IN THE MATTER OF AN APPEAL TO
THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
GENERAL REGULATORY CHAMBER

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50254787
Dated: 6 December 2010

Between

Appellant: Robert Brown

Respondent: Information Commissioner

2nd Respondent: The Attorney-General

Heard in public in London on: 11 and 12 July 2011

Decision Date: 26 August 2011

Before

David Marks QC
Jean Nelson
John Randall

SUBJECT MATTER: Section 37 Freedom of Information Act (see communications with Her Majesty, etc): section 41 Freedom of Information Act (see confidential Information)

Representation: For the Appellant: The Appellant in Person
For the Commissioner: Robin Hopkins
For the Attorney-General: Jonathan Swift QC

DECISION

The Tribunal upholds the decision of the Information Commissioner in his Decision Notice dated 6 December 2010 under reference no: FS50254787 for the reasons hereafter given and the Tribunal thereby dismisses the Appellant's appeal.

REASONS FOR DECISION

Introduction

1. This appeal concerns a set of factual circumstances which could be described as unique. As far as the Freedom of Information Act 2000 (FOIA) is concerned, it concerns two exemptions, although one only was the subject of the Decision Notice in this case. The first exemption is section 37 which provides in relevant part and at the material time with which the facts in this appeal are concerned under the heading "Communications with Her Majesty, etc. and honours":

   "37(1) Information is exempt information if it relates to –

   (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household …"

   Section 37(1) is a qualified exemption. The relevant public interest therefore has to be addressed.

2. Although the Commissioner's Decision Notice made no determination about the following exemption, the same has been considered in relation to the content of this appeal and arises out of section 41 of FOIA which deals with "Information provided in confidence" and which provides in relevant part, namely:

   "(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise and under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

3. The appeal arises out of the manner and the process with regard to which Royal Wills (a term which will be considered and explained further below) are to be dealt with or "handled" in the words of the relevant request and in particular the manner in which Royal Wills were and are to be sealed. The stated primary objective of the process was and is expressly stated to be the protection of the privacy of the Sovereign. The request sought what was described as a "Practice Direction in respect of the handling of Royal Wills".

4. The Tribunal feels bound to add that the issues which it has had to address have not been entirely clarified or even assisted by what on any view can be regarded as a change or series of changes in the arguments and contentions put forward by the Appellant, both in writing and in his oral submissions before the Tribunal. To some extent this is understandable given the concern which the Appellant has experienced in connection with proceedings pre-dating this appeal and the Commissioner's Decision Notice. As will be made clear below, these concerns have largely grown out of what can in general terms be called the driving motive behind the Appellant's application in previous litigation as well as in relation to this appeal. However, this is clearly a case where even on the Appellant's own admission, it should be emphasised that motive, whatever else that term may mean, simply has no part to play in relation to the issues arising on this appeal. The background to this appeal which is by no means a straightforward one, will show to what extent questions of motive and the Appellant's own particular concerns have intruded upon the factual background in relation to the request. Nonetheless, some of the contentions made by

the Appellant were of a very wide sweep and although the Tribunal was during the course of the appeal inclined to allow the Appellant to present them as clearly as possible, they were in the end, of little, if any, assistance to a resolution of the key issues on the appeal.

5. The critical issues will be set out in further detail below. For present purposes, it is sufficient to state that in general terms they can be described as follows. First, with regard to section 37, the question was whether the information sought to be disclosed fell within the type of information covered by the exemption. In particular, the Appellant contended that the information requested contained a form of Practice Direction, as that term is commonly normally understood in the context of legal proceedings. Moreover, the Appellant claimed that whatever precise form the alleged Practice Direction could be said to assume, it represented a document or instruction which was unconstitutional and thereby in any event went beyond the scope of section 37.

6. Second, and on the assumption that section 37(1) was otherwise properly engaged, the Appellant claimed that the competing public interests militated in favour of disclosure.

7. Third, although not material to the Tribunal's ultimate finding that the Decision Notice should be upheld and the appeal dismissed, the Appellant contended that the information which was sought to be disclosed was not in any sense confidential information and thus was also outside the scope of the other relevant exemption, namely section 41 of FOIA.

8. The Tribunal has carefully considered the requested information and has heard evidence regarding the same, as well as submissions, in closed session. However, for reasons which will become clear, it does not feel it appropriate to issue a closed judgment in this case, being entirely satisfied, as it is, that the issues can be determined on the basis of the submissions made in open session.

Background

9. The Appellant contends, though not as a formal part of his submission on this appeal, that he is the illegitimate son of the late Princess Margaret. The late Princess died in February 2002. Her late mother, Queen Elizabeth, the Queen Mother, died in early March of the same year. Section 124 of the Supreme Court Act 1981 (now The Senior Courts Act 1981) as amended, provides that:

"All original wills and other documents which are under the control of the High Court in the Principal Registry or in any District Probate Registry shall be deposited and preserved in such places as may be provided for and directions given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and any wills or other documents so deposited shall, subject to the control of the High Court and probate rules, be open to inspection."

10. Section 125 provides as follows, namely:

"An office copy, or a sealed and certified copy of any will or part of a will open to inspection under s.124 or of any grant may, on payment of the fee prescribed by an order under s.92 of The Courts Act 2003 (Fees) be obtained –

(a) from the registry in accordance with s.124 the will or documents relating to the grant are preserved; or
(b) where in accordance with that section the will or such documents are preserved in some place other than a registry, from the Principal Registry; or
(c) subject to the approval of the Senior Registrar [Senior District Judge] of the Family Division from the Principal Registry in any case where the will was proved in or the grant was issued from the district probate registry."

11. Section 127 provides for rules of court to be made in relation to probate. These rules are, for present purposes, known as the Non-

Contentious Probate Rules (NCPR). Rule 58 of the NCPR provides as follows, namely:

"An original will or other document referred to in section 124 of the Act shall not be open to inspection if, in the opinion of a [District Judge or Registrar], such inspection will be undesirable or otherwise inappropriate."

12. In the 30th edition of a leading treaties on probate, namely **Tristram & Coote's Probate Practice (2006)**, at paragraphs 4.247–4.249, the following passage occurs, namely:

"**Will of member of the Royal Family**

4.247 On the death of a member of the Royal Family, it is usual for application to be made to the President of the Family Division for an order that the will be sealed up. Application for such an order is made by summons, which is served on the Treasury Solicitor. The will and HMRC account are examined by an official of the Capital Taxes Office before the papers to lead the grant are lodged.

4.248 No copy of the will is annexed to the grant of probate: the grant bears a notation "probate granted without annexing a copy of the will by order of the President dated ..." the usual records of the grant are kept.

4.249 After the will has been sealed up it can be opened only by direction of the President."

13. It appears that the provisions set out in the above quoted passage were followed in the cases of the late Queen Mother and of Princess Margaret herself.

14. By summons dated 3 May 2006, the Appellant sought a direction for the unsealing of the Wills of those two last mentioned members of the Royal Family. The relevant executors were named as Defendants as

was the Attorney-General who is the 2nd Respondent to the present appeal. The matter came before the then President of the Family Division, Sir Mark Potter. The President's judgment is dated 5 July 2007. The neutral citation number is [2007] EWHC 1607 (Fam).

15. The learned President explained that the Wills were under the control of the High Court in the Principal Registry having been sealed up following upon orders made by the former President on 10 April and 19 June 2002 respectively on applications made by the executors. The orders were made in similar terms. The executors had permission to seal up the Wills. No copy was therefore made for the records or was kept in the court files. Neither Will was therefore to be opened without the consent of the President of the Family Division for the time being. It should be mentioned here that is has long been established that the Will of the Sovereign is not subject to probate.

16. The Appellant claimed in a manner which foreshadowed the contentions before this Tribunal, that it was in the public interest that the two Wills be accessible to public inspection, on the same basis as other wills. By his Leading Counsel, he contended that considerations of privacy were an insufficient reason for any form of exemption "when measured against the public interest" (see judgment at paragraph 3). In addition, he claimed that his present interest as the claimed illegitimate child of the late Princess meant that he had a particular interest in unsealing and inspecting the Wills in order to advance or establish his claim (ibid). At paragraph 41 of his judgment, the learned President also pointed out that the NCPR provide no guidance on the facts or circumstances which might be "apt" to justify a decision to close or seal a will from public inspection. However, the learned President pointed out that it was to be presumed that the power to do so "is concerned with considerations of privacy and a perceived necessity in particular cases to protect from harm, harassment, intrusion or publicity of those who are beneficiaries, potential beneficiaries or otherwise interested under the will or who, for other

reasons, may be adversely affected if the provisions of the will are open to public inspection." He went on to add that: "Equally, it is to be presumed that, in relation to such a decision, those considerations of privacy fall to be weighed against the manifest general statutory presumption in favour of openness in respect of all wills subject to probate."

