



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2016/0094

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50603641

Dated: 29 March 2016

Appellant: Douglas Gardiner

Respondent: The Information Commissioner

Heard on the papers: Swansea Civil and Family Justice Hearing Centre

Date of Hearing: 20 September 2016

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and Gareth Jones

Tribunal Members

Date of Decision: 27 October 2016

Date Promulgated: 11 November 2016

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 March 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 15 September 2015 the Appellant wrote to the Office of the President of the Employment Tribunals of England and Wales and requested minutes of user group meetings and:-

“Under the same heading could you please send me the minutes of meetings of the Regional Employment Judges, the most recent being Friday 11th September”

2. The President replied on 20 October providing certain user group minutes and links to a website where more recent user group minutes were published. He explained that the judiciary were not a public body within FOIA and he was not prepared to release minutes of the Regional Employment Judge Meetings which were private and confidential meetings.

3. The Appellant complained on 2 November to the Respondent about the handling of his request. The Appellant argued that since the President and other judges:-

“were without doubt salaried employees of the MoJ and whilst on the payroll, as I see it subject to the FOIA”.

4. In his decision notice the Respondent recorded that the President’s Office was a division of Her Majesty’s Courts and Tribunals Service, an executive agency of the Ministry of Justice (MoJ), which was the relevant public authority for his investigation. He considered:-

- whether the judiciary were a public authority under FOIA, and if they were not
- whether the MoJ held the minutes of judges’ meetings, and if it did hold the minutes

- whether it held them for MoJ purposes (in which case they would be within scope of FOIA and liable to disclosure) or for the President's Office (paragraph 14).
5. The Respondent considered the definition of a public authority in section 3(1) FOIA that required a public body to be listed in Schedule 1 of the Act, designated by order under section 5 or to be a publicly owned company (section 6). He concluded that the judiciary were not so listed and did not fall within either of the other two provisions and accordingly did not fall within the provisions of FOIA.
 6. He then considered whether the minutes of the judges meetings held by the President's Office (and therefore by the MoJ which does fall within Schedule 1) were held for the purposes of the MoJ or not. The MoJ explained that the information was of a Judiciary meeting held for Judicial purposes:- "*The content is determined by the President, the meetings are not attended by members of his administrative team and the minutes are taken by a Regional Employment Judge*". He concluded that there was no evidence that the MoJ accessed or had a use for the information or made decisions about its creation and retention. He found on the facts that while the MoJ might hold the information it did not do so for its own purposes and therefore did not hold the information under FOIA and it was not available for disclosure.
 7. In his notice of appeal the Appellant argued that the independence of the judiciary "*should not exclude them from FOIA*"; he stated that Schedule 1 should be amended to safeguard future generations, such amendment would not impede judicial independence.
 8. In his response to the appeal the Respondent maintained the position set out in the decision notice. The amendment of FOIA was a matter for Parliament and the Appellant appeared to acknowledge that law as it stands does not include the judiciary.
 9. In his reply to this response the Appellant invited the tribunal to conclude that the Respondent was incorrect. He drew attention to the section 32 exemption for court records which exempts from disclosure under FOIA information held by a public authority if it is held by virtue of being in a document created by a court. He drew attention to the court as including "any tribunal or body exercising the judicial power

of the state”. He argued “exemption is only necessary to counter inclusion; although not listed the Judiciary is included in the act under the MoJ”. Judicial processes should be accessible under the principle of open justice.

Consideration

10. The essential argument put forward in this appeal is whether, since judges are paid out of funds voted by Parliament for public purposes and those payments are made through HMCTS which is part of the MoJ, judges are part of MoJ for the purposes of FOIA. The question is one of statutory interpretation. Put simply a body is subject to FOIA if it is a government department or otherwise listed in FOIA. Schedule 1 to FOIA contains many bodies funded by Parliament which fall within the area of and are funded through one central government department or another however since they are separate from that department they need to be listed in order to be subject to FOIA. The judiciary are not listed.
11. While the UK lacks a formal written constitution it has one which has evolved over many centuries and is embodied in many documents, agreements, statutes and practices. In 2004 as part of the process of changing the role of the Lord Chancellor a formal agreement between the judiciary and the Government was reached and laid before Parliament:- “ *The overall aim of these reforms is to put the relationship between executive, legislature and judiciary on a modern footing, respecting the separation of powers between the three*”. This concordat was intended to both restate the principle of the separation of powers and to reinforce it by disentangling the many traditional roles of the Lord Chancellor which had historically spanned all three domains of executive, judiciary and legislature; this was subsequently implemented through the Constitutional Reform Act 2005. A document recording the agreement between the Executive and the Judiciary and laid before Parliament as the third part of the system of Government clearly is not an agreement between the Executive and itself.
12. That separation of powers is fundamental to the constitution of the UK. For this reason Schedule 1 Public Authorities Part 1 General sets out the inclusion within the scope of FOIA of Executive and Parliament explicitly:-
 - “1. *Any government department other than...*
 2. *The House of Commons, in respect of information other than...*

3 The House of Lords, in respect of information other than...

13. There is no provision with respect to the judiciary. The judiciary are not subject to FOIA. The Appellant has not challenged the conclusion of the Respondent that the information is held for the purpose of the Judiciary and the tribunal is satisfied that the Respondent's decision is correct in law. The appeal is dismissed.
14. Our decision is unanimous

Judge Hughes

Date: 11 November 2016