



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0066**  
**Information Commissioner's Ref: FS50158413**

**Heard at Procession House, London, EC4**  
**On 15<sup>th</sup> January 2009**

**Decision Promulgated**  
**5<sup>th</sup> February 2009**

**BEFORE**

**CHAIRMAN**

**FIONA HENDERSON**

**LAY MEMBERS**

**MALCOLM CLARKE**  
**JOHN RANDALL**

**Between**

**MARK BARTON**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**MINISTRY OF JUSTICE**

**Additional Party**

Subject matter:

**FOIA**

Whether information held s.1

**Information Tribunal (Enforcement Appeals) Rules 2005 as amended**

Application for striking out, Rule 9

## **Decision**

The Tribunal upholds the decision notice FS50158413 dated 10<sup>th</sup> July 2008 and dismisses the appeal for the reasons set out below.

## **Reasons for Decision**

### **Introduction**

1. The background to this case is that the Appellant was involved in proceedings in a family Court which were presided over by Recorder X, he was seeking information, the purpose of which was to ascertain whether and if so when, this Recorder had been authorised (the technical phrase being “nominated”) to sit in Children’s Act cases.
2. On 17<sup>th</sup> March 2006, the Appellant requested information from the Ministry of Justice (MOJ) who at the time of the request were known as the Department for Constitutional Affairs. The request was for:

*“... the current list of judges nominated by the principal registry of the Family Division to reside over Child Custody/Contact applications within the Midland Circuit.*

*i.e. To meet the terms of the latest Family Proceedings (Allocation to Judiciary) Direction.*

*Please also provide for each judge the dates such a nomination was allocated”.*

3. Further correspondence followed in which the MOJ having relied upon section 12 Freedom of Information Act (FOIA) (that the cost of complying would exceed the appropriate costs limit) advised the Appellant how he might wish to reduce his request. As a result of this, on 27<sup>th</sup> May 2006, the Appellant sought an internal review of the decision to rely upon section 12 FOIA and reworded his request asking for a:

*“list of Judges approved by the President of the Family Division to preside over child Custody/Contact matters in the County Courts”.*

He indicated that he wanted each Judge's "type" to be stated and that if necessary would accept a National List. He clarified that his original request had been for Judges that had been nominated by the appropriate Family Division Liaison Judge, and not for those that had actually sat.

4. This was treated as a fresh request and on 20<sup>th</sup> July 2006 the MOJ disclosed a copy of the list of judges for the Midlands Family Judiciary. No dates of nomination were included.

#### **The request for information**

5. In response to this and having sought further guidance from the MOJ to ensure that he did not exceed the appropriate costs limit, the Appellant made a request on 25<sup>th</sup> October 2006 requesting the nomination and "approval" details of 10 named judges. The MOJ replied on 20<sup>th</sup> November disclosing a table showing 4 columns headed:

- [Name of the] Judge,
- type of authorisation,
- date of nomination,
- date of authorisation.

6. For 9 Judges the date of nomination was recorded as "not available". For 3 Judges the date of authorisation was recorded as "not available (pre Children Act)". For one Judge the date of authorisation was recorded as "not available" but the year when he received his training was provided. The MOJ explained that:

*"... many of the names of judges given for research were authorised and ticketed before the Children Act came into effect. Tickets will have therefore just been carried over but with no documentation held on the judges' regional files... Most of the other judges were nominated more than 6 years ago. As I clarified in my previous letter of 5th October, files holding records on nominations dates are only retained for five years and will have also therefore been destroyed in accordance with the department's guidelines".*

7. The Appellant sought an internal review of this decision on 26<sup>th</sup> November 2006 on the basis that "notwithstanding the information being incomplete due to the destruction of some subject files, the information that has been provided is inaccurate". In particular he

disputed that 2 Judges namely Recorder X and Judge Y were approved to preside over cases in relation to the Children's Act 1989.

8. The Appellant complained to the Commissioner on 12<sup>th</sup> December 2006 having at that stage not received the response to his request for an internal review, and continued to seek clarification from and chase the review with the MOJ.

9. In response to the Appellant's request for an update in relation to his review request he was written to on 25<sup>th</sup> January 2007 by Miss Mosum Hassan (Access Rights Unit DCA):

*"I can confirm that [Judge Y and Recorder X] are on the President's list of people authorised to sit in Children Act cases and therefore have tickets. **However, I am unable to confirm the dates in which the tickets were authorised as there is no record of any letters that exist on the Department's files.** In any case authorisation can sometimes be communicated orally to ticket holders and not in writing".* (Emphasis added).

10. The Appellant responded on 31<sup>st</sup> January 2007 challenging Miss Hassan's response but in particular noting:

*"...for a date to be supplied for [Recorder X] must mean something was in the personnel file, if so then please send me a copy".*

(The above point was made in the context that the table provided on 20<sup>th</sup> November 2006 provided no date of "authorisation" for Judge Y).

11. The Appellant chased this email 4 times over a 3 month period and never received a reply. No explanation has been provided for the failure to acknowledge or respond to these enquiries, neither has any explanation been advanced for the unacceptable delay in reviewing the decision. In her email of 25<sup>th</sup> January Miss Hassan indicated that she would be "providing [the Appellant] with a substantive reply to [his] request for Internal Review in due course". The promised review did not materialize until after the intervention by the Commissioner (and more than 8 months after it had been requested) when Ms Amrit Lotay (Access Rights Unit) responded on 12<sup>th</sup> July 2007. This review reiterated the assertion that no record of any letters existed on the Department's files as follows:

*"In reply to your email, you were informed that Judge Y and Recorder X were on the President's list of people authorised to sit in cases relating to the Children Act and therefore*

*have tickets. The reasons why we were unable to confirm the nomination and approved dates were also stated in the e-mail of 25 January”.*

12. The review further stated that the Appellant had been provided with all the information that he had requested on 25<sup>th</sup> October 2006, except that information that was not held. It explained that the MOJ could not provide the dates of nomination for 9 judges because that information is not held on the Judges’ regional files

#### The Information Commissioner’s Investigation

13. By agreement the Commissioner’s investigation was limited to the request on 25<sup>th</sup> October 2006, although the Commissioner did make findings in relation to the procedural breaches which had taken place starting with the first information request. This Tribunal is satisfied that whilst the earlier information requests provide the background to this appeal, this appeal concerns the Commissioner’s decision in relation to the request of the 25<sup>th</sup> October 2006, and as such does not consider whether section 12 FOIA was properly invoked in relation to the earlier request.

14. In his Decision Notice, the Commissioner indicated that:

- he was not in a position to decide whether information held was inaccurate or misleading because FOIA provides for access to official information where held, as it is recorded,
- he could however consider whether the public authority had withheld any information in response to the request.

15. The Decision Notice was issued on 10<sup>th</sup> July 2008. In relation to the 25<sup>th</sup> October 2006 request the Commissioner found that:

- The MOJ had disclosed all the information it held falling within the terms of that request.
- In relation to the fact that it was clear that the Appellant believed some of the information supplied to be untrue, the Commissioner found that no information had been withheld, and that it was not within the remit of the Commissioner to assess

whether the information in fact held and disclosed by a public authority was also accurate.

### The appeal to the Tribunal

16. The Appellant appealed to the Tribunal on 7<sup>th</sup> August 2008. Pursuant to the Tribunal's initial directions dated 26<sup>th</sup> September 2008, the Ministry of Justice were joined as an additional party.