17. At paragraph 43, the President reverted to the particular position which pertained with regard to Royal Wills as reflected in the passage quoted above from **Tristram & Coote** supra. The President stated that he "lacked knowledge" of the matters which had been placed before the former President on the basis of which the sealing applications were made and decided. However, he went on to say the following, namely:

" … but, given the presence of the executors on one side putting the case for privacy and the Attorney-General on the other as representative of the public interest, I have no reason to doubt that, in coming to a decision, the former President would have had placed before her and would have taken into account the considerations which I have mentioned at paragraph 41 above."

18. In all the circumstances, the President refused to accede to an application to "unseal" the Wills. He noted that the terms of the former President's order were that the Wills should not be opened "without the concurrence of the President of the Family Division" for the time being. He therefore concluded at paragraph 53 of his judgment that she had envisaged and:

"… intended to provide for, the possibility of future application by any individual member of the public or an institution with grounds to assert a claim or interest under the will, or otherwise able to demonstrate substantial prejudice suffered by reason of the sealing orders, such as to render it "desirable or appropriate" that inspection should be permitted on application made to the President. I am clear that she was right to make such a proviso. Once an order has been made

under Rule 58, there is no provision in the NCPR, nor so far as I am aware is there any guidance to be found in the RSC (or CPR), affording a specific remedy to a member of the public whose private rights or interests are adversely affected by the making of such an order, but who has had no opportunity to bring such rights or interests to the attention of the court at the time of its order so as to enable the court to make special provision or reservation in that respect if it appears appropriate to do so. Nor is the remedy of appeal of judicial review available in respect of such an order."

19. As for the alleged private interest relied upon by the Appellant, the President said it was apparent from his own affidavit that such an interest was "illusory" (see paragraph 55). That in turn failed to justify the Appellant relying upon Articles 8 and 10 of the European Convention on Human Rights.

20. In the light of his findings, the learned President struck out the Appellant's claim as vexatious and as an abuse of process.

21. The Tribunal was provided with a transcript of the hearing before the learned President which occurred on 27 March 2007. In exchanges between Leading Counsel for the executors and the court, the learned President indicated that he felt "very under-informed about the whole basis on which this jurisdiction has been exercised in the past". He was informed that the executors did not wish to bring into the public domain certain documents, such documents being referred to in argument as consisting of a summons, an affidavit and "the practice direction", an expression to be found on page 12 of the relevant transcript at paragraph (f). The President remarked that he had never heard of a practice direction that was not in the public domain. Leading Counsel for the executors then said that "direction" "may be the wrong word, but in practice agreed with the then President of the Family Division".

22. The Appellant then appealed against the learned President's decision. On 17 December 2007, the parties by their Counsel, appeared before a two-judge Panel of the Court of Appeal to set aside an earlier direction made in relation to the appeal that Counsel agree upon the admission of further evidence. The executors, by their Leading Counsel, sought to set aside that direction. It is perhaps important at this stage to set out the relevant exchanges from the transcript which again has been made available for the purposes of this appeal. At page 6 of the transcript and at line 5 in answer to a question posed by the court as to who the parties were to the process described as the "the procedural review during the reign of the former President", Leading Counsel for the executors answered as follows, namely (see line 8):

"It was essentially, my Lord, between the Palace and my instructing solicitors, on the one hand, and the Treasury Solicitor, the Attorney General Secretariat and the Attorney General on the other. So they were the basic parties to the review looking at the entire practice, because it is the Attorney General who protects the public, and so you've got a question of a proper balance to ensure that it is only in proper cases that applications are made, and to agree what is a proper procedure."

The court then characterised the above process as a "sort of consensus". In further answer to that observation and to related observations, Leading Counsel for the executors at line 39 of page 6 stated the following:

"That is my understanding. The actual correspondence, until the final correspondence was with probably a Senior District Residential Judge, but the correspondence indicates him seeking the views of the President. So it was done informally through a lower officer of the court but in formal consultation with the President, then getting to a position which was thought did provide a proper balance, proper checks and proper procedure and then that is recorded properly in writing and is put to the President to either approve or not approve as she saw fit.

She approved the procedure. I should make it quite clear, my Lord, that what she approved – and it is quite clear, if we have to disclose it we have to disclose it, a letter – was the procedure. She did not pre-commit herself to the sealing of any will. But what it did mean, that when she came to consider the actual applications, of course, she had a lot more background and understanding of the background of the procedure and the history than the court would otherwise have had."

