IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2017/ 0070**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50648628
Dated: 2 February 2017

Appellant: **Steve Sanders**

Respondent: **The Information Commissioner**

Heard at: **Fleetbank House**

Date of Hearing: **22 August 2017**

Before

Chris Hughes

Judge

Pieter De Waal and Andrew Whetnall

Tribunal Members

Date of Decision: **3 October 2017**

Attendances:
For the Appellant: in person

For the Respondent: did not appear

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 2 February 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Sanders explained to the tribunal that he was involved in proceedings in the County Court relating to his leasehold flat; these were transferred to the Residential Property Tribunal in 2009. He was unhappy with procedural decisions made by the tribunal hearing his case. He spoke to tribunal staff and was told that he could complain to the President of the tribunal. He did so at some time between June and August 2009; she responded indicating that it was not for her to intervene. He continued to be dissatisfied. He unsuccessfully appealed the decision of the tribunal.
2. He said in March 2011 he sued the three members of the tribunal for misfeasance in public office. In about 2015 the Ministry of justice applied to be joined as a defendant and subsequently successfully applied for the proceedings to be struck out.
3. During the course of these proceedings Mr Sanders sent two communications, one to an email address at the First-tier Tribunal (Residential Property) (which discharges the functions of the Residential Property Tribunal following the re-organisation of tribunals under the provisions of the Tribunals Courts and Enforcement Act) and the other to the judge who had been President of the Residential Property Tribunal in 2009.

The request for information

4. Both communications are lengthy and are set out in full in the decision notice, however for convenience of analysis they are summarised.
5. The communication of 18 December 2014 makes reference to *"matters arising in 2009 and thereafter"* and there are then 12 numbered paragraphs. Paragraph 1 quotes from a tribunal document explaining the procedure of the tribunal, paragraph 2 claims *"there is some ambiguity"*, paragraphs 3-11 then explore hypothetical situations raised by Mr Sander's litigation, and 3-7 deal with the role of the President

culminating in: *"7. If the president appears corrupt and denies he/she has any responsibility.."* Paragraphs 8-11 deal with members of the tribunal culminating in: *"11. In the alternative, are the aforementioned paid not to resolve such disputes… whilst continuing to accept their salary as paid for out of the public purse?"*

Paragraph 12 asks for information: *"Please provide all the information held on and around these subjects as disclosed hereinabove in this email."*

6. On Christmas morning 2014 Mr Sanders wrote to the judge about issues raised in his litigation in 9 numbered paragraphs preceded by: *"2. I wrote to you on 8 July 2010. You have evaded and/or failed to deal lawfully or at all inter alia the following complaints and requests for information which were part of the aforementioned correspondence.."* The communication concluded: *"Kindly therefore reply in full in accordance with your duties and my rights without further prevarication, evasion or delay. Please provide all the information held on and around the subjects referred to and/or touched on herein. I register a further formal complaint with regard to your personal misconduct as demonstrated inter alia by your refusal to engage with the quoted paragraphs."*

7. The Ministry of Justice ("MoJ") in refusing to comply with these requests stated that neither "request" fell within s8 of the Freedom of Information Act ("FOIA")which provides:-

"8 ***Request for information****.*

(1)In this Act any reference to a "request for information" is a reference to such a request which—

(a)is in writing,

(b)states the name of the applicant and an address for correspondence, and

(c)describes the information requested…"

8. The MoJ told Mr Sanders that:- *"Your requests for information do not describe the information sought, they pose many questions requiring clarification or opinion on*

matters in respect of your legal matters. The FOIA only covers recorded information rather than advice or opinion."

9. The MoJ further argued that the communication addressed to the judge was not within FOIA as it was not addressed to a public authority as required by s3:-

*"**Public authorities***

(1)In this Act "public authority" means—

(a)subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i)is listed in Schedule 1, or

(ii)is designated by order under section 5, or

(b)a publicly-owned company as defined by section 6."

The complaint to the Information Commissioner

10. Mr Sanders complained to the Information Commissioner ("ICO"). In considering whether the communications were valid requests within s8 she noted the argument of the MoJ that: *"it is not possible for the MoJ to conduct a search for "all information" around a hypothetical event, or indeed why an individual has acted towards or responded to the requester in a certain way. Much of the requester's correspondence asks for clarity around situations or events which does not meet the criteria for recorded information.."* While acknowledging that there was a low threshold for the description of the information in the request she concluded that the communications were not requests for information, rather Mr Sanders was using FOIA as a means of advancing his arguments concerning his dispute with the MoJ. The ICO considered the definition of a public authority. She noted the position she had taken with respect to a previous similar request that the judiciary were not within s3 FOIA. She relied on a decision of the First-tier Tribunal which upheld that decision. She concluded that a judge did not fall within the definition and accordingly the Christmas morning communication to the judge was not a valid request for this reason also.

