



NCN: [2022] UKFTT 00481 (GRC)

Case Reference: EA/ 2022/0067

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 1 December 2022

Decision given on: 15 December 2023

Before:

Judge Alison McKenna

Tribunal Member Raz Edwards

Tribunal Member Naomi Matthews

GABRIEL KANTER-WEBBER

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

-and-

MINISTRY OF JUSTICE

**Second
Respondent**

DECISION

1. The appeal is dismissed.

REASONS

Mode of Hearing

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules¹.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 266. It also considered a closed bundle comprising 1 page.

Background to Appeal

4. The Appellant made a request to the Judicial Office on 4 May 2021 for disclosure of the index ('site map') to the content available on the judicial intranet. The Judicial Office refused his request on 14 May 2021, explaining that it is not a public authority for the purposes of the Freedom of Information Act 2000 ('FOIA').
5. The Appellant requested an internal review, which was carried out by the Ministry of Justice. On 22 June 2022, the Ministry of Justice confirmed that the information requested was not held by it for the purposes of FOIA. The Appellant complained to the Information Commissioner.
6. The Information Commissioner issued Decision Notice IC-112941-F8Q0 on 16 March 2022, naming the Ministry of Justice as the relevant public authority and upholding the Ministry of Justice's response that the information was not 'held' by it for the purposes of FOIA. The Appellant appealed to the Tribunal.
7. The Tribunal joined the Ministry of Justice as the Second Respondent to the Appeal by case management directions dated 25 March 2022.
8. The Tribunal refused an application by the Ministry of Justice (opposed by the Appellant) to join the Judicial Office as a third respondent to the appeal, by case management directions dated 1 December 2022. The Tribunal directed that the open and closed evidence and submissions (which had been submitted to it by the Judicial Office prior to determination of the joinder application) should be admitted as though made on behalf of the Ministry of Justice.
9. The Tribunal made a direction pursuant to rule 14(6) of its Rules to close the withheld information which had been submitted by the Judicial Office prior to determination of

¹ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

its joinder application. This is the closed bundle referred to in paragraph 3 above, consisting of one document: a copy of the judicial intranet site map.

The Decision Notice

10. The Decision Notice which is the subject of this appeal explains at paragraphs 33-41 that the Ministry of Justice had told the Commissioner that the judicial intranet is a private website for judicial office holders' use only. It is developed and maintained by the Judicial Office Communications team. Judicial Office is an arm's length body of the Ministry of Justice, and a unique branch of the civil service which is dedicated to supporting the judiciary. It explained that Judicial Office staff have different email addresses and a different physical location to Ministry of Justice civil servants, and are answerable not to the Minister but, through a Chief Executive, to the Lord Chief Justice and Senior President of Tribunals.

11. At paragraphs 42 - 50, the Decision Notice considered the factual nexus between the information requested and the Ministry of Justice, as the relevant public authority. At paragraph 51, the Decision Notice recognised that the purpose of the Judicial Office is to support the work of the judiciary, respecting the independence of the judiciary. At paragraph 52, the Decision Notice concluded that *'Notwithstanding the acknowledged relationship between the MoJ and the Judicial Office, the Commissioner has seen no evidence that the requested information is held by MoJ, to any extent, for its own purposes. It follows that the information falls outside the definition of information held for the purposes of FOIA under section 3(2)'*.

The Law

12. Section 1(1)(a) FOIA provides that a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds information within the scope of the request.

13. The Judicial Office is not listed as a public authority in schedule 1 to FOIA. The Ministry of Justice is a Government Department, so it is listed in schedule 1 to FOIA at paragraph 1.

14. Section 3(2) FOIA provides that information is held by a public authority if it is held *'otherwise than on behalf of another person'*.

15. The Information Commissioner's published Guidance, and the case law, makes clear that the question of whether a public authority holds information on its own behalf or 'on behalf of another person' is fact specific. In *University of Newcastle Upon Tyne v The Information Commissioner and the British Union for the Abolition of Vivisection* [2011] UKUT 185, the Upper Tribunal interpreted s. 3 (2) FOIA to mean that 'holding' information for the purposes of FOIA went beyond physical possession of the information and required an appropriate connection to be made between the information held and the public authority concerned.

16. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

*(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

17. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

18. The Appellant’s Notice of Appeal dated 20 March 2022 relied on grounds that the Decision Notice had erred in law in its conclusions. The Appellant sought to distinguish the Upper Tribunal’s Decision in *Newcastle University* and submitted that the Tribunal should follow first-instance case law in *McBride v Information Commissioner* EA/2002/0105, in which it was held that the Ministry of Justice did hold, for the purposes of FOIA, information within the Privy Council Office.

19. The Appellant relied on an argument that the Ministry of Justice must hold the requested information to some extent for its own purposes because its civil servants in the Judicial Office Communications Team develop and control the content of the judicial intranet, and that by this route the Ministry of Justice can itself post information onto the site. He referred to a job advert published by the Ministry of Justice which refers to the postholder having ‘editorial oversight’ of the reform section of the judicial intranet. He referred to the use of the judicial intranet by the Judicial College. He submitted that the Decision Notice had failed to focus on the precise nature of the information he had requested, which was held in part for the Ministry of Justice’s own purposes, in order for its civil servants to navigate the judicial intranet and post relevant content.