23. In the event, the Court of Appeal ruled by a short judgment issued on 17 December 2007 that the "cardinal and probably only issue with the Court of Appeal on 21 January is whether the President was right to conclude the complainant had no locus." This was with reference to the forthcoming appeal advanced on the substantive basis against the learned President's former order that the application should be struck out.

24. Pausing here, it should also be observed that in a later exchange than the one quoted above at paragraph 22 between Leading Counsel for the executors and the court, the question was asked by the court whether the procedural review or procedure referred to in the quoted passage above, resulted in some sort of consensus, an echo of a point already indicated above. Leading Counsel for the executors then answered that this consensus and/or procedural review "did find expression in a quite lengthy document which was put to the former President for review." The court also asked whether, and if so to what extent, the term "Practice Direction" which had been alluded to before the learned President had any meaning and if so, what. At page 10, at the beginning of line 6, the following exchange took place between Leading Counsel for the executors and the court, namely:

"**Leading Counsel:** That is the expression which, perhaps rather unfortunately, is given to this practice. But is a practice which embraces the whole question of the checks and balances for this process of sealing Royal wills. Within it there is something which does indicate –

The Court: So when you refer to "the Practice Direction" you were actually referring to the consensus that had emerged from the review –

Leading Counsel: That occurred both before and after the death of the Queen Mother, yes, my Lord.

The Court: So that is what you are referring to?

Leading Counsel: That is what I was referring to.

The Court: It is a practice unknown to the whole world."

25. It can be seen that reference is made at various stages to the concept and/or term "Practice Direction". It is clear even on the basis of this small survey of the exchanges between the parties and the court that the term was given no precise meaning or definition. As has already been indicated above, and as will be seen in further detail below, this has caused no small degree of confusion in relation to this appeal and the manner in which the Appellant has made his submissions.

26. The appeal then proceeded to a substantive hearing before a fully constituted three-judge Panel of the Court of Appeal presided over by the then Lord Chief Justice, Lord Phillips of Worth Matravers CJ. The Court Appeal's decision is dated 8 February 2008. It is reported at [2008] 1 WLR 2327. For present purposes, it is sufficient to record the Court of Appeal's main finding that there was nothing on the face of a section 124 of the then Supreme Court Act to suggest that the court might only exercise its powers under the Act on an application by the Attorney-General. The Court of Appeal stated that there was no reason why a person asserting a genuine private interest who could simply apply for the will to be unsealed on behalf of himself should have any more standing than a member of the public who had no private interest. It followed that if the Appellant was not permitted to challenge the order made by the former President, it was difficult to envisage circumstances in which anyone else would be permitted to do so. In allowing the appeal, the Court of Appeal determined that the

issues raised by the Appellant's application were of public importance and it was not for the Court of Appeal to prevent him making the application. It was therefore impossible to say that the Appellant's application was doomed to failure. The Appellant was therefore given permission to prosecute his application and to have a substantive hearing of his claim to re-open the Wills.

27. The Tribunal feels that it is important at this point to note that even as at the date of this appeal, it was common ground that the Appellant had since taken no steps to prosecute his application any further.

28. At paragraph 47 of his judgment, the Lord Chief Justice, giving the judgment of the court, stated as follows:

"There may well be good reason for the procedure apparently agreed between the Palace and the Attorney General, with the approval of the former President, in relation to the treatment to be given to royal wills. It appears that, before this procedure was agreed, a practice had long existed under which royal wills would be sealed up – see the extract from Tristram & Coote's Probate Practice (30th ed.) and Williams, Mortimer & Sunnucks cited by the President in paragraph 9 of his judgment. We would not dissent from the President's reference at paragraph 50 of his judgment to the "seemingly insatiable curiosity about the private lives, friendships and affections of members of the royal family and their circle" and this may justify special treatment for royal wills. We consider, however, that these are questions that should properly be explored by the President with knowledge of the material facts."

29. The Court of Appeal also considered at paragraph 49 that it was "unfortunate" that the important matters to which the court had had its attention drawn should be raised by an application "made by a person motivated by a belief that is both irrational and scandalous." (see judgment at paragraph 49).

