Appeal number: EA/2016/0204

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

CHRISTIAN HAZELWOOD **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
THE CABINET OFFICE

TRIBUNAL: JUDGE ALISON MCKENNA
Mrs SUZANNE COSGRAVE
Mr PAUL TAYLOR

Heard in public at Bristol Magistrates' Court on 25 January 2017

The Appellant appeared in person

The Cabinet Office was represented by Jonathan Scherbel-Bell of counsel, instructed by the Government Legal Department

The Information Commissioner was not represented.

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made a request to The Cabinet Office on 31 July 2015 in the following terms:

"I would very much appreciate it if you can tell me if the Carlyle Group, which is an American global asset management firm, has ever made an application to you for permission to use the word 'Royal', implied or otherwise, in any of their subsidiaries operating as a company within the United Kingdom".

3. The Cabinet Office informed the Appellant that it could neither confirm nor deny whether it held the requested information, pursuant to s. 37 (2) of the Freedom of Information Act 2000 ("FOIA").

4. The Respondent issued Decision Notice FS50621483 on 1 August 2016, upholding the Cabinet Office's decision. It concluded that (i) the information requested related to the conferring by the Crown of an honour or dignity so, if it was held, s. 37 (1) (b) of the Freedom of Information Act 2000 ("FOIA") would be engaged; (ii) The Cabinet Office was entitled to rely on s. 37 (2) FOIA because to confirm or deny whether it holds the information requested would reveal information exempt from disclosure; (iii) the public interest in maintaining the exemption outweighed the public interest in confirming or denying whether the information requested was held.

5. The issue for the Tribunal was whether The Cabinet Office was entitled to rely on s. 37 (2) FOIA to neither confirm nor deny whether it held the requested information.

Appeal to the Tribunal

6. The Appellant's Notice of Appeal dated 27 August 2016 relied on grounds that: (i) he had asked The Cabinet Office to tell him whether a "bogus company" had permission to use the Royal prefix; (ii) this information was to be used as evidence in a Court; (iii) there is no legitimate reason not to reveal whether or not a company has the right to use a Royal title; (iv) The Cabinet Office routinely makes available details of honours such as OBEs and knighthoods in a published list and so should be open about the status of companies also; (v) the right for a company to use the Royal name proceeds by way of making an application, so it cannot properly be viewed as an "honour" under FOIA.

7. The Respondent's Response dated 19 September 2016 maintained the analysis as set out in the Decision Notice. It refers the Tribunal to the *Royal.uk* website, which states that permission to use the title "Royal" is a mark of Royal favour granted by the Sovereign, acting on the advice of her Ministers. It is submitted that, as these matters are dealt with under the Royal Prerogative, information about any criteria and the reasons for grant or refusal may not be disclosed. The Response also referred to guidance on Companies House website about the procedure for a company wishing to use the word "Royal" in its proposed name. The Information Commissioner asked the Tribunal to interpret the terms "honour or dignity" in s. 37 FOIA in a purposive manner, and submitted that the purpose of the section was to exempt from disclosure information contained in communications with the Royal Household. With regard to the balance of public interest, the Information Commissioner submitted that the public interest favoured maintaining the exemption so as to protect the confidentiality of the honours process and to avoid reputational damage to organisations whose applications to use the name "Royal" were unsuccessful.

8. The Cabinet Office filed a Response dated 28 October 2016 in which it confirmed that decisions about whether to allow a company to use the word "Royal" are made in the exercise of the Royal Prerogative. It explained that a company or LLP cannot be incorporated at Companies House using the term "Royal" in its name unless permission has been given by the Secretary of State. The Cabinet Office supported the Information Commissioner's reasoning as to the engagement of s. 37 (1) (b) FOIA, the reliance upon s. 37 (2) in this case and the public interest arguments in favour of maintaining the exemption.

9. The Appellant filed a Reply to each Response. He submitted that the system for allowing companies to use the word "Royal" is essentially administrative with the favour being granted by Ministers rather than the Sovereign and that The Cabinet Office fails to understand what the Royal Prerogative is. He disputed that s. 37 (1) (b) was engaged as he submitted that the information requested does not relate to an honour. He disputed that s. 37 (2) was properly applied as he submitted that The Cabinet Office could answer his request with a simple "yes" or "no" answer. Finally, he submitted that the Royal Prerogative cannot be used to override the Freedom of Information Act 2000.

10. The Tribunal held an oral hearing at which the Appellant appeared in person and the Cabinet Office was represented by Jonathan Scherbel-Bell of counsel. The Information Commissioner was not represented. The Tribunal is grateful to all parties for their written submissions and to the Appellant and Mr Scherbel-Bell for their oral submissions.

11. No witness evidence was called. The Tribunal had before it an agreed open bundle of some 250 pages and a closed bundle consisting of a single letter from The Cabinet Office to the Information Commissioner. The entire hearing was held in open session.

The Law

12. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*
>
> *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

13. The category of exemption relied upon under FOIA in this case is s. 37 (1) (b). This is a so-called qualified exemption, giving rise to the public interest balancing exercise required by s. 2 (2) (b).

14. S. 37 (1) and (2) FOIA provide that :

> *"(1) Information is exempt if it relates to –*
>
> *(a)...*
>
> *(b) the conferring by the Crown of any honour or dignity.*
>
> *(2) The duty to confirm or deny does not arise in relation to information which is ...exempt information by virtue of subsection (1)."*

15. 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."*

16. We note that 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.

Argument

17. It is unfortunate that, during its internal review of this case, The Cabinet Office had wrongly referred in a letter to the Appellant to s. 31(1) (b) FOIA. The Appellant was initially concerned that there had been an attempt to cover up criminality but finally accepted that this had been a typographical error and that The Cabinet Office had only ever sought to rely on s. 37 FOIA. It was agreed that he did not need to address us on this matter.

