs Gaskell, who told me at the oral hearing that she could not believe that a simple series of questions to the Rent Service had got to the stage of an Upper Tribunal hearing at which she faced experienced counsel on behalf of the Commissioner and HMRC. She was understandably "surprised and bewildered that it has snowballed this far". But snowballed it has, not least as the outcome of this appeal may have implications for other FOIA requests and investigations by the Commissioner.

The background to Mrs Gaskell's request under FOIA

5. In the old days the amount paid by way of housing benefit (or, in the really old days, before the introduction of that benefit, housing costs for rent under the former supplementary benefits scheme) for private sector tenants on low incomes was

based (in most cases) on the actual rent for the particular property. Over the years successive governments have introduced various changes to the housing benefit scheme with the aims of saving public expenditure, reducing administrative costs and 'nudging' the behaviour of both landlords and tenants.

6. One of the most radical changes was the introduction of the "local housing allowance" (LHA), which is strictly a modification of the housing benefit (HB) scheme rather than a different benefit. Under LHA rules, HB entitlement depends on whereabouts in the country a private sector tenant lives, the maximum rent allowed for properties in that area and the number of rooms s/he is assessed as needing. As Mrs Gaskell rightly reminded me, the local limits were reduced earlier in 2011 and are now based on the cheapest 30 per cent of properties in an area, instead of the cheapest 50 per cent as previously.

7. The LHA scheme was 'rolled out' nationally in April 2008 for most new claims. However, for the previous five years it had been piloted by a small number of local authorities in so-called Pathfinder areas. One of those authorities was Teignbridge in South Devon (see the Rent Officers (Housing Benefit Functions) (Local Housing Allowance) Amendment Order 2003 (SI 2003/2398)). Mrs Gaskell made a FOIA request to the Rent Service (then part of the Department for Work and Pensions, or DWP) for the information described above (at [2]). The Rent Service used such information to compile a list under paragraph 2 of Schedule 3B to the Rent Officers (Housing Benefit Functions) Order 1997 (SI 1997/1984, as amended). That list in turn was used to calculate the appropriate rate of LHA for different categories of property in the local "Broad Rental Market Area".

The fate of Mrs Gaskell's FOIA request

8. It is only right to point out that the Rent Service provided Mrs Gaskell with an anonymised copy of the list. However, they refused to disclose the specific information she requested, initially citing sections 40(2) (personal information), 41 (information provided in confidence) and 43(2) (commercial interests) of FOIA, later adding section 36 (prejudice to the effective conduct of public affairs).

9. The full history of her request is described in the Commissioner's Decision Notice (ref FS50211872 at paras. 7-21) and in the statement of reasons by the First-tier Tribunal (FTT; ref EA/2010/0090 at paras. 3-8) and need not be rehearsed here. The critical dates in the chronology were as follows:

9 July 2008	Mrs Gaskell requested the information from the Rent Service
6 August 2008	The Rent Service refused to disclose the information
12 December 2008	The Rent Service reviewed her request but refused to disclose the information
14 December 2008	Mrs Gaskell complained to the Commissioner
1 April 2009	The Rent Service was transferred from the DWP to HMRC as part of the Valuation Office Agency (VOA)
30 April 2009	The VOA repeated its original grounds for refusing disclosure but cited section 44 (statutory bar on disclosure) as a new exemption
23 March 2010	The Commissioner issued a Decision Notice ruling that the VOA could not be required to disclose the withheld information due to section 44 of FOIA, in conjunction with section 18 of the Commissioners for Revenue and Customs Act (CRCA) 2005, and requiring no steps to be taken by the public authority.

