



**IN THE FIRST TIER TRIBUNAL**

**Appeal No: EA/2014/0290**

**GENERAL REGULATORY CHAMBER**

**INFORMATION RIGHTS**

**On appeal from the Information Commissioner's Decision Notice No FS50538007 dated 16 October 2014**

**Before**

**Andrew Bartlett QC (Judge)**

Heard at Field House, London EC4

Date of hearing 29 April 2015

Date of decision 18 June 2015

**APPELLANT: STEVE SANDERS**  
**FIRST RESPONDENT: INFORMATION COMMISSIONER**  
**SECOND RESPONDENT: MINISTRY OF JUSTICE**

**Attendances:**

The appellant in person

For the 2<sup>nd</sup> respondent: Jennifer Thelen

**Subject matter:**

Freedom of Information Act 2000 – whether information held

**Case:**

*University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC)

### **DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is struck out pursuant to rule 8(3) of the First-tier Tribunal (General Regulatory Chamber) Rules 2009 as having no reasonable prospect of success.

### **REASONS FOR DECISION**

#### Introduction

1. In October 2012 Mr Sanders made an information request to the Judicial College, asking for copies of the course modules (ie, training materials) in the Judicial College Civil Law prospectuses. Without limiting his request, he indicated that he was particularly interested in the modules on appeals, civil restraint orders, costs, and the Equality Act.
2. After an initial refusal there was some further correspondence. In December 2013 the Judicial Office, which is part of the Ministry of Justice (MOJ), communicated the outcome of its internal review of his request; this was that the MOJ did not 'hold' the requested information, within the meaning of the Freedom of Information Act (FOIA), because it was held by the judiciary, who are not a public authority subject to the Act (not being listed in FOIA Schedule 1).
3. Mr Sanders complained to the Information Commissioner. After investigation, the Commissioner upheld the refusal on the same ground.
4. Mr Sanders appeals to the Tribunal. He complains of procedural defects in the Commissioner's investigation and decision and that the Commissioner arrived at the wrong outcome. The other parties maintain their previously stated positions, and the MOJ has applied to strike out the appeal on the ground that it has no reasonable prospect of success. The application is made under rule 8(3) of the First-tier Tribunal (General Regulatory Chamber) Rules 2009.
5. At the oral hearing the MOJ and Mr Sanders advanced their respective submissions. The hearing was attended by Ms Terry Hunter of the Judicial Office, whose role is head of governance and policy for the Judicial College, and who provided answers to some factual queries that were raised during the hearing. At the hearing I requested that the MOJ provide the governing documents of the Judicial College. As a result, documents were provided on the day following the hearing, and Mr Sanders provided his comments on these on 15 May 2015.
6. The documents which were provided after the hearing appeared to me to show that the correct factual position regarding the Judicial College was somewhat different from the position that had been expressed in some of the material submitted by the MOJ, as a result of which the issue which would arise for decision in the appeal was clearer than it had previously been. I therefore issued a note to all three parties dated 21 May 2015, upon

which they were given the opportunity to make further representations if they wished to do so. The Information Commissioner and the MOJ provided short additional comments on 3 June 2015.

The question for the Tribunal

7. The relevant statutory provision for present purposes is FOIA s3(2)(a). By virtue of this provision information is 'held' by a public authority if it is held 'by the authority, otherwise than on behalf of another person'. The meaning of the term 'held' was explained at some length in *University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC).
8. The MOJ is a public authority subject to FOIA. The MOJ's case is that, in so far as the course information is held by the MOJ, it is so held solely on behalf of others, namely, the judiciary. If that is right, the appeal cannot succeed, because the materials are not 'held' by the MOJ within the meaning of FOIA s3. On the other hand, if the course information is held not only for the judiciary but also, in part, for the MOJ's own purposes, it would follow that the materials are held by the MOJ within the meaning of FOIA.
9. The procedural criticisms raised by Mr Sanders are only relevant to the outcome of this appeal in so far as they provide support to the argument that the Commissioner may have reached the wrong conclusion.
10. The question for the Tribunal is whether Mr Sanders' appeal has a reasonable prospect of success.

