



Neutral citation number: [2025] UKFTT 00915 (GRC)

Case Reference: FT/EA/2024/0472V

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

**Heard by Cloud Video Platform
Heard on: 27 June 2025
Decision given on: 02 August 2025**

Before

**JUDGE A. MARKS CBE
MEMBER N. MATTHEWS
MEMBER J. MURPHY**

Between

THOMAS ELSBURY

Appellant

and

THE INFORMATION COMMISSIONER ("Commissioner")

Respondent

Representation:

For the Appellant: Represented himself

For the Respondent: Unrepresented and not in attendance

Decision: The appeal is allowed on the basis that the Commissioner's decision dated 11 November 2024 is not in accordance with the law and/or that the Commissioner wrongly weighed the public interest in relying on a 'neither confirm nor deny' response.

Substituted Decision Notice:

**To: HM Revenue & Customs
FOIA Team Manager
Information Rights Unit
Solicitor's Office
Ruskin Square
Croydon
CRO 2WF**

email: foi.request@hmrc.gov.uk

Ref. IC-298140-V1D6 - Tom Elsbury FOI2023/100493 - IR2024/14040

HMRC must, by no later than 4pm on the date 35 working days after promulgation of this First-tier Tribunal decision reference *FT/EA/2024/0472* (or, if later, until the outcome of any appeal of that decision), state if it held the information requested by the appellant in each separate part of his request for information dated 14 December 2023 and, if it did hold it, either supply the information to the appellant by 4pm on the above-mentioned date or serve a refusal notice under section 17 of FOIA, including the grounds on which HMRC relies by 4pm on the above-mentioned date. **A failure to comply with this Substituted Decision Notice could lead to contempt proceedings.**

REASONS

Introduction

1. This appeal is against the Commissioner's Decision Notice (IC 298140-V1D6) dated 11 November 2024, which held that HMRC was entitled to refuse to confirm or deny that it holds the requested information.

2. On 14 December 2023, the Appellant had submitted a request to HM Revenue and Customs (HMRC) in the following terms:

"Under the Freedom of Information Act 2000, I am writing to request information regarding the use of Large Language Models and generative AI [Artificial Intelligence], such as ChatGPT, by HM Revenue & Customs (HMRC), specifically within the context of the 'R&D Tax Credits Compliance Team'. My request focuses on the following areas:

** Implementation Details: Please provide details on how Large Language Models are currently being used within the R&D Tax Credits Compliance Team. This should include, but is not limited to, the purposes for which these models are employed (e.g., data analysis, decision-making support, enquiry responses, penalty justifications, etc.)*

** Model Selection and Development: Information on the criteria used for selecting these models, any custom development or training undertaken, and the providers of these models.*

** Data Privacy and Security: Details on the measures in place to ensure the privacy and security of taxpayer data when using these models, including any data protection impact assessments conducted. Given the sensitive nature of R&D claims, detail should be provided if information is being uploaded relating to the claim which is then used to train language models and be available for use by private companies engaged by the Government, who own the overarching tool.*

** Outcome and Impact Analysis: Any available information or studies on the impact of using Large Language Models on the efficiency, accuracy, and overall outcomes of the enquiry processes within the R&D Tax Credits Compliance Team.*

** Policies and Procedures: Information on the policies and procedures governing the use of these models, including guidelines on human oversight and ethical considerations.*

** Future Plans: Details on any planned expansions or changes in the use of Large Language Models within the R&D Tax Credits Compliance Team or other departments within HMRC."*

3. HMRC responded on 8 January 2024, confirming that it holds the information requested but was withholding it under section 31(1)(d) FOIA (prejudice to the assessment or collection of tax or duty).

The internal review and response

4. On 9 February 2024, the Appellant asked HMRC to carry out an internal review.
5. Only after the Appellant had complained to the Commissioner on 2 April 2024 (see below) did HMRC provide the outcome of that internal review on 24 May 2024 maintaining its original position, namely reliance on s.31(1)(d) FOIA to refuse to comply with the request.-

Complaint to the Commissioner

6. On 2 April 2024, the Appellant complained to the Commissioner about HMRC's handling of his request.

7. In his complaint, the Appellant challenged HMRC's position and asked for his request to be dealt with in an expedited manner, and additionally sought a full response to his request for an internal review (see above, provided by HMRC on 24 May 2025).

Commissioner's investigation

8. During the Commissioner's investigation, HMRC stated in its letter to the Commissioner dated 3 September 2024 that it had *"considered whether to reverse or amend its position. Having done so, I regret to advise that the response to the request was incorrect... I have determined that the department should have in fact relied upon s. 31(1)(3) [sic] with reference to s.31(1)(d)."*
9. HMRC went on to explain that it was relying on the "neither confirm or deny" (NCND) exclusion in s. 31(3) FOIA. HMRC stated that it recognised the general public interest in promoting transparency, accountability and wider understanding surrounding public authorities - and that publishing the requested information would, on the face of it, reassure the public that its compliance activities are fair, robust and applied equitably.
10. However, HMRC also stated that the level of information in the public domain on R&D tax relief compliance satisfies the requirement for transparency and accountability which adequately facilitates public debate on the matter. HMRC stated its belief that there is no additional interest in disclosing information which puts its compliance activities at risk when the subject has already been openly discussed and confirmed through a variety of platforms.
11. HMRC concluded by saying that it was *"in no way dismissive of the public interest...nor impact which fraudulent claims of R&D tax relief have had so far on the public purse... the requirement to protect the public purse from any further abuse than it has already been subject to outweighs the public interest in disclosure of the requested information."*

The Decision Notice

12. On 11 November 2024, the Commissioner issued his Decision Notice.
13. In summary, the Commissioner concluded that HMRC confirming or denying whether it held the requested information would assist those intent on defrauding the system, which would in turn prejudice the collection of tax. The Commissioner then considered the public interest and, whilst he gave appropriate weight to the clear public interest in transparency in the information sought, he concluded that the public interest in maintaining the exemption was stronger.

Appeal to the Tribunal

14. On 4 December 2024, the Appellant sent a Notice of Appeal to the Tribunal, challenging the Decision Notice.
15. The Appellant submits that the Decision Notice was wrong in law and also that the Commissioner ought to have exercised his discretion differently when deciding, having taken into consideration the public interest in disclosure of the requested information, that HMRC was entitled to rely upon s.31(3) FOIA.
16. In summary, the Appellant submitted:

Error of law

(a) The Notice misapplied the "prejudice" test in s.31(3) FOIA by relying on speculation rather than concrete evidence of:

i. any causal link:

HMRC failed to substantiate its claim that merely confirming or denying the use of Large Language Models (LLMs) would enable fraud.

ii. real, substantive harm

HMRC's refusal to disclose the requested information disregards the role of public oversight of artificial intelligence (AI) usage in highlighting flaws or abuses of the system, reducing opportunities for actual fraud: openness enhances security rather than undermines it.

Wrongful weighing of the public interest

(b) The Notice downplays the significant public interest in transparency in:

i. public confidence

The use of AI in sensitive contexts like tax compliance gives rise to concerns about the sensitive intellectual property which is often disclosed in a claim for R&D relief. Transparency is also critically important in the use of AI in government functions, especially where taxpayer rights and compliance mechanisms intersect.

ii. enhancing compliance through clarity

Public understanding of HMRC's AI strategies could deter non-compliance: clear guidance on the use of AI tools fosters trust and innovation, ensuring businesses understand and comply with tax relief policies.

iii. countering misinformation

Lack of transparency breeds speculation and distrust. Disclosure of the requested information would counteract fears of unfairness, privacy violations, inaccuracies, "hallucination" (which is prevalent with LLMs and AI) and would ultimately promote confidence in the tax system.

iv. ICO's own Guidance on AI

ICO's own guidance emphasises accountability and transparency in AI deployment. The Notice fails to reconcile this approach with HMRC's secrecy on this topic, creating a conflict that undermines public trust in regulatory practices.