10. The reasoning in the Commissioner's Decision Notice can be summarised simply. Section 44(1)(a) of FOIA provides an absolute exemption where disclosure by the public authority holding it "is prohibited by or under any enactment". Section 18(1) of CRCA 2005 provides that "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." Section 18(1) did not apply to the Rent Service at the time that Mrs Gaskell made her original request. However, by the time of his Decision Notice, Rent Service staff had become HMRC officials. If the Commissioner were to order disclosure, those staff would be contravening section 18 of CRCA 2005. There was no point in considering the other exemptions claimed, as that new legal restriction meant that it was inappropriate to ask the VOA to release the information sought.

11. The transfer of the Rent Service from the DWP to HMRC was implemented by the Transfer of Functions (Administration of Rent Officer Service in England) Order 2008 (SI 2008/3134). Mrs Gaskell pointed out that the statutory instrument had been laid before Parliament on 17 December 2008 and did not come into force until 1 April 2009. She had made her request to the Rent Service (and indeed her complaint to the Commissioner) before both those dates. In short, she believed that her FOIA inquiry should be answered on the basis of the law as it was in force at the time of her original request or at the latest when the Rent Service issued its refusal notice.

The First-tier Tribunal's decision

12. The FTT decided as a preliminary issue that (i) the Commissioner has no discretion in deciding whether or not to enforce compliance with FOIA in terms of specifying steps under section 50(4) of FOIA; and (ii) if it was wrong on that point, the Commissioner was wrong to exercise his discretion in the way that he did in the present case.

The proceedings before the Upper Tribunal

13. The Commissioner, supported by HMRC, appeals to the Upper Tribunal against the FTT's decision. The Commissioner argues first that he enjoys a discretion when considering what "steps" to require a public authority to take under section 50(4) of FOIA, and that this construction of FOIA best represents Parliament's intention. Secondly, the Commissioner submits that since the information in question was covered by section 18 of CRCA 2005 by the time of his Decision Notice, and so was now exempt under section 44 of FOIA, the Commissioner could properly decide not to require it to be communicated to Mrs Gaskell. In other words, the FTT was wrong to decide that the Commissioner had no discretion and was wrong to decide that, if he had, he had exercised it incorrectly.

14. I held an oral hearing of the appeal at Harp House on 7 July 2011. The Commissioner and HMRC were represented respectively by Mr Ben Hooper and Ms Karen Steyn, both of Counsel. Mrs Gaskell attended and ably represented herself. I am grateful to them all for their written and oral submissions.

The section 50(4) point: the Upper Tribunal's analysis

15. Mrs Gaskell made her complaint to the Commissioner under section 50(1) of FOIA. In doing so, she was applying "for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I." The words "has been dealt

with" indicate that the Commissioner must consider the historic position (see *All Party Parliamentary Group on Extraordinary Renditions v. Information Commissioner* [2011] UKUT 153 (AAC) ("the *APPGER* case"), at [9(iii)]). So far so good for Mrs Gaskell's central argument – namely her request should be determined on the basis of the law as it then stood.

16. Given that none of the exceptions under section 50(2) applied, the Commissioner was then bound to issue a Decision Notice (see section 50(3)). In doing so, he was governed by section 50(4):

> "Where the Commissioner decides that a public authority—
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
> (b) has failed to comply with any of the requirements of sections 11 and 17,
> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."

17. The Commissioner's Decision Notice found (at [28] & [29]) that the public authority was in breach of section 17(1)(b) of FOIA in that the specific exemptions had not been cited in its initial refusal notice (e.g. section 36(2)(c) rather than simply section 36). To that extent – albeit at a fairly technical level – there had been a failure to comply with the requirement of section 17 for the purpose of section 50(4)(b). On appeal, the FTT, in a carefully argued statement of reasons, concluded that the Commissioner had no discretion on whether or not to order steps under section 50(4).