The parties' submissions

11. The MOJ concedes that it holds on its own behalf some information relating to the Judicial College, but in relation to the training materials housed on the LMS the MOJ contends that in so far as it holds them it does so only in the sense of being the provider of the LMS and thereby holding them on behalf of the Lord Chief Justice and for the judiciary.
12. The MOJ also points out:
  - a. FOIA is written on the basis that the judiciary are not within it; where information is held solely on behalf of the judiciary, if it were decided that this brought the information into the scope of FOIA, this would bring the judiciary within the folds of FOIA, contrary to the clear intent of the Act.
  - b. The MOJ has no access to the training materials except for the purpose of making them available to judges.
13. The essential logic of Mr Sanders' argument on the substantive issue is:
  - a. The MOJ is responsible to provide the infrastructure of the judicial system.
  - b. Pursuant to this role, the Judicial College is an organ of the MOJ.

- c. The Judicial College holds its course materials. It would be absurd to posit a College which did not hold its course materials.
  - d. Therefore the materials are held by the MOJ or, at least, the materials are held partly for the purposes of the MOJ (ie, the purpose of providing the infrastructure to support the judges).
  - e. Since the MOJ is subject to FOIA, it holds the materials and should release them.
14. Mr Sanders also relies on some subsidiary arguments concerning the ownership of the materials and who pays for them, and who pays for the Judges.
15. The central item in the procedural concerns raised by Mr Sanders is an 11-page document which he prepared, entitled "Representations, issues and questions put forward by Mr Sanders for the ICO's consideration with regard to the FOI request for the Judicial College's course materials" (14 July 2014). The Commissioner sent this on to the MOJ for comment, but the MOJ decided not to respond to it. Mr Sanders not unreasonably argues that, if the Commissioner considered the matters raised were irrelevant, he would not have sent them to the MOJ for comment and, if he thought they were relevant, he should have insisted that the MOJ provide answers. Mr Sanders was subsequently informed that his questions could be considered as a further FOI request but, when he did so, the MOJ declined to answer on the ground that the request was 'vexatious'.
16. I feel bound to express sympathy with Mr Sanders' sense of frustration at being treated in this manner. Further, the fact that the Commissioner and the MOJ did not seriously engage with his questions and comments in the 11-page document suggests that the Commissioner's decision was not made on a satisfactory basis. However, the relevant question for present purposes, given that we are now at the appeal stage, is whether the absence of comprehensive answers to the matters raised either (a) points towards a favourable resolution of the issue in the appeal, to the effect that the course materials are held by the MOJ for FOIA purposes, or (b) at least points to a degree of uncertainty about the correct resolution of the issue such that it can only safely be decided after a full hearing. Mr Sanders submits that, if there were a full hearing, he would be able to put his questions to a witness from the MOJ, and the answers might assist his case.
17. The MOJ's response is that the position is sufficiently clear, and that more detailed answers to the matters raised in the 11-page document would not advance Mr Sanders' case.

#### Analysis

18. As a result of the parties' submissions, the oral hearing and the additional information provided afterwards, the facts concerning the nature and status of the Judicial College, and how its course information is held, became much clearer than they had initially been. I found the published document setting out the Strategy of the Judicial College for the period 2011-2014 particularly helpful in resolving the lack of clarity. As a result, the following can be stated with confidence:

- a. The Lord Chief Justice has statutory responsibility for the training of the judiciary of England and Wales, and the Senior President of Tribunals has statutory responsibility for the training of tribunal judges and other tribunal members.
  - b. The Lord Chief and the Senior President are required by statute to co-operate in relation to judicial training. They jointly decided that it would be beneficial for all judicial office holders to be trained by the same organisation. For this reason they established the Judicial College on 1 April 2011.
  - c. The Lord Chief and the Senior President exercise oversight of the Judicial College through the Judicial Executive Board (JEB). Sitting below the JEB is the Board of the Judicial College, which is the governing body of the College. The College Board was set up by the JEB. The JEB is chaired by the Lord Chief, and its members include the Senior President and the Chairman of the College Board.
  - d. The College Board sets overall strategy, agrees business plans and oversees the delivery of judicial training. The College Board is almost wholly comprised of judges. The only non-judicial member of the Board is the Executive Director of the Judicial College, who is responsible for the administrative staff. The Board is supported by a series of committees responsible for the various detailed training programmes.
  - e. The Executive Director of the Judicial College and the other administrative staff of the Judicial College are part of the Judicial Office. The Judicial Office is staffed by civil servants from the MOJ; it is part of, and is provided by, the Ministry of Justice, but it is independent in the sense that its staff report to the Lord Chief and the Senior President. The function of the Judicial Office is to support the judiciary.
  - f. The materials for judicial training in Civil Law are mostly written by judges and delivered by judges. In some instances judges responsible for training ask academics to provide written papers or lectures. However, all those who design and deliver training to judicial office holders do so on behalf of the Judicial College.
  - g. The College has developed, and maintains, a learning management system (LMS). This is a computerised system which houses the training materials. Civil servants working for the Judicial Office provide the technical support for the LMS.
19. One of the conclusions reached by the Commissioner in his decision notice, based on information provided by the MOJ, was that the Judicial College was part of the Judicial Office. In argument at the hearing the MOJ maintained its support for this conclusion. In similar vein, information attached to the letter from the Judicial College to Mr Sanders dated 20 November 2013 stated that the Judicial College was a public body for the purposes of FOIA. However, in the light of the facts set out above it appears to me that these were rather unclear and misleading statements. They are true only as regards the administration of the Judicial College and not as regards the Judicial College as a whole. I am sure that the judges who comprise the College Board, and the judges who provide the training, would be

surprised to be told that they were part of the Judicial Office. Plainly, they are not; it is the administrative staff of the Judicial College who are part of the Judicial Office. Unlike its predecessor the Judicial Studies Board, the Judicial College is not listed as a public body in Schedule 1 to FOIA; thus the statements that the Judicial College is part of the Judicial Office, or that it is a public body for the purposes of FOIA, are not correct; these statements are imprecise and materially inaccurate shorthand for the fact that the Judicial College administration (not the Judicial College as a whole) is part of the Judicial Office and hence part of the MOJ, which is itself a public body subject to the Act.

20. In my view, therefore, the facts do not support a central plank of Mr Sanders' case, namely, that the Judicial College is an organ of the MOJ. This is not his fault. This part of his case is based on unclear explanation provided by the MOJ concerning the nature of the Judicial College. The true position is that the Judicial College is a creature of the Lord Chief Justice and the Senior President. The role of the civil servants provided by the MOJ via the Judicial Office, who form the administrative staff of the College, is a supporting and administrative role. The Civil Law course materials housed on the LMS are provided by judges for judges. It follows that, in so far as they are held by the MOJ, they are so held not for the MOJ's purposes but on behalf of the College, understood not as part of the MOJ but as an independent organisation set up by and responsible to the Lord Chief Justice and the Senior President.
21. It could perhaps be argued on Mr Sanders' behalf that, since it is part of the MOJ's function to provide the judicial infrastructure, the MOJ holds the materials not only for the purposes of the College but also in order to fulfil its own purpose of providing the necessary infrastructure for the judiciary. In my judgment this argument would not be correct. In these circumstances the MOJ does not hold the information 'otherwise than on behalf of another person', because the only purpose of holding it is to do so for the Judicial College.
22. Accordingly, in my judgment, on the facts as they presently appear, the only possible conclusion is that the MOJ does not 'hold' the requested information within the meaning of s3(2)(a) of FOIA.
23. The appeal should only be struck out if it has no reasonable prospect of success. If there were any realistic possibility that other evidence might emerge at a full hearing which would support Mr Sanders' case and lead to the conclusion that the MOJ does after all hold the requested information, it would not be right to strike it out. The nature of the Judicial College, and of how it is supported by civil servants provided by the MOJ, is clear from the published documents. My conclusions do not depend upon statements formulated by the MOJ for the purposes of the appeal. In my judgment the possibility of a different analysis being supported by evidence which might be given at a full hearing is not realistic in the circumstances of the present case.

Conclusion

24. For the reasons stated above, it is appropriate to strike out the appeal. It should be clear from what I have said above that this result does not involve or imply any criticism of Mr Sanders.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge