



[Neutral Citation Number]

**IN THE FIRST-TIER TRIBUNAL**

**Case No. EA/2010/ 0101**

**GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**

**Decision Letter No: FS50235796**

**Dated: 29<sup>th</sup> April, 2010**

**Appellant:           John Cross  
Respondent:        Information Commissioner  
On the papers**

**Date of decision: 21<sup>st</sup> December, 2010**

**Before**

D.J. Farrer Q.C.  
(Judge)

and

Tony Stoller  
and  
Narendra Makanji

**Subject matter: Whether The Duchy of Lancaster is a “public authority” for the purposes of the Environmental Information Regulations, 2004 (“EIR”)**

**Cases: BBC v Sugar [2009] UKHL 9, [2009] 1 WLR 430).  
Town Investments Ltd v Department of the Environment [1978] AC 359.  
Network Rail Limited v IC (EA/2006/0061 and EA/2006/0062);  
Port of London Authority v IC (EA/2006/0083).  
Duchy of Lancaster Case (1561) 1 Plowd. 212**

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

The Tribunal upholds the decision letter dated 29<sup>th</sup>. May, 2010 and dismisses the appeal.

## REASONS FOR DECISION

### Introduction

#### (i) The jurisdiction of the Tribunal

1. The issue for determination goes to the jurisdiction of the Information Commissioner (“the ICO”) hence of the Tribunal. The ICO’s power to issue a decision notice derives from EIR Reg.18 and FOIA s.50 which are founded on a request for information made to a “public authority”. In his Decision letter, the ICO noted that he had no power to issue a decision notice, given his finding that the Duchy was not a “public authority”. He therefore issued a “letter” and indicated that he would not argue against the jurisdiction of this Tribunal, should another party seek to challenge that finding
2. *BBC v Sugar [2009] UKHL 9, [2009] 1 WLR 430*) dealt with the question whether a “hybrid authority”, that is to say an authority holding information of which a specified category is excluded from the requirements of FOIA s.1 by virtue of s.7(1) and Schedule 1, is, in respect of requests for excluded information, a public authority for the purposes of FOIA, hence whether the IC and the Tribunal were competent to rule as to whether the requested information was excluded from the duty to provide information enacted in s.1.
3. The majority of the House of Lords was of the view that a hybrid authority, listed in FOIA Schedule 1, was a “public authority” for the purposes of a request for information,

whether or not the information requested was excluded information. Accordingly, the ICO and the Tribunal had jurisdiction to rule on that issue.

4. EIR reg.18 and FOIA s.50 empower the ICO to decide whether a request to a public authority *“has been dealt with in accordance with the requirements of Part 1(of FOIA)*. The Duchy is not a hybrid authority. Either it is a public authority for the purposes of the EIR or it is not. If it is not, then, on a plain reading of the statute, the ICO has no jurisdiction to entertain a complaint nor the Tribunal to hear a subsequent appeal.
5. However, such a reading ignores the stark practical problems identified by Lord Phillips of Worth Maltravers in *Sugar* at para. 20

*“Under the scheme of the Act an issue as to whether a public authority has complied with the requirements of Schedule 1 falls to be determined initially by the Commissioner, with an appeal to the Tribunal. In a case such as this, that issue turns on whether the information held is public or excluded information. If the Commissioner’s jurisdiction turns on precisely the same question, how is he to set about resolving it if, as is likely to be the case, he lacks the necessary information? Section 51 is designed to enable him to require production of the information that he needs to perform his duties, but that section will not apply if the Commissioner has no jurisdiction. Quite apart from this practical problem, if the Commissioner’s decision goes to his jurisdiction, whether the*

*decision is positive or negative, the appropriate forum for a challenge will be the administrative court in judicial review proceedings. It is hard to believe that Parliament intended that the issue of the capacity in which a hybrid public authority holds information should have to come before a court rather than the Commissioner and the Tribunal, who would seem tailor made to resolve it.*

In the present case the issue of compliance for the ICO is similarly determined (to a significant degree) by the same considerations as apparently determine his jurisdiction. As in *Sugar*, the ICO invoked his powers under FOIA s.51 in order to decide whether the Duchy was caught by EIR. He was bound to do so. The result of his research was a finding that the Duchy was not a public authority for EIR purposes. It would indeed be very odd if that finding meant that his research was conducted ultra vires and any requirements to produce material were unlawful..

Moreover, adapting Lord Phillips` words in the final sentence of the cited passage, it is hard to believe that Parliament intended that the question whether an entity was a public authority within FOIA or EIR “*should have to come before a court rather than the Commissioner and the Tribunal, who would seem tailor made to resolve it.*”

6. If the ICO is competent to make such a finding, what is the position of the Tribunal when the requester or the authority purports to appeal against it ? Its jurisdiction, enacted in s.57, derives from the issue of a decision notice by the IC : -

*57.—(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.*

So the question for the Tribunal is whether a decision notice has been served, not whether the Duchy is a public authority. The decision letter labels itself as such because the ICO does not regard himself as having jurisdiction to adjudicate, though he appears to have done just that by the finding that he makes. Lord Phillips, in *Sugar* at paragraph 37, made clear that a decision notice could be by letter and that no form was prescribed:

*“Section 50 of the Act does not prescribe the form of a “decision notice”. I consider that this phrase simply describes a letter setting out the Commissioner’s decision”.*

It seems to us arguable that the letter was a decision notice giving power to entertain an appeal under s.57.

Neither the IC nor the Appellant has challenged the jurisdiction of the Tribunal to determine this appeal and neither the Appellant nor the Duchy questioned the competence of the ICO to rule on the complaint. Accordingly, we have received no argument against assuming jurisdiction. Neither did the Tribunal in *Network Rail Limited v ICO (EA/2006/0061 and EA/2006/0062)* or *Port of London Authority v ICO (EA/2006/0083)*, though in each of those cases the ICO had decided that the appellant authority was one to which EIR applied. Moreover, those decisions preceded *Sugar*.

7. The upshot is that the Tribunal decided to entertain this appeal on the ground that there was a plausible argument that it had

jurisdiction, notwithstanding the terms of the statute and obvious features on which *Sugar* could be distinguished. However, it acknowledges that the parties cannot by agreement confer jurisdiction on a tribunal which has no power in law to make the relevant decision. We emphasise that this issue has not been argued and our decision is not strong authority for the proposition that this Tribunal has power to adjudicate under s.57 on a decision of the ICO that a body is not a public authority for the purposes of EIR.

(ii) The substantive issue for determination

As is apparent from the preceding paragraphs, the sole question is whether the Duchy of Lancaster is a public authority to which EIR apply.

(iii) The historical background

8 This was undisputed. Indeed, the Appellant relied on particular features of the role and jurisdiction of the Duke and the Chancellor in support of the case which he advanced and which is summarised below.

9 In 1265 the estates of Simon de Montfort were confiscated by Henry 111rd. and granted to Henry`s younger son. The duchy was created in 1351. In 1362 it was conferred by Royal Charter on John of Gaunt, Earl of Lancaster, a son of Edward 111rd.

10 John of Gaunt`s son, Henry Bolingbroke, acceded to the throne as Henry 1Vth. in 1399 upon the deposition of Richard 11nd.

Henry ensured the separation of his hereditary family estates from those of the Crown by charter in the same year and his successors maintained that separation in the same way. In 1485, following the wars of the roses, Henry Tudor (Henry V11th.) vested the duchy estates in himself and his heirs by charter as a separate inheritance from the Crown.

11 Therefore, since the fourteenth century, the Duchy estates have been vested in the Sovereign, though as a separate inheritance from the Crown, as recognised in *The Duchy of Lancaster Case (1561) 1 Plowd. 212*. The Sovereign therefore retains the revenues of the Duchy for her private use.

12 The Chancellor to the Duchy of Lancaster has been a member of the cabinet throughout the last century or more. He has occupied a dual role, as steward of the Duchy estates, as to which his duty is to act solely in the interests of those estates and as a political figure, in which role his functions are unrelated to the Duchy. He is appointed by the Sovereign on the recommendation of the Prime Minister and receives separate seals of office from the Sovereign in respect of each aspect of his role.

13 Within the Duchy the Chancellor administers “bona vacantia”, that is to say private estates for which there are no successors in title. Outside the Duchies of Lancaster and Cornwall the Treasury solicitor administers such estates on behalf of the Crown. The right of the Duke to bona vacantia within the Duchy derives from a fourteenth century charter which preceded the accession of Henry 1Vth. It was preserved as a right separate from that of the Crown by subsequent charters.



14 The Sovereign, in right of the Duke of Lancaster, appoints to a variety of offices within the Duchy, namely

- the High Shreevalties of Lancashire, Merseyside and Manchester,
- (through the Chancellor) the Stewardship and Barmastership of the Barmote Courts which retain a largely or entirely ceremonial regulatory jurisdiction over mining disputes and offences in Derbyshire,
- the office of High Constable of Lancaster Castle
- judicial appointments to the courts of the County Palatine <sup>1</sup> and
- positions on the Councils of Liverpool and Salford Universities.