### The questions for the Tribunal

17. The Appellant's Grounds of Appeal were clarified at the telephone directions hearing of 20<sup>th</sup> October 2008 in which the issues that fell to be determined by the Tribunal were limited at paragraph 1 to the following:

*i) Insofar as any information held by the Ministry of Justice in relation to this Information request is recorded inaccurately by them, the Commissioner erred in failing to reprimand the Ministry of Justice for providing incorrect information.*

*ii) The Commissioner erred in failing to find that the Ministry of Justice has breached section 1 FOIA in that:*

*a) it held the information that is the subject of the information request,*

*b) it has not provided it pursuant to the information request,*

*c) This ground includes the assertion that what has been provided as being recorded as the date of Recorder X's nomination is in fact the date that he is recorded as having been appointed as a Judge.*

18. The Commissioner and Additional Party apply for ground 1 to be struck out pursuant to rule 9 of the Information Tribunal (Enforcement Appeal) Rules 2005. The Commissioner also applies for ground 2 to be struck out as well. There is no explicit power to strike out part of a ground of appeal under rule 9, and in any event for the reasons set out (at paragraph 50 et seq) below in relation to ground 1 the Tribunal does not find that it is appropriate to strike out ground 1. In relation to ground 2, the Tribunal is satisfied that it is a reasonable ground of appeal and that there is a factual issue to determine, for these reasons the Tribunal does not strike out ground 2.

## Evidence

19. During the currency of the Commissioner's investigation, the Appellant accepted that Judge Y was nominated for the purposes of the Children's Act, and he has focussed his challenges in relation to the information provided relating to Recorder X. Whilst the Tribunal is charged with establishing whether section 1 FOIA has been complied with in relation to the entirety of the request, there is no serious challenge to the information provided in relation to any of the other 9 Judges. Consequently this decision concentrates upon the information requested and supplied in relation to Recorder X.
20. The MOJ relied upon the witness statement of Ms Karen Bruton who had been the Judicial and Family Liaison Officer for Her Majesty's Court Service (HMCS) Midlands Regional Office of the MOJ. At the time of the request she was responsible for family law "authorisations". She provided the information contained within the table disclosed to the Appellant on 20<sup>th</sup> November 2006.
21. From her evidence it is clear that the terms "*nomination*" and "*authorisation*" have been used inaccurately by the MOJ throughout their dealings with the Appellant.
- Ms Bruton used "nomination" to mean the administrative process by which the Midlands Circuit would write to the President of the Family Division proposing that a Judge was "ticketed" and therefore allowed to hear certain types of cases.
  - Section 2(2) *Family Proceedings (allocation to Judiciary) Amendment Directions 2002* (the Directions) specifies:

*"nominated" in relation to a judge means a judge who **has been approved** as one to whom family proceedings may be allocated by the President of the Family Division;*  
(Emphasis added).
  - Ms Bruton and the table disclosed to the Appellant on 20<sup>th</sup> November 2006, referred to the "nomination" date (as it is defined within the Directions) as the "authorisation date".

22. In his original request on 17<sup>th</sup> March 2006 from which the request of the 25<sup>th</sup> October 2006 flowed, the Appellant made reference to “*Nomination*” in the context of “*the terms of the latest Family Proceedings (Allocation to Judiciary) Direction*” and asked for the dates of nomination. Whilst it is accepted that in the correspondence prior to the 25<sup>th</sup> October request the Appellant indicated that he wanted the date of “*nomination*” and of “*approval*”, the Tribunal finds it extraordinary that a “term of art” – “*nominate*”, with a legal definition which is used to signify a particular process, was substituted by the Department responsible for administering it, for a different word in response to a request for information that specifically referenced that term of art. The fact that the same term (*nominate*) was used in the wrong context in relation to different information with a different meaning encompassed within the same request could only have led to confusion and was inexcusable.

23. Ms Bruton’s evidence was that:

- The President’s Office at the Royal Courts of Justice held a list of all those authorised to hear Children’s Act cases. Whilst this office is exempt from FOIA the list was disclosed in relation to the Midlands region by agreement on 20<sup>th</sup> July 2006. This list did not include any of the dates.
- The personnel files of Judges were now held by the Judicial Office in England and Wales at the Royal Courts of Justice (which was exempt from FOIA) and as at 6<sup>th</sup> September 2006 it was believed that:

*“Judge’s personnel files might be held in other local offices, but that it was difficult to know whether any such files would contain the information [the Appellant] sought”.*

- The information provided in the table disclosed on 20<sup>th</sup> November 2006:

*“was obtained by [Ms Bruton] looking up the information in the Judges’ personal files. The original documentation was not disclosed as it is held in the form of personal letters from the Family Division Liaison Judge to each judge at his or her home or chambers addresses. The letters are held on the personal files of the judges, which are retained until after a judge has retired.”*



24. It is not clear to the Tribunal whether the files where the information has been found by Ms Bruton (also referred to as “P” files) are the personal files belonging to or the personnel files relating to the Judges, however, the Tribunal is satisfied that no point turns on this as in either case it is would not be unexpected that they would contain copies of the letters of appointment and nomination.
25. In response to the Appellant’s concerns that the information within the table was inaccurate and the date of “*authorisation*” as set out in the table of 20<sup>th</sup> November 2006 (which should be referred to as “*nomination*” as per the Directions) was in fact the date that Recorder X became a Judge. Before the Tribunal Ms Bruton produced as exhibit KB/1 a series of 3 documents. The first of these documents was a copy of the letter to Recorder X dated 18 October 1994 confirming the addition of his name to schedule 2 of the *Family Proceedings (Allocation to Judiciary) Directions 1991* enabling him to deal with Private Law family matters. The Tribunal will refer to this letter as KB/1a. Additionally a copy of the letter showing the date that he was appointed to sit as an Assistant Recorder (which the Tribunal will refer to as KB/1b) and a copy of the letter showing the date that he had been sworn in as a Recorder (KB/1c) were also provided to demonstrate that there had been no confusion relating to which date had been provided in the table of 20<sup>th</sup> November 2006.
26. The Appellant provided evidence of:
- the MOJ’s conflicting accounts as to which files have been kept and what would be found within them,
  - the absence of any reference to Recorder X in the relevant Family Court Report for 2005-6, and
  - the absence of any evidence to suggest that Recorder X had ever practised in family law,

in support of his contention that KB/1a is not genuine and that either the information is not held (because the Recorder is not nominated) or the MOJ have provided the Appellant with the wrong date (because the Recorder was not nominated at the date of the Appellant’s hearing.)

#### Legal submissions and analysis

27. The Tribunal deals with ground 2 first, as in deciding that ground, it makes findings of fact which are relevant to its consideration of ground 1.

The MOJ's denial that any letter was held

28. At the root of the Appellant's belief that the MOJ have not complied with section 1 FOIA is his belief that Recorder X was not "nominated" at the date of the Appellant's Court case. He is of the view that either:

- The information is held, and proves his point, hence a wrong date has been provided to cover this up or
- The information is not held as he has never been nominated.

In order to support their case the MOJ have provided a copy of the letter of "nomination" and letters relating to the Recorder X becoming a Recorder to prove that:

- they held the information and
- it has been provided.

The Appellant does not accept that the letter KB/1a is genuine.

29. The Appellant appears to believe that this letter is not genuine, because he has been given conflicting information in the past, and because of the MOJ's failure to provide the letter to the Appellant before now. The Appellant's view is that it would have been produced to him in response to his enquiries at an earlier stage if it had existed. He asserts that there has never been any reference to this letter before its sudden appearance in November 2008 after the completion of the documentary bundle for this hearing.

30. On 25<sup>th</sup> January 2007 Miss Mosum Hassan (Access Rights Unit DCA) wrote to the Appellant (the Tribunal has added the emphasis):

*"I am unable to confirm the dates in which the tickets were authorised as **there is no record of any letters that exist on the Department's files.**"*

The Appellant responded on 31<sup>st</sup> January 2007 challenging Miss Hassan's response but in particular noting:

*“...for a date to be supplied for [Recorder X] must mean something was in the personnel file, if so then please send me a copy”.*

The Appellant chased this email 4 times over a 3 month period and never received a reply, or a copy of the letter (which has now been produced as KB/1a).