18. I agree with the submissions of Mr Hooper and Ms Steyn that the FTT's decision involves an error of law on this point. Mr Hooper, in his skeleton argument, helpfully summarised the conundrum which he described as the "Retrospectivity Difficulty" in these terms:

> "Whether a public authority has complied with the disclosure regime in the Freedom of Information Act 2000 ("FOIA") falls to be assessed at the date when the request for information in question was first dealt with. However, by the time the Information Commissioner ("the Commissioner") comes to determine compliance, this date may well be months, or even years, in the past. It follows that cases may exceptionally arise where a public authority should have communicated information at the time it was requested, but where – by the time of the Commissioner's consideration – circumstances have changed such that disclosure has, for instance, become unlawful, impossible or wholly impractical."

19. Mr Hooper identified a number of scenarios in which the "Retrospectivity Difficulty" might arise because of a change of circumstances in the meantime: the factual matrix might shift, so that a pre-existing but previously inapplicable statutory prohibition might now apply; a new statutory bar on disclosure might be enacted by Parliament; the requested information might have been inadvertently destroyed; disclosure of the information might have since become a contempt of court; and disclosure might now breach the rights of third parties. The question of how section 50(4) might accommodate such changes of circumstances has not to date been the subject of any binding precedent. However, the point was considered by Stanley Burnton J. (as he then was) in *Office of Government Commerce v Information*

Commissioner [2008] EWHC 737 (Admin); [2010] QB 98; [2010] 1 Info LR 743 ("*OGC v ICO*").

20. That appeal arose from FOIA requests in relation to the "gateway reviews" carried out by the OGC of the then Government's identity (ID) card programme. Section 37 of the Identity Cards Act 2006, which required the Secretary of State to lay before Parliament an estimate of the public expenditure likely to be incurred on the ID cards scheme, was enacted after the FOIA requests had been made but before final decisions by the Commissioner and the FTT had been taken. One issue was whether the enactment of section 37, which might have afforded a degree of accountability, could be taken into account by the Commissioner. Mr Pitt-Payne, counsel for ICO in that appeal, submitted that FOIA required questions of disclosure to be determined on the basis of the facts as they were at the date of the request (in other words, Mrs Gaskell's argument in the present appeal). Stanley Burnton J. observed as follows (at [98]; emphasis added):

> "It is unnecessary for me to decide whether Mr Pitt-Payne's submissions on this point are correct, since no point had been taken by the OGC on the information available to the public as a result of the reports submitted to Parliament under section 37, but I am not sure that they are. Take a case in which the information requested is relevant to criminal proceedings that are begun after the date of the request, and the disclosure of that information would prejudice the fairness of the trial. In that case, the information was not exempt when requested, but became so under section 31 subsequently. It would be undesirable for the Commissioner to be obliged to require disclosure in such a case. Conversely, if the change of circumstances favours disclosure, the complainant can make a new request. Section 50 is not entirely clear in this respect, in that the past tense of subsection (1) is not repeated in subsection (4) in the phrase 'in a case where it is required to do so by section 1(1)', or in the requirement that 'the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken'. As it happens, in paragraph 85 of the decision the Tribunal took into account circumstances post-dating the original requests for information under FOIA in deciding whether disclosure should be ordered. *It seems to me to be arguable that the Commissioner's decision whether a public authority complied with Pt I of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required to be taken by the authority may take account of subsequent changes of circumstances.*"

21. The FTT sought to distinguish *OGC v ICO* on two grounds. The first was that the section 50(4) point had not actually been decided in that case, as Stanley Burnton J's comments were strictly *obiter* (not necessary for his decision) and the matter had not been the subject of full argument. That is all true, although of course Stanley Burnton J's observations were at the very least persuasive. The Upper Tribunal has had the benefit of argument on the point, which is essential for the decision in this appeal, although the legal debate has to some extent been rather one-sided in the sense that Mrs Gaskell, while tenacious in her pursuit of information from the Rent Service, would not pretend to have any legal expertise. In fairness, however, Mr Hooper in particular has made a number of points which might assist Mrs Gaskell and, as this is an inquisitorial jurisdiction, I have certainly looked (but to no avail) for contrary arguments on her behalf.