### The Law

15 Regulation 2(2) of the EIR, so far as material to this appeal provides –

*“Subject to paragraph (3), “public authority” means–*

*(a) government departments;*

*(b) any other public authority as defined in section 3(1) of the Act,*

*-----*

*(c) any other body or other person, that carries out functions of public administration; or*

*-----“*

16 Section 3(1) of FOIA, to which (b) refers, defines “public authority”

*(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.*

17 The Duchy is neither listed in Schedule 1 nor designated by order under s.5. Section 6, so far as material reads :-

*“(1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if—*

*(a) it is wholly owned by the Crown,*

*-----*

*(2) For the purposes of this section—*

*(a) a company is wholly owned by the Crown if it has no members except—*

*(i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or*

*(ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and*

*-----*

*(3) In this section—*

*“company” includes any body corporate;*

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<sup>1</sup> Courts exercising a jurisdiction in chancery matters in North West England and dating back to the semi – autonomous regions established in the middle ages to guard the border with Wales.

18 In s.84 of FOIA, “government department” is, so far as material, defined as including :-

*“any - - - body or authority exercising statutory functions on behalf of the Crown”.*

EIR reg.3(3) provides:-

*“(3) These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.”*

### The Appellant`s case

19 The Appellant set out his arguments clearly and concisely in his complaint to the ICO, which he incorporated in his Notice of Appeal. He added further points in an email later submitted to the Tribunal in response to the ICO`s Reply.

20 He contends that the Duchy is a “government department” (reg. 2(2)(a)) or, if not, a “publicly- owned company” (FOIA s.3(1)(b)) or, if not, a “body that carries out functions of public administration” (reg. 2(2)(c)).

21 In support of the submission that the Duchy is a government department, he points to the role of the Chancellor as a cabinet minister, in receipt of a salary and answerable to Parliament for the affairs of the Duchy.

22 He contends alternatively that the Duchy is plainly a body corporate, incorporated in 1461, referred to in the Companies

Act, 2008 hence a company within s.6(3) of FOIA. It is wholly owned by the Crown as its ownership falls within s.6(2)(a)(i).

23 His case is, however, principally founded on the contention that the Duchy is a body “ that carries out functions of public administration” pursuant to EIR reg.2(2)(c). He relies on the role of the Duke or the Chancellor in administering bona vacantia. If he did not perform that function, then it would be fulfilled by a government department, namely the Treasury.

24 He points to a series of public general statutes enacted over the last two centuries concerning the Duchy and argues that their existence indicates that it is not, as the Clerk to the Duchy claims, a private estate.

25 He says that the duty to submit accounts to the Treasury, imposed by the Duchies of Lancaster and Cornwall (Accounts) Act, 1838 is inconsistent with such a claim.

26 Even if the Duchy is a private estate, that does not exclude the possibility that it is also a public authority for the purposes of the EIR, if it has any of the characteristics set out in the statutory provisions quoted above.

27 The powers to appoint to judicial office, in particular the Vice – Chancellorship of the County Palatine and the Stewardship and Barmastership of the Barmote Courts in Derbyshire is itself a function of public administration.

28 So also are the powers of appointment to the offices of High Sheriff and membership of the university councils. The High Sheriff has duties relating to protection of High Court judges, the

administration of justice, specifically the issue of high court writs and to parliamentary elections. Those are functions of public administration and so is the antecedent power of appointment.

29 In his Decision Notice and Reply the ICO has drawn heavily on the helpful and scholarly submission of the chief executive and clerk to the council of the Duchy contained in a letter to the ICO dated 3<sup>rd</sup>. February, 2010. That submission recites the history of the Duchy and its relationship to the Crown, briefly summarised in the introduction to this Decision. It emphasises the separation of the Duchy from the Crown. It analyses the distinct functions of the Chancellor of the Duchy as a political figure on the one hand and as a steward of the assets of the Duchy on the other. It characterises the function relating to bona vacantia as a property right rather than a duty of public administration. It rejects any suggestion that the Duchy fulfils the criteria specified by Lord Nicholls in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 (See below).