31. In her email of 25<sup>th</sup> January Miss Hassan indicated that she would be *“providing [the Appellant] with a substantive reply to [his] request for Internal Review in due course”*. The promised review did not materialize until after intervention by the Commissioner when Ms Amrit Lotay (Access Rights Unit) responded on behalf of the MOJ on 12<sup>th</sup> July 2007. This review reiterated the assertion that no record of any letters existed on the Department’s files as follows:

*“In reply to your email, you were informed that Judge Y and Recorder X were on the President’s list of people authorised to sit in cases relating to the Children Act and therefore have tickets. The reasons why we were unable to confirm the nomination and approval dates were also stated in the e-mail of 25 January”.*

32. In the letter to the Commissioner dated 20<sup>th</sup> March 2008 Mr Carl Pencil of the Access Rights Unit noted on behalf of the MOJ that:

*“It was not possible to provide the applicant with complete information on nominations and approval dates because the information is no longer held as it was **only** kept in subject files which are only retained for five years in accordance with retention schedules...”*

*Regarding the request for MOJ to provide [the Appellant] with documentary evidence to show that the 10 Judges, specifically including [Judge Y and Recorder X] have been properly authorised to preside over family cases, this information is evidenced by the statement made to the applicant by the Ministry of Justice that they have been so authorised. The Ministry of Justice did not provide him with additional documentary evidence, other than the statement that they had been so authorised, but explained in the response to the internal review why such evidence could not be provided because **copies of the original authorisation letters have not been retained”.***

33. Further detail is provided in response to a request for clarification from the Commissioner. In his letter dated 10<sup>th</sup> April 2008 Mr Pencil stated that:

- Since the Constitutional Reform Act 2005, files for all serving members of the paid judiciary are kept by the Judicial Office for England and Wales on behalf of the Lord Chief Justice.
- Files relating to the appointment of individual judges have been transferred to the Judicial Appointments Commission.
- Both these types of files are retained at least while the judges still hold office **but would not usually hold information about which “tickets “ or authorisations the judges concerned had been given after appointment.**
- The Regions or Circuits maintain their own records, which would include the date of “nomination” (now understood to mean proposal) but these records are retained for only 5 years.
- The names appear on the Presidents list because they are authorised, but the list does not contain dates.

Accompanying this letter was the records/destruction schedule which states:

*13        Judiciary        5 years for policy files, but destroy individual files 1 year  
after retirement*

34. In light of the above, the Appellant asserts that there is no mention anywhere within the correspondence from the MOJ to Appellant or the Commissioner that this letter KB/1a existed. However, the Tribunal is satisfied that there was direct reference in the letter to the Commissioner of 28<sup>th</sup> May 2008 in which Mr Pencil explains:

*“The 10 dates provided in the 20<sup>th</sup> November letter were provided by the Midland Circuit Office. The source of the information was the judges personal files and file 31/1 “Children Act 1989” – nomination – Schedules. It is a file held in the Midlands Regional Office (and former Circuit Office) which held all Schedules and **copy letters of family authorisations for District and Circuit Judges. The data where held was provided”.***

35. The Tribunal has considerable sympathy for the Appellant who when faced with the repeated explicit denial that such a letter had been retained and the assertion that it was not expected to be found in the Judge’s personal files, may not have realized that this was an

admission that the Appellant had been misinformed and KB/1a was in fact held in Recorder X's personal file.

The late appearance of KB/1a during these proceedings.