Events following upon the Request to the date of the Decision Notice

30. As indicated above, and just prior to the judgment of the Court of Appeal which is cited at some length above, on 3 January 2008, the Appellant made a Freedom of Information request for a copy of a particular document that had been referred to as the "Practice Direction" in the following terms, namely:

"I would wish to make an application under Freedom of Information for the document presented as being a Practice Direction in respect of the handling of Royal Wills."

The Attorney-General, as the public authority concerned, concluded that it was not required by the provisions of FOIA to disclose the requested information. The response was dated 16 June 2008. Reliance was then placed on both sections 37 and 41. An internal review was then upheld by the terms of a letter dated 30 April 2009.

31. The Commissioner, in his Decision Notice dated 6 December 2010, determined that the Attorney-General had properly relied on the exemption in section 37(1)(a). He also found that the application of the relevant test reflected in section 2(2)(b) of FOIA as to the respective public interests militated in favour of non-disclosure. Put shortly, the Decision Notice noted that the initial request was made with regard to a document which had been drawn up through communications with Her Majesty the Queen and the Royal Household via her solicitors: see Decision Notice, paragraph 25. The Commissioner also noted that it was a document which reflected the personal views of the Queen: see paragraph 33. At paragraph 21, the Decision Notice cited passages from the hearing before two-judge Court of Appeal to which reference has been made, in particular, that passage which referred to the production of "a quite lengthy document". The Commissioner also noted at paragraph 28 that the Appellant had argued that the subject of Royal Wills was "cloaked in the greatest secrecy, is completely opaque rather than transparent and potentially sets dangerous precedents as to the administration of the law." This, it was claimed by the Appellant,

underlay the Appellant's contention that the public interest would be served by what he called greater transparency.

32. Reverting to a point that has already been made above, it will be noted that although the phrase "quite lengthy document" appears in the body of the Decision Notice, it refers back to the exchange which has already been referred to in this judgment and which appears to refer back in turn to the use of the expression "Practice Direction" as employed before the learned President in the initial hearing prior to the substantive appeal being heard by the Court of Appeal.

33. As for the public interest, the Commissioner afforded weight to the Appellant's argument which stressed the need for openness and transparency, a contention already highlighted above. However, it is perhaps fair to say that the Appellant's contention was based largely, if not almost exclusively, on his view and understanding that the information sought was contained in some sort of Practice Direction otherwise publicly available for inspection. However, the Commissioner determined that this overall contention was outweighed in the present case by the public interest required in order to protect the privacy and dignity of the Royal Family and in order to preserve its position and ability to fulfil its constitutional role. The information was in a document which was intended to reflect private matters and which did not constitute any form of a Practice Direction in the normal sense in which that term is normally employed: see Decision Notice at paragraphs 33-34.

The Evidence

34. Apart from the Appellant himself who formally gave evidence in support of his appeal, the Tribunal heard from Alexander Allen, a senior and extremely experienced civil servant currently attached to the Cabinet Office. Mr Allen provided a witness statement in two forms, namely an open version and a closed version, and gave evidence in open and closed sessions. He has a number of current responsibilities including

being Chairman of the Joint Intelligence Committee, but he also oversees the Constitution Directorate. In that capacity, he has certain responsibilities on issues connected to the Royal Household.

35. In his open statement, Mr Allen confirmed that the information sought by the Appellant took the form of two documents which he described as Annexes A and B. In his words, the two Annexes in question "recorded (respectively) the principles relevant to an application to seal a will made by a member of the Royal Family, and the practice to be followed when an application to seal was made." He confirmed that applications to seal were made in order to protect the privacy of Her Majesty the Queen and of the Royal Family. He also confirmed that the document was not in fact a practice direction within the meaning of the Civil Procedure Rules. He of course accepted that the phrase in question had been used, but also noted that the Court of Appeal itself at the hearing on 17 December 2007 appeared to be satisfied that the document referred to as such a direction "was not in fact a practice direction in any form or sense".

36. He therefore had little hesitation in saying that the information in the two documents comprising Annexes A and B fell squarely within the exemption set out in section 37(1)(a) of FOIA. He then dealt with the competing public interests and, in effect, endorsed the findings of the Commissioner.

37. He also stated that he was aware that one of the points relied on by the Appellant was to the effect that the disputed information was "confined to process" and that as a result, the public interest in maintaining the exemption was reduced. He expressed his disagreement with that assertion adding that, in his view, any suggested distinction between "process" and "substance" was, in this context at least, "a false distinction".