(c) Overall, the Commissioner misjudged the balance of public interest by accepting the public interest in avoiding fraud yet giving inadequate weight to the societal benefits of transparency, particularly when AI's role in decision-making is a pressing concern globally.

Procedural failures

(d) HMRC's handling of the request, including delays and reversals, highlights procedural issues that warrant scrutiny, and undermines FOIA's intent to promote transparency and public accountability:

i. delays

HMRC took far longer than it should have done to respond to the Appellant's review request, namely 95 working days rather than the ICO's guidance of no longer than 20 working days in most cases or 40 days in exceptional circumstances.

ii. reversal of position

HMRC's initial acknowledgement that it holds the information followed by a reversal to a NCND position is both inconsistent and disproportionate, raising questions about procedural fairness and adherence to FOIA principles.

17. The Appellant invites the Tribunal to set aside the Notice and substitute it with a decision notice which requires HMRC to disclose the information requested.

The Law

General Right of access to information held by public authorities

18. Section 1(1)(b) of FOIA imposes a duty on a public authority, in response to a request, to provide information held by it. By virtue of section 2(2)(b) of FOIA, the duty does not extend to information if it falls within an absolute exemption, or within a qualified exemption and "*the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".

Exemptions claimed in this case - s.31 (Law enforcement)

19. In this case, the exemptions claimed are set out in sections 31(1)(d) and 31(3):

s. 31(1) Information...is exempt information if its disclosure under this Act would, or would be likely to, prejudice --

...

(d) the assessment or collection of any tax or duty...

s.31(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in sub-section (1).

20. The Court of Appeal in DWP v Information Commissioner [2016] EWCA Civ 758 (at paragraph 22) approved the approach of the Tribunal in Hogan and Oxford City Council v Information Commissioner {2011} 1 Info LR 188 as a correct statement of the approach to determining "prejudice".

21. In summary, the prejudice test in relation to s. 31 FOIA comprises three limbs:

- (a) which interest(s), protected by section 31, could be harmed by the disclosure?
- (b) is the harm "real, actual or of substance" and is there a causal link between disclosure and that harm?
- (c) what is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?

22. Section 31(3) FOIA is a qualified exemption to disclosure and is therefore also subject to the public interest test under s. 2(2)(b) FOIA. This states that a public authority does not have to provide the information if “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*”.

The role of the Tribunal

23. The Tribunal has the following powers when determining appeals against the Commissioner’s decisions for the purposes of FOIA.

Section 57 FOIA: Appeal against notices...

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

Section 58 FOIA: Determination of appeals

(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 the 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.

24. The effect of section 58 is that the right of appeal to this Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority’s response to the FOIA request is in accordance with Part I of FOIA (Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29, at §45-46 and §90).

25. The Upper Tribunal in Montague v Information Commissioner and DIT [2022] UKUT 104 (AAC), at §86 decided “...*the public authority is not to be judged on the balance of competing interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part I of FOIA to make.*” In the current appeal, HMRC refused the request on 8 January 2024. It is therefore at that date that the public interest balance must be assessed.

Evidence

26. The parties had submitted written evidence to the Tribunal prior to the hearing, comprising an Open Bundle of 89 pages (including indices). The panel additionally had access to a Closed Bundle.

27. The Appellant gave evidence and made submissions at the hearing. The Information Commissioner was neither present nor represented at the hearing.