36. The letter KB/1a was eventually provided to the Appellant enclosed with a letter dated 27<sup>th</sup> November 2008. The Treasury Solicitor on behalf of the MOJ stated:

*“As you are aware we are currently in the process of agreeing the bundle for the hearing in this matter. As part of this process it was anticipated that there would also be a closed bundle of material including a letter dated 18 October 1994 from the [Family Division Liaison Judge] confirming that Recorder X is authorised to hear private law family matters. However, after discussing the matter with Recorder X my client has agreed that this letter can be disclosed to you outside my client's obligations under the Freedom of Information Act 2000”.*

37. The Appellant relies upon the directions dated 20<sup>th</sup> October 2008 issued by this Tribunal in which it was directed that the contents of the bundle were to have been agreed by 17<sup>th</sup> November 2008 and that:

*“9. In the event that the Ministry of Justice intend to provide a closed bundle, they are to notify all parties of this fact by the 7<sup>th</sup> November 2008”.*

Not only had the MOJ failed to notify the Appellant that they intended to provide a closed bundle by 7<sup>th</sup> November 2008 in breach of the directions, but the letter KB/1a did not appear on any index or proposed index of the open bundle which should have been agreed by 17<sup>th</sup> November 2008. The first indication that the Appellant had that this specific letter was to be relied upon at the appeal was 10 days after the deadline had expired for agreeing the documentary evidence.

38. The Appellant is of the view that there is no reason to have KB/1a in a closed bundle, and that this cannot be the real reason why KB/1a appeared so late in the day. From the evidence of Ms Bruton it would appear that the original documentation was not disclosed as it was a personal letter addressed to Recorder X at his Chambers address. However, the Chambers address is a matter of public knowledge and one of which the Appellant was

aware (see paragraph 39 below.) It may also be that the fact that the letters were personal was considered relevant, but the MOJ have never sought to explain why:

- It was ever considered suitable to put the letter in a closed bundle,
- The Appellant was not notified of the intention to place the letter in a closed bundle within the timescale set out in the directions,
- A redacted version of the letter could not have appeared in the open bundle.

Recorder X claims no experience of Family Work in his Chambers CV and wouldn't therefore have been nominated.

39. The Tribunal notes that the Appellant had some concerns as to the way in which the agreed bundle was compiled and that in particular it may have been that the Chambers' CVs of Recorder X (which make no reference to any experience of family work) had been omitted (deliberately in the contention of the Appellant). The Commissioner, who was responsible for compiling the draft index, denies that it was omitted. The Tribunal notes that with the Notice of Appeal, the Appellant sent to the Tribunal:

- A copy of his letter to the Commissioner dated 3<sup>rd</sup> July 2006 in which he provides web links to the CVs on the Chambers sites,
- A copy of his letter to the Commissioner dated 11<sup>th</sup> February 2008 in which he lists as an attachment the Chambers CVs
- Print outs of the Chambers CVs.

40. The Tribunal is satisfied therefore that all parties would have been aware prior to the compilation of the bundle that the Tribunal already had a copy of the CVs and was aware that the Commissioner's attention had been drawn to them during his investigation. Consequently the Tribunal is satisfied that there is no necessity to consider further whether the CVs were omitted from the first index of the bundle, and if so the reason for this.

41. Additionally the Tribunal does not consider the Recorder's Chambers CVs to be a material consideration. Whilst there is no reference to his undertaking family work, the purpose of a Chambers CV is to attract work in the fields in which the subject would wish to work, not to list every area in which work has been undertaken. Additionally there is no evidence before

the Tribunal that practising in family law is a necessary pre-requisite to nomination under the *Family Proceedings (Allocation to Judiciary) Directions 1991*. Indeed the terms of the letter KB/1a itself acknowledge:

*“For some of you, it is a new or comparatively new field of practice...”*

42. The Appellant further relies upon the fact that the relevant Family Court Annual Report provided by the Court where Recorder X sat on the Appellant’s case, for 2005-6, has left the section dealing with *“Recorders with Family Authorisations”* blank, in support of his contention that Recorder X does not have a family authorisation and is not nominated. He contrasts this with the reports from Coventry, Nottingham and Mansfield, Worcester and Northampton for the same period all of which provided named lists of Recorders.
43. Ms Bruton provides evidence that the Family Court Annual Reports would not usually make reference to Recorders because fee paid Judges in the Midlands are organised into a single pool and booked to sit where needed, hence they are not allocated to a group of Courts. The Family Court Reports will only list those “salaried” Judges who have all or part of their sittings at that Court.
44. The Tribunal notes that of the Recorders named in the other reports, the vast majority had spent 100% of their time sitting on family cases. However, the combined report for Wolverhampton, Walsall and Dudley named 2 Recorders in relation to Wolverhampton, but noted that in Walsall *“16 Recorders sat 106 days in total throughout the year on family work”* and in Dudley *“6 Recorders sat 29 days in total throughout the year on family work”*.
45. The Tribunal is satisfied therefore that there is no consistent approach to the naming of Recorders within the Family Court Reports for that region at that time. It is clear from the reports that some Recorders sit very few days, despite their “nomination” and there is no evidence to suggest that there is an obligation for them to sit on family cases alone or even at all within a year. Whilst it is noted that the Appellant’s local Family Court Report makes no reference to any Recorders sitting at all, the Tribunal is satisfied that this is in keeping with Ms Bruton’s evidence as is the approach taken in the Wolverhampton, Walsall and Dudley Report. The fact that a Family Court Report could have been more detailed does not, in the finding of this Tribunal support the Appellant’s assertion that Recorder X is not nominated and that the information provided is either wrong or not held.

The form of KB/1a

46. The Appellant takes issue with the fact that the letter KB/1a is from the Family Division Liaison Judge Midland and Oxford Circuit, but that the letter states that it is the Lord Chancellor who has approved the nomination, in support of his assertion that the letter is fabricated. The Tribunal is satisfied that this point is without substance because, from Section 9 *Courts and Legal Services Act 1990* it is clear that:

*9 (1) The Lord Chancellor may, with the concurrence of the President of the Family Division, give directions that, in such circumstances as may be specified—*

*(a) any family proceedings which are within the jurisdiction of county courts ...*

*shall be allocated to specified judges or to specified descriptions of judge.*

(emphasis added)

47. From the table of dates given and the terms of KB/1a, it is clear that a standard letter was sent to several Judges at the same time. The Appellant believes this should have made it easier for the dates to be traced, it being a group appointment date. In light of the date of appointment, some 11 years before the information request, and the explanation as to how the letters were kept in individual personal files; the Tribunal is satisfied that this is not a relevant consideration.

48. The MOJ rely upon section 9(3) of the *Courts and Legal Services Act 1990* which states;

*(3) Where any directions have been given under this section allocating any proceedings to specified judges, the validity of anything done by a judge in, or in relation to, the proceedings shall not be called into question by reason only of the fact that he was not a specified judge*

in support of their assertion that the letter KB/1a is genuine and that therefore the information was held and had been provided. The Tribunal is satisfied that in light of section 9(3) there would be no reason to provide false information and takes this into consideration in deciding that KB/1a is genuine.

49. In light of the conflicting and misleading information given by the MOJ to the Appellant, the Tribunal has considered carefully all the evidence that the Appellant relies upon in



support of his contention that the letter KB/1a is not genuine. The Tribunal is satisfied that the letter is genuine and that therefore the information given in relation to Recorder X in the table on 20<sup>th</sup> November 2006 was held and has been provided in accordance with Section 1 FOIA. There has been no challenge to the rest of the information that was provided, and in any event the Tribunal is satisfied on the evidence before it that the Commissioner (in what was a tenacious and thorough investigation) was correct in his analysis and conclusions in relation to the reasons why some of the information was not held. Ground 2 is therefore dismissed.

### **Ground 1**

50. Ground 1 is expressly limited to the circumstances that arise where information is provided that has been recorded inaccurately. Upon the facts of this case as set out above, the Tribunal is satisfied that the correct information is held and has been supplied to the Appellant and for that reason ground 1 falls without further examination. However, the Tribunal notes the Commissioner's broad contention as set out in his reply that: "*it is not within the Commissioner's remit to assess the accuracy of information in fact held and disclosed by a public authority*" and the Tribunal makes the following observations in the paragraphs below.

51. Inaccurate information can be provided for a number of reasons:

- If the information is not held and other information has been provided in its stead (e.g. if the date when Recorder X was made a Judge had been provided in lieu of his nomination date because no nomination date was held). In that case the Commissioner would have a role as there would have been a breach of section 1(a) FOIA in that the requestor would not have been told that the public authority did not hold the information.
- If the information is held, but the wrong information has been provided in its stead, (e.g. if the date when Recorder X was made a Judge had been provided instead of his nomination date when that date was held). In this case the Commissioner would have a role as there would have been a breach of section 1(b) FOIA in that the requestor would not have had the information which is held communicated to him.

- If the information is wrongly recorded (i.e. a scribe’s error e.g. 2 digits transposed or an error in calculation) – the provision of this incorrect information is not necessarily a prima facie breach of FOIA and will depend upon the facts of the case. Whether there is a breach or not may depend upon the wording of the request e.g. a request for a figure submitted in a document should yield the figure in that document (with no concerns as to whether the figure was correctly arrived at), however the request for an incontrovertible fact such as a date of birth, if recorded wrongly might lead to the conclusion that the public authority does not hold a record of that date of birth (since that which purports to be a record of a date of birth is in fact not). In those circumstances if there is prima facie evidence that the information is wrongly recorded, the question arises, whether this is the only place where the public authority “holds” the information? If the public authority has another record where the correct information is held, then there is a duty under FOIA 1(b) to communicate that information.
52. In his arguments the Appellant has raised the concern that FOIA can be defeated by a public authority deliberately providing inaccurate information either to cover up the fact that information is not held when it should have been, or to prevent a requestor from obtaining the true information sought. The Tribunal is satisfied that should the Commissioner find that incorrect information has been provided in these circumstances, not only would section 50 FOIA provide for the Commissioner to ensure that the requestor was supplied with the correct information through a Decision Notice requiring the public authority to comply with section 1 FOIA, but that the Commissioner does have powers to take the matter further as set out in section 77 FOIA which provides:

*77(1) Where—*

*(a) a request for information has been made to a public authority, and*

*(b) under section 1 of this Act ..., the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,*

*any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.*

...

*(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.*

*(4) No proceedings for an offence under this section shall be instituted—*

*(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions; ...*

This power would appear to qualify the Commissioner's assertion that the accuracy of information provided is not within the Commissioner's remit.

53. The Tribunal notes that ground 1 included the Appellant's assertion that the Commissioner should have "reprimanded" the MOJ. Whilst section 77 FOIA provides a mechanism for prosecution in certain cases, that is not the same as a "reprimand" in that the Commissioner may institute the proceedings, but is not the person in front of whom the proceedings take place. Additionally there is no power within FOIA for the Tribunal to interfere with the Commissioner's decision to invoke section 77 or otherwise. The Tribunal's powers are set out in section 58 FOIA and whilst it would be open to the Tribunal to make a finding that the Commissioner had erred in failing to find that there had been a breach of a particular provision of FOIA, there is no jurisdiction whereby the Tribunal can find that the Commissioner ought to have "reprimanded" a public authority.

#### Conclusion and remedy

54. Upon consideration of the evidence, the Tribunal is satisfied that where the information was held, it has been disclosed by the MOJ and for the reasons set out above, the appeal is dismissed. The Tribunal's decision is unanimous.

Signed:

Fiona Henderson  
Deputy Chairman

Dated this 5<sup>th</sup> day of February 2009