38. Finally, he turned to the possible application of section 41 of FOIA. In short terms, he confirmed that the information contained in the disputed

information was provided in confidence to the Attorney-General's office. Even though the purpose of providing the information was to permit the Attorney-General to obtain he agreement of the President of the Family Division, and for that purpose the information was provided to the President, it nonetheless remained, and was intended to remain, confidential.

39. The Tribunal does not feel, with great respect, that the answers he gave in cross-examination did anything to alter the thrust and content of his evidence. As indicated above, the Tribunal had the benefit of studying the disputed information in closed session with the aid of Mr Allen. It is entirely satisfied that the general description of the information sought according to that information by Mr Allen, is entirely correct and that no purpose would be further served by elaborating upon the general descriptions, not only afforded by Mr Allen himself, but also in the terms of the Decision Notice and the earlier judgments of Sir Mark Potter at the Court of Appeal.

The Contentions of the Commissioner

40. Many of the submissions formally made on behalf of the Commissioner in this appeal have been foreshadowed already. They can be summarised as follows, and in effect reflect the manner in which the Commissioner dealt with the various submissions lying at the heart of the Appellant's stance in relation to this appeal. One of the arguments at the forefront of the Appellant's case was to the effect that the requisite information arose out of the Wills of the late Princess Margaret and/or that of her late mother, as distinct from constituting any form of communication from or on behalf of Her Majesty the Queen. The Commissioner refuted this by claiming not only that such a contention was speculative, but also by pointing out that before section 37 could be engaged, the information must "relate to … communications with Her Majesty" or with the Royal Family or with the Royal Household. That is simply a question of fact.

41. The Tribunal respectfully agrees. Moreover, it has seen the disputed information and has examined the same in detail in closed session. It is entirely convinced and satisfied that section 37 is engaged as a matter of fact on the basis articulated by the Commissioner. Moreover, the contents of the witness statement of Mr Allen alone further justify that finding.

42. Secondly, the Commissioner took issue with a further argument which was canvassed by the Appellant on the appeal and which can be said in some way to be related to the arguments referred to in the previous paragraph. The Appellant claimed that a will is not a communication within the meaning of section 37 and for that reason too he claimed that section 37 was not engaged. The answer provided by the Commissioner is again straightforward. Section 37 is addressed to and includes information relating to specified communications. On any basis, section 37(1) is simply not confined to the communication itself. As the Commissioner made clear in his written submissions, section 37(1) is much broader.

43. Thirdly, and again as a reformulation perhaps of the argument that has just been considered, the Commissioner turned to the Appellant's contention that even the expression "relates to" should be read very narrowly or strictly, such that some information might simply be too remote from any true communications with Her Majesty or the Royal Household so as to fall within the proper scope of section 37. The Commissioner says that the latter proposition may well be correct, at least in certain factual circumstances. The Tribunal, however, agrees with the Commissioner, and again expresses its entire satisfaction with the fact, that any such remote communication has no connection whatsoever with, or any part to play in relation to, the facts in issue in the present case.

44. In any event, another decision of this Tribunal, namely DfES v Information Commissioner and Evening Standard (EA/2006/0006) firmly took the view, with which this Tribunal respectfully agrees, that a

broad interpretation should be afforded to the phrase or concept "relates to" as used in section 37. See that Decision at paragraph 58.

45. In dealing with the public interest, the Commissioner again approached this issue by addressing the principal contentions of the Appellant. First, the Appellant invoked the doctrine of the separation of powers in order to bolster his contention that secret or private arrangements between representatives of the Crown on the one hand and the judiciary on the other were unlawful and/or unconstitutional. The Commissioner countered this by pointing to the existence and scope of the practice which has already been referred to and which is in the public domain as explained above with regard to the sealing of Royal Wills to emphasise the plain fact that the sealed wills remain under court control and can be unsealed on the application of third parties, including in this instance, the Appellant himself. As the Commissioner maintains, there is no question of there being any involvement of the doctrine or principles relating to the separation of powers with regard to the longstanding procedure regarding the sealing of Royal Wills as set out in **Tristram & Coote** as referred to in detail above.

46. Again, the Tribunal respectfully agrees. This is where perhaps it could be stressed that the Appellant's reliance on the existence of a Practice Direction is totally misconceived. The arrangements described by **Tristram & Coote**, whether or not addressed to the specific circumstance of Royal Wills or with regard to the information which has sought to be disclosed, simply have no bearing upon the handling of court cases, let alone can they be said to be described as being or as reflecting some kind of Practice Direction as that term is commonly understood. This is so even on the basis of the use of the expression "Practice Direction" to which reference has been made, on more than one occasion above, arising out of the exchanges between the parties and the courts in relation to the anterior litigation.