Submissions

Summary of written submissions on behalf of the Commissioner

28. The Commissioner relies on the Notice and HMRC's submissions during his investigation. The Commissioner's observations on the Appellant's Grounds of Appeal were as follows:

(a) The prejudice test

i. The Commissioner accurately referred to the requirements for the prejudice test in the Notice and remains satisfied with HMRC's submissions in that regard. The Commissioner said he would be "*consulting with HMRC to ascertain what, if any, of those submissions can appear in the open hearing bundle.*"

(b) Public Interest Test

i. The Commissioner notes that there is no explicit presumption in favour of disclosure under FOIA. Where the public interests in favour of, and against, disclosure are evenly balanced, the information ought to be disclosed according to the Court of Appeal decision in Department of Health v IC and anor [2017] EWCA Civ 374 at § 46.

ii. The public interest factors advanced by the Appellant, both during the Commissioner's investigation and on appeal are, in the Commissioner's submission, insufficient to outweigh the stronger public interest in either confirming or denying whether the information is held in this case as set out in the Notice and in HMRC's submissions. Ultimately, the Commissioner considers the public interest to be better served by not prejudicing the collection of tax as a result of confirmation or denial.

iii. The "open" public interest factors advanced by HMRC and largely adopted by the Commissioner in his Notice are (in summary):

In favour of disclosure

- (a) With the current increased coverage, there is public interest in artificial intelligence and machine learning systems in place in government systems, used in the course of discharging HMRC's duties as the UK's tax, payments and customs authority;
- (b) HMRC is in no way dismissive of the public interest and concerns surrounding this matter, nor the impact which fraudulent claims of R&D tax relief have had so far on the public purse;
- (c) there is a general public interest in promoting transparency, accountability, and wider understanding surrounding public authorities, and FOIA is a means of satisfying this public interest;
- (d) there is a need to demonstrate robust yet proportionate and effective actions which will stand the test of public scrutiny; and
- (e) there is a strong public interest in ensuring that HMRC is as transparent as possible about its activities, and that publishing the requested information would, on the face of it, reassure the public that its compliance activities are fair and robust and applied equitably.

In favour of maintaining the exemption

- (f) The level of information in the public domain on R&D tax relief compliance satisfies the requirement for transparency and accountability which adequately facilitates public debate on the matter;
 - (g) there is no additional interest in disclosing information which puts its compliance activities at risk when the subject has already been openly discussed and confirmed through a variety of platforms;
 - (h) releasing details about HMRC's projects, processes and technologies could provide potential opportunities to evade these controls by exposing HMRC's methods and where it is focusing its resources. This would therefore prejudice the assessment or collection of any tax or duty;
 - (i) disclosing the information requested would likely influence or assist those considering, or intent on, not paying the right amount of tax at the right time and that is not in the public interest;
 - (j) disclosing the requested information also has the potential to undermine both current and future compliance activity. Anything that puts at risk HMRC's compliance activities could undermine public confidence in the tax system. This could damage the general climate of honesty among the overwhelming majority of taxpayers, who use the system properly, and that is not in the public interest; and
 - (k) releasing the data requested risks prejudicing future tax collection and HMRC consider that this risk outweighs any benefit to be gained in terms of public good through the provision of details.
- iv. The "closed" public interest factors advanced by HMRC and relied on by the Commissioner are set out in the confidential annex to this decision. The 'gist' of these factors is that they comprise a more detailed explanation of HMRC's reasoning for maintaining its NCND stance.

Summary of written and oral submissions by the Appellant

29. In addition to the submissions in his Notice of Appeal, the Appellant made the following submissions in support of the requested information being disclosed:

Background

- (a) As the founder of a business which specialises in Research & Development (R&D) tax relief, the Appellant often works with would-be applicants for such relief and their advisers. Some have shared correspondence from HMRC with tell-tale signs of AI usage such as American spellings and use of the "em-dash" punctuation mark. Moreover, the content of some HMRC letters - while framed convincingly - does not align with the relevant facts.
- (b) The above has triggered concerns in the industry, as has the increasing frequency of inquiries into R&D applications. The Appellant wonders whether HMRC Officers are making errors and misjudgements; or whether they are using generative AI without proper authorisation or training, perhaps using inappropriate prompts such as "reject with

reasons" to write letters to taxpayers. Some of the letters taxpayers receive are nonsensical.