18. The Appellant had understood FOIA to confer an unfettered right to the information he had requested and that it was somehow untoward (or possibly unlawful) for The Cabinet Office to seek to rely on an exemption. The Tribunal explained that the system of exemptions was an integral feature of FOIA and that it was the Tribunal's role to decide whether any exemption had been properly applied. We reminded the Appellant of this several times during his submissions when he returned to the argument that the Royal Prerogative could not be used to override an Act of Parliament.

19. The Appellant was critical of the suggestion that the Tribunal could refer to a dictionary definition of words in a statute. He pointed out that "honour" might also be defined in other ways, for example to refer to a woman's chastity.

20. The Tribunal asked the Appellant why he could not have checked with Companies House whether the company was entitled to use the word "Royal", as had been repeatedly suggested. He submitted that there was a public interest in being able to check whether the system was working properly, which was why he had asked if an application had been made, rather than merely checking the publicly available information about that company at Companies House. He was concerned that the situation which had prompted him to make his enquiry was "not a one-off". The Appellant was concerned that certain people could gain advantage by misrepresenting themselves as entitled to use the word "Royal". As an example, he said that he would be more likely to lend money to a man in a pub if he said he was a Lord. He considered that The Cabinet Office should publish a register of companies permitted to use the title "Royal" to prevent similar mischief. He submitted that the situation was analogous to the public's right to know whether a company with the word "British" in its name was actually British-owned.

21. The Appellant submitted that an "Honour", properly understood, was something conferred without an application having been made, and the fact that there is an application process for companies to apply to use the word "Royal" therefore distinguishes it from the conferral of other honours such as a knighthood. He erroneously suggested that Judges receive the honour of appointment without making an application. He submitted that the application system for companies to use the word "Royal" falls outside of the scope of s. 37 FOIA because it is not an honour.

22. The Appellant did not accept that confirming or denying whether the information was held would be revelatory in any way. He submitted that it was analogous to saying one could not confirm or deny whether one was human.

23. Mr Scherbel-Bell submitted that, if The Cabinet Office were to confirm or deny whether it held the requested information, that response would be revelatory of the very information in relation to which the exemption was claimed. He submitted that there was a strong public interest in maintaining the confidentiality of the honours system and that the information requested in this case was part of that system. He submitted that the Appellant's distinction between the system for allowing companies to use the word "Royal" and other types of honour was misconceived.

24. Mr Scherbel-Bell acknowledged that there is a public interest in knowing whether a company using the "Royal" title was lawfully entitled to do so, but submitted that (i) that is not the information requested here as the request is about whether a particular company has ever made an application; (ii) the fact of whether permission has been granted to that company is publicly available from Companies House; and (iii) the Appellant has been told how to make a complaint to Companies House, Trading Standards or Action Fraud if he has concerns about the manner in which a company is holding itself out to the public.

25. The Cabinet Office helpfully provided the Tribunal with relevant extracts from the Companies Act, and the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014 which together form the legislative framework for permitting corporate use of the word "Royal".

Conclusion

26. We note that neither "honour" nor "dignity" is defined in s. 37 FOIA. The Information Commissioner referred us to the Oxford English Dictionary definitions of "*a mark of respect or distinction*", "*a privilege, a special right*" and "*a source or cause of distinction*". Although we acknowledge that the Appellant took exception to this approach, we consider that words in statutes should be given their ordinary and natural meaning and we find nothing objectionable in referring to the Oxford English Dictionary in interpreting a statutory provision. Clearly, giving the term its natural meaning in context would exclude non-contextual definitions such as the use of "honour" to connote chastity.

27. We also accept that the Freedom of Information legislation should be given a purposive interpretation, so that, in the context of this case, s. 37 may be understood to relate to the honours system in its widest sense, including the system for giving permission to companies to use the term "Royal". The Cabinet Office's role in administering such applications seems to us to fall within the statutory framework which encompasses information which "relates to" conferring an honour. We accept the Cabinet Office's submission that the system of consent and refusal for this "honour" derives from the Royal Prerogative and that the purpose of the s. 37 FOIA exemption is to protect the confidentiality of sensitive communications with the Royal Household on the subject of honours.

28. We are for these reasons satisfied that s. 37 (1) (b) is engaged by the information request in this case. We are also satisfied that, if The Cabinet Office were to confirm or deny whether the information was held then this would implicitly

reveal the exempt information. We note that the question of whether permission has actually been granted to a company is a matter of public record at Companies House.

29. It does not seem to us that, where Parliament has established a legislative framework to control the use of the name "Royal" by companies, there can generally be said to be a public interest in "testing out the system" as the Appellant seeks to do. Our approach to that question might be different if there were any evidence before us that the system was malfunctioning, but that is not the case here. We also find it difficult to see how the terms in which the particular information request with which we are concerned was made could have revealed whether a particular company was operating in breach of the relevant legal requirements because the company concerned was not named.

30. We are satisfied that the balance of public interest favours maintaining the exemption and consequently that the approach of not confirming or denying whether the information is held is correct. We consider that the public interest lies in the confidentiality of the honours system, which in this case includes a process for applications from companies to be considered in confidence, free from outside interference, and acknowledging the expectation of privacy of applicants.

31. For all of these reasons, we are satisfied that the Decision Notice is in accordance with the law and this appeal is dismissed.

ALISON MCKENNA **DATE: 13 February 2017**

PRINCIPAL JUDGE **PROMULGATED: 15 February 2017**