47. In relation to this issue, the Appellant relied upon *Bovale Ltd v Secretary of State for Communities and Local Government and another*

[2009] 1 WLR 2274. In that case, a question arose as to whether a judge's ruling constituted a Practice Direction within section 9(2) of the Civil Procedure Act 1997. The Court of Appeal found that while a judge had wide powers in an individual case before him to depart from the Civil Procedure Rules and practice directions in the exercise of general case management powers, he could not with any general effect disapply or vary the Rules, nor could he disapply or vary practice directions with general effect except in accordance with the process set out in the 1997 Act. Although much time was spent reading this case, the Tribunal feels, with respect, that the only relevant passage which in its view provides a complete answer to any contention along these lines made by the Appellant is paragraph 31 which reads in relevant part as follows, namely:

"However 'practice directions' are defined in section 9(2) of 1997 Act and the definition is at least at first sight extremely wide. 'Practice directions' means 'directions as to the practice and procedure of any court within the scope of the Civil Procedure Rules.' That definition goes far beyond the practice directions referred to in the CPR. How wide however is it? Does it include any guidance whether given by practice statements or judgments?"

48. The Court of Appeal answered that question in the negative. It emphatically held that the term "Practice Direction" did not extend to the judgments or other documents which merely provided guidance as to the way in which rules and practice directions should be interpreted. The Tribunal has attempted in this judgment to show that the term "Practice Direction" was used in a very wide and perhaps technically inaccurate way in the course of exchanges in the earlier litigation. The *Bovale* case shows, if it needs to be shown at all, that the document at issue in this case is simply not a Practice Direction in any sense of that term.

49. In addition, the Appellant also emphasised the need for a wide degree of openness and transparency. The Decision Notice dealt, in the

Tribunal's view, quite firmly and conclusively with that argument. The Tribunal can find no fault in the determination adopted by the Commissioner in that particular regard.

50. Related to the above contentions as advanced by the Appellant is perhaps the additional argument made by the Appellant that the information in question can probably be characterised as administrative in nature and thus susceptible to being put into the public domain. The Commissioner points to the overarching private character of the information. Again, the Tribunal respectfully agrees. If justification were needed, then the same can be again afforded by the evidence of Mr Allen.

51. Finally, the Commissioner dealt with the Appellant's contention that the dignity and the privacy of the Royal Family would not be prejudiced by the disclosure of information which he submitted, did or might relate to the existence and description of illegitimate children born of the Royal parent and/or as a result of what could be called a Royal affair. Although the Commissioner did not allude to this factor in the Decision Notice, in his contentions before the Tribunal, and by his Counsel, he reminded the Tribunal of the Court of Appeal's remark in the principal judgment with regard to the earlier application made before the court by the Appellant that the Appellant's personal belief as to his own parentage was both "irrational and scandalous". On that basis alone, the Tribunal entirely agrees that this element can play no part in the public interest equation. On any basis, it is at most a private matter.

<u>The Attorney-General's Contentions: section 41</u>

52. The Attorney-General advanced similar arguments to the Commissioner in relation to this appeal. The Tribunal intends no disrespect whatsoever to the careful way in which these were deployed in argument by saying that it regards the arguments advanced on behalf of the Attorney-General as being, to all intents and purposes, on

all fours with those advanced by the Commissioner with regard to section 37.

53. However, the Attorney-General did advance further submissions regarding section 41 with regard to the present case even though, as has been noted, the exemption formed no part of the Decision Notice by the Commissioner in the present case.

54. The Tribunal accepts that there are three principal ingredients arising out of section 41. For the information in question to be exempt from disclosure under that section, the information must be obtained by a public authority for another person. Secondly, it must be information which could, if disclosed, be the subject of an action of a breach of confidence, and thirdly, if such a breach of confidence claim were brought, there should not be a public interest defence which would be likely to defeat the claim.

55. Enough has been said in this judgment already to confirm that the Tribunal is firmly of the view, and so finds, that the disputed information is derived from communications with Her Majesty and reflects her private views. That is clear from the evidence that the Tribunal heard in open session. Secondly, it is again clear from the evidence described in this judgment that the said information was provided to the Attorney-General in confidence. Thirdly and finally, it must and does follow in the Tribunal's clear view that the disputed information would be information on matters within the scope of Her Majesty's right of privacy. There is no doubt but that she could bring a personal claim were there to be a breach arising out of disclosure. The reasoning articulated in the Commissioner's Decision at paragraphs 33 and 34 show, and in the Tribunal's view, firmly confirm that there is a strong public interest in protecting that privacy.

56. In those circumstances, quite apart from the Tribunal confirming the findings made by the Commissioner with regard to section 37, the

Tribunal is also entirely satisfied that the exemption under section 41 is also properly engaged in this case.

Conclusion

57. For all the above reasons, the Tribunal dismisses the Appellant's appeal and upholds the Decision Notice of the Commissioner on the grounds set out in this judgment.

David Marks QC
Tribunal Judge

26 August 2011

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IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Case No. EA/2011/0002

GENERAL REGULATORY CHAMBER

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50254787
Dated: 6 December 2010

BETWEEN:

Appellant:	Robert Brown
Respondent:	Information Commissioner
Second Respondent:	The Attorney-General

Heard in public in London on 11 and 12 July 2011

Decision date: 26 August 2011

Decision with regard to application for permission to appeal and notice of appeal from the above Decision

DECISION

The Tribunal acting by a single Tribunal Judge refuses to grant the Appellant's application for permission to appeal.

REASON

1. As a general principle an appeal to the Upper Tribunal lies only on a question of law.

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2. The matters set out in section (1) of the Appellant's application which although undated was sent by email to the First Tribunal on 23 September 2011 relate to questions of background and in the circumstances consist of fact and/or opinion.

3. In section (2) of the Appellant's Application under the sub heading "Legal rights of illegitimate children in royal succession" the Appellant contends in sub paragraph (a) that the Tribunal "failed to address the legal arguments by the appellant that illegitimate royal children have a clear legal right to a place in Royal succession …". With regard to that contention the Tribunal in its judgment duly took into account the fact that there was no evidence either before the earlier civil courts to which express reference was made or before the Tribunal that there was any proper basis for placing any weight with regard to the relevant competing public interests in realtion to the alleged consideration.

4. In section (2) under the sub heading "Practice Directions – Matters of fact and law" the Appellant makes the overall contention that the Tribunal erred in law in failing to apply correctly the decision of Bovale Limited v Secretary of State for Communities and Local Government and another [2009] 1 WLR 2274.

5. With regard to the allegation referred to in paragraph (4) herein the Tribunal denies that it failed to address and /or apply the said decision properly, express reference being made to the said decision in paragraphs 47 and 48 of the Tribunal's decision. The Tribunal considered the effect of the Bovale decision in the context of the closed evidence it heard to which reference is also made in the open judgment.

6. In the alternative the alleged error of the Tribunal which the said sub heading of the Appellant's application is directed at is in part or in whole an error of fact and in accordance with what is said above is not thereby appealable.

7. With regard to section (2) and the paragraph bearing the sub heading "The need for separation of the judiciary and legislature and related irregularities", insofar as the contents of the said paragraph seek to allege

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that the Tribunal erred in law the same is denied. The Tribunal dealt with issues which the paragraph appears to relate to in particular in paragraph 45 of its Decision.

8. With regard to section (2) and the passage bearing the sub heading "Disclosure of an illegitimate child would not damage the dignity of the Royal Family", the Tribunal respectfully disagrees and again respectfully maintains that there was no valid element of public interest in relation to an issue which on the evidence presented before it and previously considered in the civil courts was based on speculation and which had been characterised as such in no uncertain terms by the earlier civil decisions.

9. The passage in section (2) under the sub heading "Established principle no right of privacy in respect of the later stages of pregnancy" is not a ground within the original appeal which was articulated in any form let alone advanced at the hearing of the appeal. In the alternative this passage is not understood.

10. The passage in section (2) under the sub heading "Legal arguments as to Section 41 are contested" is again based apparently on the assumption that there existed a proper basis that there was a legitimate public interest in the matters alluded to. It is denied that any proper evidential basis for any such assumption existed for the reasons set out above.

11. In all the circumstances the Tribunal respectfully finds that there is no realistic prospect that an appeal on any or all of the grounds contended for has a reasonable prospect of success.

12. For the sake of completeness and again in all the circumstances the Tribunal declines to direct that there be a review of its decision.

David Marks QC
Tribunal Judge
4 October 2011