20. The Information Commissioner’s Response dated 27 April 2022 maintained his analysis as set out in the Decision Notice. He did not dispute that the Judicial Office Communications Team physically develop and maintain the judicial intranet but submitted that the purpose for which the information was thus controlled was to assist the judiciary.

21. With regard to the Judicial College, the Information Commissioner referred the Tribunal to the recent first-instance Decision in *Forstater v Information Commissioner and Ministry of Justice* EA/2021/0129, in which the Tribunal had found that the Judicial College was not a public authority for the purposes of FOIA. It was further submitted that the Upper Tribunal had made clear in *Newcastle University* that the relevant facts in any one case should not be read as a test to whether information is held for the purposes of FOIA, because the answer will depend on an assessment of all the facts in each case. Thus, the facts in *McBride* could not assist the Tribunal in this appeal. The

Information Commissioner suggested that the Ministry of Justice should be joined as a party to this appeal in order to assist the Tribunal with the relevant factual picture.

22. The Ministry of Justice's response dated 31 May 2022 purported to be made on behalf of itself and also the Judicial Office as the third respondent. However, the application for joinder by the Judicial Office was refused and so we treat it here as the Ministry of Justice's response only.

23. The Ministry of Justice resisted the appeal on the basis that information held by or on behalf of the judiciary is excluded from FOIA. This is described as a 'conscious legislative choice' reflecting the fundamental constitutional importance of the separation of powers and the preservation of an independent judiciary.

24. It was submitted that the statutory responsibilities imposed on the Lord Chief Justice and Senior President of Tribunals by the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007 respectively are carried out through the medium of the Judicial Office. The Ministry of Justice stated that it provides logistical, technical and administrative support to the Judicial Office, but that control of the Judicial Office is nevertheless retained by the judiciary. It is submitted that the Appellant has wrongly understood that access to judicial information is automatically afforded to civil servants, rather than afforded on an as-needs basis.

25. The parties exchanged further submissions on 1 June and 8 June 2022 regarding the disputed application for joinder of the Judicial Office. The Appellant's reply to the Respondents' responses was dated 13 June 2022. This emphasised that the Appellant regarded the Ministry of Justice's argument that the Judicial Office was not within the scope of FOIA as novel and inconsistent with its previous practice. He submitted that public authorities are not permitted to re-brand their sub-units as excluded from FOIA in order to circumvent its provisions. He submitted that the fundamental question posed by his appeal was whether the particular information requested was held by the Ministry of Justice only on behalf of the judiciary or also to some extent for its own purposes. He submitted that as the Ministry of Justice had conceded that its staff were able to access the judicial intranet but had provided no evidence of a duty of confidentiality to the judiciary as against the Ministry, so that the requested information must be held to some extent for the Ministry of Justice's own purposes.

26. The Tribunal had the benefit of a witness statement provided by Amy Shaw dated 3 May 2022. Ms Shaw is the Deputy Director of Communications in the Judicial Office, in which role she reports to its Chief Executive. She explained that the Judicial Office was established in 2006, following the enactment of the Constitutional Reform Act 2005. She describes the Judicial Office as an arm's length body of the Ministry of Justice and exhibits to her statement the 'Concordat' in which its responsibilities are described.

27. Ms Shaw's evidence is that the Judicial Office is a 'unique' branch of the civil service, in that it is independent of the machinery which supports the Government. Its purpose is to provide support to the judiciary as the third branch of the state and to promote and safeguard judicial independence in order to maintain confidence in the rule of law.

28. Ms Shaw describes the Judicial Office Press and Communications team, for which she is responsible, as supporting the judiciary's communications with the public and

also communications within the judiciary. She describes the purpose of the judicial intranet as to assist the effective leadership and management of the judiciary by providing a place for all judicial office holders to access information relevant to their role and to be kept informed of developments. Its terms of use describe it as a 'private website for judicial office holders' use only'. Its content is described as created from a variety of sources, including judicial office holders and administrative staff with specifically created access rights which are purpose-limited and time-limited.

29. Ms Shaw accepts that, in the past, the Judicial Office has responded to FOIA requests made to it but confirms that its new approach is to take the view that it is not within the scope of FOIA because it is not listed in schedule 1 FOIA.

30. Exhibited to Ms Shaw's statement are: AS/1: the 'Mini-Concordat' between the Secretary of State for Justice and the Lord Chief Justice which set out a methodology for agreeing the levels of support to be provided to the Lord Chief Justice following the Constitutional Reform Act 2005. This created the 'Judicial Admin Office' (precursor to the Judicial Office); AS/2: The Lord Chancellor's Proposals for Judiciary-related functions dated January 2004 (thus preceding the 2005 Act). This was a high-level proposal for the abolition of the Lord Chancellor's Office and the transfer of functions between the Government and the judiciary including, amongst other things, the establishment of the independent Judicial Appointments Commission; AS/3: a screen shot showing the terms of use of the judicial intranet; AS/4: the Judicial Office Business Plan for 2020-2021, which describes 'Our Purpose' as 'Strengthening the rule of law and improving the administration of justice by supporting the leadership and governance of the judiciary'.; AS/5: The Lord Chief Justice's Report for 2021.