22. The second distinction was that the FTT took the view that there was already sufficient flexibility within FOIA to deal with Stanley Burnton J.'s scenario of subsequent criminal proceedings. The FTT considered that "there is no prescribed timescale applicable to s.50(4) in that the 'period within which they must be taken' does not require a calendar date but would allow for disclosure e.g. 'after the conclusion of Trial proceedings'". I agree with Mr Hooper that this approach is unsatisfactory in two ways. First, "the period within which they must be taken" for the purpose of section 50(4) must be a defined period (e.g. 7 days, one month, etc). The FOIA regime needs to be readily understood by public authorities and requesters alike, so everyone knows where they stand. A period identified by reference to some uncertain trigger date is not going to be workable in practice (what happens if there is then an appeal after the trial? Or a satellite challenge is brought under the European Convention of Human Rights (ECHR) by way of proceedings in the Strasbourg court?). Second, the FTT's attempted solution provides no relief in the other types of retrospective difficulty identified by Mr Hooper (see [19] above).

23. Mr Hooper very properly noted that section 54 of FOIA might appear at first sight to offer some solace for Mrs Gaskell, as it vested the Commissioner with a discretion in deciding whether or not to refer a public authority's non-compliance to the court. Could it therefore be argued that the Commissioner was bound to direct steps under section 50(4) but could then opt not to enforce that requirement? This would, however, create an unsatisfactory and unworkable regulatory regime, with the Commissioner at risk of sending out simultaneous but conflicting messages to public authorities. In addition, Mr Hooper made the telling point that section 58(1) of FOIA provides public authorities with no right of appeal if circumstances relating to the lawfulness of disclosure have changed, so in the absence of any discretion vested in the Commissioner such a problem cannot be cured on appeal.

24. So what was the answer to the Retrospectivity Difficulty? Mr Hooper's submission was that, on a proper construction of FOIA, the Commissioner does indeed enjoy a discretion under section 50(4) to take account of subsequent changes of circumstances. Accordingly, section 50(4) should be construed as imposing an obligation on the Commissioner, where a requirement falling within section 50(4)(a) or (b) has been found to have been breached, to specify such steps – if any – as the Commissioner considers must be taken by the authority for complying with that requirement. I accept Mr Hooper's analysis that Parliament can be presumed not to have intended that the Commissioner might have to impose an obligation on a public authority to take the "step" of communicating certain information where that step would, in the circumstances, be e.g. unlawful, impossible or wholly impractical. In other words, Parliament can be presumed to have intended that the Retrospectivity Difficulty would not arise in the FOIA scheme.

25. Likewise, Parliament can be presumed not to have intended to require the Commissioner to perform the impossible task of specifying "steps" to comply with a past breach of the section 17 time requirements that resulted from the late giving of a notice under that provision. By definition any such historic failure cannot be remedied subsequently by taking any further "steps", as the horse will already have bolted (see *E.J. v Information Commissioner* [2011] UKUT 171 (AAC) at [19]).

26. There was some learned discussion by counsel at the oral hearing as to whether the construction urged by Mr Hooper and Ms Steyn could be arrived at on a normal reading of section 50(4), applying the ordinary principles of statutory interpretation, or whether it was necessary to "read in" the necessary words. On the latter basis section 50(4) would be re-written to read as stating, for example, "the decision notice must specify the steps*, if any,* which *the Commissioner considers*

must be taken by the authority for complying with that requirement and the period within which they must be taken."

27. The language of section 50(4) is certainly ambiguous. My understanding is that the former Information Tribunal took the view that it gave the Commissioner a discretion in deciding what steps to direct, but I accept that the mandatory construction adopted by the FTT in the present case could be sustained on a literal reading of the legislative text. However, for the reasons identified above, my conclusion is that on a purposive reading of the statute section 50(4) vests the Commissioner with a discretion, rather than imposing a duty.

28. I am fortified in reaching that conclusion by noting that, not only is this approach consistent with the observations (admittedly *obiter dicta*) of Stanley Burnton J. in *OGC v ISA*, but it also chimes with the reasoning of the Upper Tribunal in the *APPGER* case (at [109] note 4) and with the decision of a different panel of the First-tier Tribunal in the very recent case of *Sittampalam v Information Commissioner and the BBC* (EA/2010/0141; at [53]-[61]).

29. There is an obvious concern that the approach adopted here may give the Commissioner too much 'wriggle-room', with the result that public authorities might be too readily relieved of the need to take appropriate steps in a manner which would be inimical to the principles underpinning FOIA. To that extent I was reassured by Mr Hooper's observation that the Commissioner does not anticipate needing frequently to exercise this discretion under section 50(4), so as to decline to require the communication of requested information that should have been communicated when the public authority at issue first dealt with the request. Indeed, Mr Hooper advised me that the present case is the only one since FOIA came into force in which the Commissioner considered it appropriate to decline to require information to be communicated on the basis that a statutory bar on disclosure had come to apply between the date when the request for information was first dealt with and the date of the Decision Notice. To that extent I agree with the analysis of the tribunal in *Sittampalam* (at [60]; emphasis added):

> " … The Tribunal [in *Gaskell v Information Commissioner*] expressed a concern that the existence of what we may call a 'steps discretion' under s.50(4) would require the Commissioner in every case to consider first whether there had been a breach of FOIA at the time of the request and then to reconsider whether there would be a breach if the request were resubmitted at the date of the decision notice; this would undermine the Act by giving every reluctant public authority two bites at the cherry in every case. This is not our understanding of the situation under s.50(4). The Commissioner's general function is to enforce the Act. *In our view his steps discretion will only result in his declining to order disclosure, where disclosure was originally required under s1 but not given, in exceptional cases.*"

30. I should also note for the record that if his "steps discretion" argument did not prevail, Mr Hooper (supported by Ms Steyn) had an alternative submission on the construction of section 50(4). This was to the effect that, for example, any obligation on the Commissioner to specify such "steps" would need to be read down under section 3(1) of the Human Rights Act 1998 insofar as the disclosure of the information at issue would (at the date of the decision notice) give rise to a breach of an individual's ECHR rights. In the circumstances I do not need to resolve that question.

31. In conclusion, I agree with both counsel that the requirement under section 50(4) that the decision notice should specify the steps which must be taken by the public authority does not amount to a mandatory obligation on the Commissioner to require steps to be taken to comply with the requirements of sections 1(1), 11 or 17 in every case, although that consequence will usually follow, save for exceptional cases such as the present one. As a matter of law the mandatory element of section 50(4) is that, if the Commissioner considers that the public authority ought to take any steps to comply with those statutory requirements, then he must specify them in the decision notice, along with the defined period within which they must be undertaken.

The exercise of the section 50(4) discretion: the Upper Tribunal's analysis

32. As to the second main issue on this appeal, the Commissioner concluded that, although the section 44 exemption could not be applied retrospectively, the very fact that the statutory prohibition on disclosure (under CRCA 2005) applied to the information at the time of the Decision Notice meant it was not appropriate for him to direct any steps to order disclosure of the withheld information.

33. The FTT acknowledged that an offence would be committed **if** (the tribunal's emphasis) the disclosure of the disputed information amounted to a contravention of section 18(1) of CRCA 2005 (at [30]). However, the FTT concluded that section 44 could not be relied on as an exemption in this case because CRCA 2005 did not apply at the time of the request (at [32]). Accordingly the FTT found that the information must be treated as non-exempt information disclosable under section 1 of FOIA and that the Commissioner had exercised his discretion under section 50(4) wrongly (the FTT assuming for these purposes he had such a discretion).

34. This ground of appeal turns on the inter-action of section 44 of FOIA and sections 18, 19 and 23 of CRCA 2005. Section 44(1) of FOIA provides as follows:

> "**44 Prohibitions on disclosure**
>
> (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—
>
> (a) is prohibited by or under any enactment,
>
> (b) is incompatible with any Community obligation, or
>
> (c) would constitute or be punishable as a contempt of court."