The appeal to the Tribunal

11. Mr Sanders' notice of appeal consists of 20 numbered paragraphs. Paragraphs 1-9 are criticisms of the tribunal panel which considered his case in 2009, paragraph 10 criticises the ICO. Mr Sanders argues in paragraphs 11-12 that the judge *"could not only have been a member of an independent judiciary since she had various email addresses… some were HMCS/HMCTS addresses and some of these were/are judicial email addresses"*. Paragraphs 13-16 deal with possible complaint procedures for dealing with a complaint against a judge, paragraphs 17-20 criticise the MoJ and the ICO's acceptance of information provided by the MoJ.

12. The ICO resisted the appeal relying on the reasoning of her decision notice. With respect to the status of the judge she argued:-

"the Appellant does not appear to dispute that [the judge] was a member of the judiciary, but instead appears to submit that she was not necessarily acting as a member of the judiciary when she received the Second Request.

… The Commissioner considers that a judge will likely perform a number of functions that would fall within the remit of the judiciary, and submits that the Appellant has failed to set out why [the judge] was not acting as a member of the judiciary at the time of the request.

… The Commissioner does not consider the use of a HMCTS email address to indicate that [the judge] was acting otherwise than as a member of the judiciary." .

13. The Commissioner also noted that Mr Sanders was fully aware of the MoJ FOIA procedures *"yet chose to submit the Second Request directly to [the judge], a point which is indisputable given that the email was addressed directly to her. This indicates that the purpose of the second Request was to obtain information from her which was connected with her judicial function, rather than requesting information from the MoJ in the usual manner."*

14. In responding to the ICO's case Mr Sanders argued that he had not written solely to the judge on Christmas Day 2014 since: *"the email in question was also sent to numerous other recipients all of whom were either employees of HMCTS or the generic inbox for RPT London (HMCTS) enquiries"*. He suggested that in 2010 he was not aware that the judge was a judge when he first wrote to her. He noted the ICO's position that judges were constitutionally separate from the administration and

argued that: *"Judges do not have HMCS/HMCTS email addresses as standard unless they also perform some other non-judicial role"*.

15. In the tribunal Mr Sanders argued that it was a factual question whether the individual was only a judge and he suggested that she may have had another role. He pointed to the difficulty a requester had of knowing what precise information was held which would answer his request, and said that he had been seeking information of how a President of a tribunal exercises her responsibilities. He had not been exploring hypothetical scenarios but had been trying to get information to move forwards. He noted that the MoJ had argued that a previous request to them had been vexatious; however that had been totally different.

Consideration

16. In his appeal Mr Sanders has not challenged the reasoning of the ICO that a judge is not a public authority within s3 FOIA. Although Mr Sanders claimed that when he first wrote to the judge in 2010 to complain about the conduct of a tribunal panel he was not aware that he was writing to a judge, when he wrote on Christmas Day 2014 he did know. Although he claims that the possession of a HMCTS email address points to the judge exercising a non-judicial function and that a complaints function with respect to members of a tribunal may not be a judicial function, these propositions are neither evidence nor convincing arguments. The possession of an email address may simply be a convenience and a matter of how the email system of a particular tribunal has been administered. The role of a President of a tribunal includes handling complaints about tribunal members, however this complaint handling does not extend to the content of their judicial decisions. That is a matter for appeal. The tribunal is satisfied that the ICO was correct to conclude that Mr Sanders wrote to the judge about her judicial work. The fact that he copied the email to other recipients is irrelevant. He wrote to her, complaining about her actions and sought a reply from her.

17. Furthermore the content of both communications was not seeking information that was likely to be held. They were written against the background of a claim alleging misconduct and they advance arguments and criticisms. They were a misuse of the statutory procedure for the purpose of conducting a dispute, not to seek information.

18. The tribunal is satisfied that the ICO in her decision correctly analysed the factual position and came to the only possible conclusion with respect to s3 and s8.

19. This appeal is without merit and is dismissed.

20. Our decision is unanimous.

Judge Hughes
[Signed on original]
Date: 3 October 2017