Conclusion

31. Following the fact-specific approach advised by the Upper Tribunal in *Newcastle University*, we note that the relationship between the Judicial Office and the Ministry of Justice exists within the context of the important constitutional principle of the separation of powers. None of the caselaw to which we have been referred has precisely considered this context, but we regard it as a key element of the test to be applied in deciding whether the requested information was 'held' for the purposes of FOIA by the Ministry of Justice in this appeal.

32. The documents produced by Ms Shaw create an impression of the Judicial Office as an autonomous unit, answerable to the senior judiciary only and outside the control of the Ministry of Justice. This is as we would expect it to be, given the constitutional background. However, we note that the Judicial Office has no governing document of its own and that there is no statutory or contractual document which sets out the high-level relationship between the two, still less any specific agreement which mentions their respective relationships to the judicial intranet.

33. We note that the documents produced by Ms Shaw do not specifically address the relationship between the Ministry of Justice and the Judicial Office as seen through the prism of FOIA. Given the constitutional framework within which these two entities exist, we do not share the Appellant's concern that the Ministry of Justice is seeking to avoid its responsibilities under FOIA by re-branding the Judicial Office as a separate sub-unit and declaring it to be exempt from FOIA. We accept that the exclusion of judicial information from FOIA was a conscious legislative choice by Parliament and our Decision in this appeal seeks to give effect to that choice.

34. Nevertheless, we were troubled by some confusing procedures and practices in this case, as follows. Given that the Judicial Office regards itself as a separate entity to the Ministry of Justice and so falling outside the ambit of FOIA, we were puzzled that the Ministry of Justice should have carried out the internal review of the Appellant's request; we are further puzzled that the Ministry of Justice has not suggested that the Decision Notice was erroneous in naming it as the relevant public authority for the purposes of FOIA. As noted above, the Tribunal refused to join the Judicial Office as a party to this appeal, but we were puzzled that an entity which regarded itself as falling outside the ambit of FOIA should have applied to be joined as a party at all, and even more surprised that it should have provided the Tribunal with the requested information which it then risked being directed to disclose. It seems to us that a document setting out the relationship between the Ministry of Justice and the Judicial Office in the context of FOIA would have assisted us in making sense of this picture. The creation of such a document may assist in the handling of future cases, especially as Ms Shaw indicates a recent change of approach.

33. Despite these troubling factors, we were greatly assisted by Ms Shaw's witness statement. We accept her unchallenged evidence that the Judicial Office is a 'unique' branch of the civil service, independent of the machinery of Government, providing support to the judiciary and promoting judicial independence. Given this constitutional context, our starting point is that there would have been no intention for the Ministry of Justice to 'hold' information provided for the judiciary's use for the purposes of FOIA. We have nevertheless considered whether such a situation may have been created (albeit unintentionally) by the joint responsibilities of the Judicial Office and Ministry of Justice civil servants in relation to the judicial intranet. The focus of this consideration is, rightly, the specific information requested i.e., the content page or site map, which the Appellant contends must be used by Ministry of Justice officials for their own purposes in order to carry out their functions of maintaining and developing content for the judicial intranet.

34. In considering this question, we accept Ms Shaw's unchallenged evidence. At paragraphs 18 to 21 of her witness statement, she explains that civil servants' access to the judicial intranet is specifically controlled by the Press and Communications Team, which is answerable only to judicial office holders, and is granted for limited purposes and limited periods of time. She confirms that the Team must decide also whether a Ministry of Justice message can be posted. This evidential picture does not, in our view, support the Appellant's submission that the Ministry of Justice holds the content page for its own purposes. We note here that the Appellant did not request to cross examine Ms Shaw and that he has provided no evidence to counter her witness statement.

35. Having considered the evidence and submissions carefully, we are satisfied that the information requested is held by the Judicial Office alone and on behalf of the judiciary. That information is not therefore within the scope of FOIA.

36. If the requested information is 'held' by the Ministry of Justice at all, then we find that the extent to which Ministry of Justice staff can access the judicial intranet, and the permission they need to do so, is controlled through a chain of command presided over by senior judiciary. We conclude from this, not only that the constitutional background is such that there was no intention for the Ministry of Justice to hold the requested information for the purposes of FOIA, but also that the working relationship between the Judicial Office and the Ministry of Justice is such that no relevant relationship

between the Ministry of Justice and the requested information has been created in practice.

36. In deciding this appeal we therefore conclude that the requested information is not held by the Ministry of Justice ‘otherwise than on behalf of another person’. That conclusion is sufficient for us to uphold the Information Commissioner’s Decision Notice and we now dismiss this appeal.

(Signed)

JUDGE ALISON MCKENNA

DATE: 15 December 2022

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