35. Section 44, of course, is an absolute exemption (see section 2(3)(h)). It may be significant in this context that section 44(1)(a) uses the present tense, namely that disclosure "is prohibited by or under any enactment", not "was prohibited by or under any enactment". Mr Hooper and Ms Steyn submitted that at the time of the Commissioner's Decision Notice that was the case, because of section 18 of CRCA 2005. Section 18(1) provides as follows:

> "**18 Confidentiality**
>
> (1) 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."

There are various specific exceptions to sub-section (1) in section 18(2), but none arises on the facts of the present case. In addition, section 18(3) provides that "Subsection (1) is subject to any other enactment permitting disclosure."

36. In order for section 18(1) to apply three conditions have to be met on the face of the statutory provision. First, the statutory bar applies to "Revenue and Customs officials", an expression defined by section 18(4)(a). It is accepted that at the time of the Decision Notice the former Rent Service (now VOA) staff had become HMRC officials. Second, the information in question must be held by "the Revenue and Customs", as defined by sections 17(3) and 18(4)(b); again, this was not in dispute. Third, the information must be held "in connection with a function of the Revenue and Customs" (see also section 18(4)(c)); again, there was no dispute that the administration of the work of rent officers had become an HMRC function (see [11] above).

37. However, section 18 is not a stand-alone provision. As Ms Steyn pointed out, it is part of a suite of inter-locking statutory provisions under the heading "Information" in CRCA 2025. Under section 19(1) a person commits a criminal offence:

> "if he contravenes section 18(1) … by disclosing revenue and customs information relating to a person whose identity—
>
> (a) is specified in the disclosure, or
>
> (b) can be deduced from it."

Under the Interpretation Act 1978 (section 5 and Schedule 1) a "person" includes a corporate person (a company) or an unincorporated person as well as natural (or human) persons, unless the contrary intention appears. There is no such contrary intention evident in these provisions of CRCA 2005, and so "information relating to a person" could include details about a company that acts as a letting agent as well as an individual landlord or agent.

38. In addition, section 23 provides as follows:

> **"23 Freedom of information**
>
> (1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (prohibitions on disclosure) if its disclosure—
>
> (a) would specify the identity of the person to whom the information relates, or
>
> (b) would enable the identity of such a person to be deduced.
>
> (1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.
>
> (2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.
>
> (3) In subsection (1) 'revenue and customs information relating to a person' has the same meaning as in section 19."

39. It should be noted that sub-section (1A) was inserted by section 19(4) of the Borders, Citizenship and Immigration Act 2009 with effect from 21 July 2009. It was therefore in force at the time that the Commissioner issued his Decision Notice. It follows that the complex issues of statutory interpretation on the pre-amendment version of section 23 that arose in *Pricewaterhouse Coopers v HMRC*

(EA/2009/0049, currently under appeal to the Upper Tribunal under reference GIA/1205/2010) do not arise in the present appeal.

40. Notably, section 23(1) of CRCA 2005, as with section 18(1), uses the present tense. Given the nature of the requested information, there seems to me to be no answer to the proposition that the combined effect of sections 18(1) and 23(1) was that at the time of the Decision Notice that information was exempt information by virtue of section 44 (1)(a) of FOIA. The Commissioner was accordingly entitled to exercise his discretion in the way that he did – both because the fact that any request after 1 April 2009 would have been subject to the statutory bar was a relevant consideration, and because requiring disclosure after that date would on the undoubted facts of this case have required the commission of a criminal offence under CRCA 2005.

41. The only answer to that conclusion is to contend that the statutory bar on disclosure was only relevant if it was in existence at the time that the original request was made or when it was dealt with by the public authority. This was, in essence, the case for Mrs Gaskell and the position as found by the FTT. It is true that in general terms the purpose of section 44(1) is to ensure that "existing legal prohibitions on disclosure by the public authority 'trump' any rights given by [FOIA]" (P. Coppel, *Information Rights: Law and Practice*, 3rd edition (Hart Publishing, 2010), p.818 at §26-015). However, I agree with the reasoning in Ms Steyn's submission in her skeleton argument to the effect that:

> "When a public authority responds to a FOI request it should consider whether s.44 applies at the time of the response. Consequently, the Commissioner and the FTT should also look back in time to the time of the response when considering whether the public authority complied with its FOIA obligations. But it does not follow from the fact that the Commissioner, when applying s.50 of FOIA, looks back to the time of the request/response that Revenue and Customs officials, when considering whether they are prohibited from disclosing information pursuant to s.18(1) of the CRCA 2005 should also look back to that time. There is no warrant in the language of s.18(1) of CRCA for such an approach."

42. It follows that the Commissioner was entitled to consider whether disclosure would have been prohibited at the point in time when HMRC officials would have been required to take steps to disclose the information.

43. My initial impression in this case was that there was something deeply unattractive in the argument that an internal government reorganisation involving the transfer of the Rent Service from the DWP to HMRC had necessarily had the effect that a citizen's FOIA rights were effectively blocked. To that extent Mrs Gaskell's enquiries, based on her understandable concerns about the robustness of the data being used to set LHA levels, appeared to have been frustrated by the happenstance of particular dates. On closer examination, however, the position is not quite that straightforward.

44. First, at a general level, Mr Hooper advised me that he was not aware of any other cases in which a moving of the organizational and legislative goalposts had brought into play an absolute exemption on disclosure. He conceded, however, that the Commissioner anticipated that with the reorganisation of various public advisory bodies (sometimes referred to as the 'bonfire of the quangos') further such cases might emerge in the future.

45. Second, however, in the context of this particular request, HMRC had in fact disclosed a considerable body of anonymised data to Mrs Gaskell. It is true that HMRC had not disclosed the names of agents or the source of the particular information it had received about two properties in the Dawlish area, purportedly let at £38.50 a week in January 2008. Mrs Gaskell had sought to make her own enquiries and had been greeted with astonishment by local agents at the notion of such low rents, which I can certainly believe. However, at the time in question the LHA was based on the median value in the list, not the average, and the removal of two 'outliers' at the bottom of the list would not have had any impact on the LHA.

46. I acknowledge Mrs Gaskell's point that as a result of recent legislative changes LHA rates are now set, not at the median, but at the 30th percentile of rents for properties of a given size in each Broad Rental Market Area rather than the median (see Rent Officers (Housing Benefit Functions) Amendment Order 2010 (SI 2010/2836), Article 2(3)(b)). For example, if a list contains 70 rents, the rent at position number 21 would be the rent at the 30th percentile. This change – along with other significant modifications to the LHA scheme – has been the subject of considerable policy and political controversy (see e.g. the November 2010 Social Security Advisory Committee report at §4.24, p.23, and also the Second Report of the House of Commons Work and Pensions Committee, *Changes to Housing Benefit announced in the June 2010 Budget* (HC-469, December 2010) at §38-40). Those are clearly matters of great public interest, but section 44 is an absolute exemption and those considerations cannot influence the meaning attached to CRCA 2005.

47. I also note that the VOA cited a number of other exemptions, including other absolute exemptions, in its original refusal notice. Even if the provisions in CRCA 2005 had not come into play, it is entirely possible that disclosure of the requested information would have been blocked under one of those other provisions. However, for obvious reasons neither the Commissioner nor the FTT needed to examine those exemptions, and there is no need to here either.

Conclusion

48. For the reasons explained above, I allow this appeal by the Information Commissioner. The FTT decision is set aside and the Commissioner's Decision Notice confirmed (under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and section 58 of FOIA).

Signed on the original
on 20 July 2011

Nicholas Wikeley
Judge of the Upper Tribunal