#### The Reasons for the Tribunal`s decision.

30 In our judgment, the distinct separation of the Duchy from the Crown, evident from its history, from statute and from the decision in the *Duchy of Lancaster Case (1561)* 1 Plowd. 212, is of fundamental importance to the determination of the status of the Duchy for EIR purposes. It is a separation which is clearly reflected in the dual appointment and responsibilities of the Chancellor.

31 We shall deal with the different arguments as to the status of the Duchy as a public authority in the order of the relevant provisions in EIR reg. 2(2).

A government department ?

32 Section 84 of FOIA is not expressly incorporated into EIR, which contains no definition of the term. However, neither in its natural meaning nor in the arguably extended sense provided for by s.84, can the Duchy be regarded as a government department. Its only connection with government is that its Chancellor has governmental responsibilities as a result of his appointment by the Prime Minister to that office. They do not extend to the management of the Duchy's affairs, which is a separate operation undertaken by a chief executive and management committee. The Chancellor is answerable for such matters, not to Parliament but to the Sovereign.

33 If s.84 of FOIA provides the test, namely is it a "*body or authority exercising statutory functions on behalf of the Crown*", the answer is :

- (i) It is a body.
- (ii) It has no statutory functions, that is functions conferred on it by statute (None was cited ).If it had, they would not be exercised on behalf of the Crown but of the Duke of Lancaster, as is apparent from the summarised history. The Crown means the central executive arm of government – see *Town Investments Ltd v Department of the Environment* [1978] AC 359.

So the Duchy is not a government department.

A publicly - owned company ?

34 To qualify as a public authority under s.3(1), it must be “wholly owned by the Crown” (FOIA s.6(1)), for which purpose it must have -

*“no members except—*

*(i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or*

*(ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown”,*

35 The use of the term “members” clearly envisages a company limited by shares or guarantee, not a corporate body created or recognised by charter. The Duchy simply has no members.

It is owned by the Duke of Lancaster, who is also the sovereign.

It is not a publicly - owned company.

A body that carries out functions of public administration ?

36 The starting point for any determination as to whether a body undertakes public functions at all is the statement of the relevant criteria by Lord Nicholls in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 at 555 paragraph 12

*“12 What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single*

*test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”*

37 This test was applied by the Tribunal in *Network Rail Limited v IC (EA/2006/0061 and EA/2006/0062)* and *Port of London Authority v IC (EA/2006/0083)*. Other factors were considered in those appeals which are not relevant here. Though no single test applies, the absence of some, let alone all of those characteristics must weigh very heavily against a finding that a body undertakes public functions.

38 The Duchy is not publicly funded. It is dependent on the income generated by its estate. The Chancellor receives a publicly – funded salary for his services as a cabinet minister not his duties in relation to the Duchy.

39 We have already determined that the Duchy exercises no statutory powers. Its powers are matters of private law and derive from the series of charters granted in the thirteenth to fifteenth centuries.

40 Is it taking the place of central or local government? The principal argument in relation to the functions of central government centres on the role of the Chancellor as to bona



vacantia. This is, however, not an administrative duty but a residual right to property to which no heir exists, enjoyed elsewhere in the United Kingdom by the Sovereign and exercised by the Treasury on her behalf. The fact that any assets recovered are, with the Duke's consent, routinely applied for public charitable purposes is immaterial.

41 The offices to which the Duke or the Chancellor appoint are, with the exception of judicial posts in the Palatine Court, largely, if not entirely ceremonial in nature. As to the excepted offices, the power of appointment is a matter of form rather than substance. Judicial appointments are matters for the Judicial Appointments Commission and the Lord Chief Justice. The Chancellor takes no independent decision as to who should be appointed. We observe that EIR reg.3(3) does not assist the Appellant. If, which is doubtful, the role of the Duke or the Chancellor is partly judicial in nature, then EIR is, to that extent, disapplied. It does not follow that the other functions of a body exercising a range of powers are public administrative functions.

42 We further agree with the ICO that the requirement that the Duke of Lancaster consent to legislation relating to the Duchy says nothing as to the nature of his functions. Parliament has legislated so as to require the Sovereign's consent to enactments affecting her private property and could do likewise in relation to any private property whatever.

43 It is clear that these are not public functions. We do not need, therefore to go on to consider whether they are functions of administration.

44 The Duchy is not a public authority under any of the tests enacted in EIR reg.2(2).

45 For these reasons we dismiss this appeal. We wish to pay tribute, however, to the care and the precision with which Mr. Cross presented his case, in a difficult area of the law, both to the ICO and to us.

46 Our decision is unanimous.

Signed

David Farrer Q.C.

Judge

21<sup>st</sup> December, 2010