- (c) Further, if HMRC is using such AI, what safeguards are there around transparency, security (especially bearing in mind the intellectual property inevitably involved in Research & Development claims) as information fed into LLMs is used to "train" them; and is HMRC using its own AI configuration or modifications of the existing models? There are huge risks to R&D in the UK if legitimate and sensitive information given to HMRC is being used insecurely.
- (d) The Appellant's request was not purely personal or professional curiosity but in the public interest of the wider community in sufficient transparency to understand how taxes, penalties, and reliefs applications are being dealt with by HMRC and how the confidentiality of taxpayers' affairs is being protected and kept secure.
- (e) Speculation is mounting in the industry that, whether HMRC admits or not, AI is being used, either as a legitimate policy decision (though this gives rise to security and other concerns) or by rogue HMRC Officers (where the concerns are even greater).
- (f) Further context is that publicly available statistics from HMRC show that R&D tax relief claims in 2022-23 (the latest published figures) were 66,000 which represents a significant drop from 80,000-90,000 in the years before. This still amounts to billions of pounds' worth of claims, some of which were undoubtedly abusive or even fraudulent.
- (g) However, there are still many tens of thousands of legitimate claims but applicants are being discouraged from applying because making claims is complex; the science and technological R&D has to be explained to HMRC Officers in terms they can understand; and the frequency of HMRC challenges has recently increased from 2-5% to around 20%.
- (h) All these features are discouraging genuine applicants for applying, especially those dealt with by the ISBC unit within HMRC which deals with small business compliance. This unit deals with around 80% of the total applications.
- (i) ISBC applicants must use a central HMRC email address (rather a named HMRC caseworker as larger companies do) with no individual's name stated on correspondence nor any contact details. This results in cases - and challenges - being dealt with by multiple HMRC staff which is repetitive, frequently inconsistent and exasperating for applicants, especially when they then receive incomprehensible, seemingly AI-generated letters from HMRC.
- (j) Moreover, if ISBC challenges a claim, everything is dealt with in writing rather than by telephone or meetings. This is time-consuming, slow and stressful - especially as the applicant being challenged may ultimately face repaying tax relief previously granted plus penalties and interest.

The prejudice test

Applicable interest

- (k) It is accepted that HMRC's collection of tax is the applicable interest when considering the s. 31(1)(d) FOIA exemption claimed as the basis of withholding the information.

Causal relationship

(l) However, neither HMRC in its submissions nor the Commissioner in his Notice or Response to this appeal has produced any evidence let alone discharged the "*evidential burden*" of showing that some causal relationship exists between the potential disclosure and "*real, actual or of substance*" prejudice. HMRC has merely identified an unsubstantiated theoretical risk on which the Commissioner has relied.

Risk of prejudice

(m) Likewise, neither HMRC nor the Commissioner has established - merely asserted - that there is "*a very significant and weighty chance of prejudice ... such that there 'may very well' be prejudice...even if the risk falls short of being more probable than not*".

The public interest

(n) Overall, the result is that - despite HMRC's own statement that R&D tax relief is "*designed to incentivise R&D in companies*"- the way the scheme is being administered is undermining and actually discouraging genuine applicants, as well as likely reducing small companies' investment in R&D for which they are entitled to tax relief yet are increasingly reluctant to apply.

(o) The Appellant is aware of cases where small businesses with R&D tax relief claims worth between £5,000-£10,000 are choosing to repay the relief with interest rather than incur the time, stress and legal fees in responding to HMRC's seemingly AI-generated correspondence and enquiries.

(q) The balance of the public interest lies in disclosing the information requested.

Conclusions

(r) Both industry and public confidence in HRMC's method of administering R&D relief is being undermined by evidence suggesting that AI is being used to assess and reject R&D relief claims. Disclosure of the requested information would either allay these fears or provoke public debate about the proper and secure use of AI for the important task of assessing and collecting tax and, where appropriate, challenging and rejecting claims for relief.

Discussion

The facts

30. The panel first considered the relevant facts of this case. As the Commissioner chose neither to attend nor be represented at the hearing, the Commissioner did not have the benefit of hearing oral evidence and submissions from the Appellant, nor avail himself of the opportunity to challenge that evidence or respond to submissions. None of the evidence presented to the panel was disputed on the papers or at the hearing.

31. Based on all the evidence provided, the panel made the following findings of fact on the balance of probabilities.

(a) HMRC first informed the Appellant that it holds the requested information but relied on the exemption in s. 31(1)(d) FOIA.

- (b) Following an internal review, HMRC maintained the above position.
- (c) It was only during the Commissioner's investigation that HMRC changed its position to rely on the NCND provision in s. 31(3) FOIA based on s. 31(1)(d) FOIA.
- (d) While HMRC claimed that information widely available in the public domain is sufficient to satisfy public interest and debate about its use of AI, the Commissioner had not seen any information in the public domain that undermines HMRC's NCND stance in relation to the R&D Tax Credits scheme.
- (e) HMRC has not provided any evidence to support its NCND position, instead relying on submissions (some of which are elaborated upon in its 'closed' submissions) that:
- i. NCND is the appropriate response to the Appellant's request;
 - ii. there is a causal relationship between disclosing the information and "*real, actual or of substance*" prejudice as claimed; and
 - iii. there is a "*very significant and weighty chance of prejudice ... such that there 'may very well' be prejudice*" were the requested information to be disclosed.
- (f) R&D tax reliefs support the government's aim of increasing UK spending on R&D to 2.4% of GDP by 2027.
- (g) The reliefs are designed to incentivise R&D in companies who can claim R&D tax relief for qualifying activities which will reduce their tax bill and/or result in a payable tax credit.
- (h) As the relief generates tax repayments, it is an attractive target for criminals and wider non-compliance.
- (i) Correspondence received from HMRC by claimants of R&D relief indicates use of AI.
- (j) This, coupled with an increasing frequency of inquiries into R&D relief claims, has triggered taxpayer concerns and distrust of HMRC in this area, especially around the security of sensitive R&D information shared with HMRC.
- (k) Particularly serious concerns are that if AI is not legitimately being used by HMRC officers, perhaps some officers are using open-source AI which gives rise to even greater risks of insecure handling of claimants' confidential R&D information.
- (l) Combined, these factors risk discouraging legitimate claimants - particularly those in small businesses - from applying for the relief, thus undermining its very purpose of incentivising businesses to invest in R&D activities and thereby innovate.

Error of law or wrongful exercise of discretion

32. Having made the above findings of fact, the remaining issues for the panel in this appeal were (a) whether the Notice was not in accordance with the law and (b) to the extent that the Notice involved an exercise of discretion by the Commissioner, whether he ought to have exercised his discretion differently.

Is there an error of law in the Commissioner's Decision Notice?

33. The Appellant submits there are errors of law in the Notice namely:
- (a) the Commissioner has not demonstrated a causal link between disclosure of the requested information and the alleged prejudice that would be caused; and
 - (b) the Commissioner wrongly concluded that HMRC could rely on a NCND response under s.31(3) FOIA despite having first responded (and then confirmed in response to a review request) that information is held.
34. On (a), the panel agrees with the Appellant's submissions for reasons set out in the confidential annex to this decision.
35. On (b), the panel considers HMRC's reversal of its position as untenable, having not once but twice confirmed that it held the requested information. Belatedly claiming that its correct response should have been to rely on s.31(3) FOIA to neither confirm nor deny whether it holds the information is, in the panel's judgment, beyond uncomfortable and like trying to force the genie back in its bottle.
36. In case the panel is wrong in its conclusions above, the panel has gone on to consider the parties' respective submissions and (in, the Appellant's case, evidence) about the public interest and then weighed up where the balance of the public interest lies.

Did the Commissioner exercise his discretion wrongly?

37. The panel went on to consider whether the Commissioner exercised his discretion wrongly: namely whether he was correct in concluding that the significant public interest in HMRC maintaining its refusal to confirm or deny that relevant information is held outweighs the public interest in HMRC responding to the request.
38. The panel notes that the parties agree that there is a public interest - meaning the public good rather than what is or might be of interest to the public - in:
- (a) promoting transparency, accountability and wider understanding surrounding public authorities, and that FOIA is a means of satisfying this public interest;
 - (b) HMRC being as transparent as possible about its activities;
 - (c) knowing about the usage of AI, owing to its potential to pose a high risk to individuals and their rights and freedoms - a particular priority of the Commissioner;
 - (d) protecting the public purse from abuse such as fraudulent tax relief claims; and
 - (e) supporting HMRC's compliance activities.
39. However, the parties disagree about other public interest factors, and where the balance of the public interest lies.
40. In essence, the Commissioner accepted in his Decision Notice HMRC's argument that to confirm or deny whether it held the information would prejudice its ability to collect tax. This, the Commissioner found, attracts considerable weight since it is of significant public interest to protect the public purse from fraudulent activity. Ultimately, the Commissioner concluded that "*ambiguity around the information held (or not held)*" by HMRC makes it more difficult for

those who intend to commit fraud to be confident of their chances of success and this acts as a powerful deterrent.

41. In the panel's view, however, the Appellant's submissions on the public interest in transparency summarised in paragraphs 16(b) and 25 above, have considerable force.

42. For example, based on the Appellant's submission that legitimate claimants are abandoning claims due to their distrust of the responses and inquiries they are receiving from HMRC, it seems to the panel plausible that the apparent reduction in the number of R&D claims in the recent past is as much due to the disincentive of applying for R&D relief - or even carrying out R&D in the first place - as it is the result of deterring fraudsters. If the former is true, then the fall in the number of annual R&D relief claims is contrary to the UK government's policy of encouraging R&D.

43. Secondly, in view of the Commissioner's own finding that there is no information in the public domain which undermines HMRC's NCND stance, HMRC has in the panel's view not satisfied the requirement for transparency and accountability so as to facilitate public debate on the matter of HMRC's use (or not) of AI and LLMs in respect of R&D tax relief.

44. Overall, for reasons explained in more detail in the confidential annex to this decision, the panel agrees with the Appellant's arguments that the Commissioner over-emphasised the (unsubstantiated and unevidenced) risks of causing an increased incidence of fraud in R&D tax relief claims and gave inadequate weight to the societal benefits of transparency.

45. We also agree with the Appellant's argument that transparency on HMRC's part is particularly important when AI's role in decision-making is a pressing concern globally. The Appellant supported his arguments with evidence which neither the Commissioner nor HMRC have challenged, and on which we have made factual findings. We therefore consider that the public interest factors advanced by the Appellant collectively outweigh those made by the Commissioner for supporting HMRC's NCND stance.

46. In short, the panel found compelling the Appellant's submissions that HMRC's failure either to confirm or deny it holds the requested information reinforces the belief based on indicators in HMRC correspondence dealing with R&D claims that AI is being used by HMRC officers - perhaps in an unauthorised manner - thus undermining taxpayers' trust and confidence in HMRC's treatment of claims, in turn discouraging legitimate claimants from making claims thereby hindering the policy objectives of the R&D tax relief scheme itself.

Conclusion


47. For the above reasons, the panel finds that the Commissioner's Decision Notice involved both errors of law and wrongful exercise of his discretion within the meaning of s.58 FOIA.

48. Accordingly, this appeal is allowed.

49. A substitute Decision Notice is set out at the start of this decision.

50. As the substituted Decision Notice requires HMRC to respond to the request for information, to preserve the right to any further appeal, HMRC's "closed" submissions and the confidential annex to this decision remain confidential under GRC Rule 14 for 35 days from promulgation of this decision or, if later, until the outcome of any appeal of this decision.

51. Finally, the Tribunal's jurisdiction is limited by s.57 FOIA to complaints about decision notices rather than the Commissioner's (or public authorities') procedures. For this reason, the panel did not make any findings on the Appellant's complaints about the procedural matters summarised in paragraph 17 (d) save to the extent otherwise indicated in this decision.

Signed: 

Date: 31 July 2025

Alexandra Marks CBE
(First-tier Tribunal Judge)