



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No EA/2010/0157

ON APPEAL FROM:

The Information Commissioner's Decision Notice reference FS50207213

Dated: 29 March 2010

Appellant: Andrew Nicoll

Respondent: Information Commissioner

Second Respondent The Cabinet Office

On the papers considered at: Fox Court, 14 Grays Inn Road, London WC1X 8HN

Date of hearing: 2 March 2011

Date of decision: 21 March 2011

Before

Angus Hamilton DJ(MC) Tribunal Judge

and

Suzanne Cosgrave Tribunal Member
and

Dr. Malcolm Clarke Tribunal Member

Attendances: None

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses this Appeal.

REASONS FOR DECISION

1. This appeal concerns a request made by Mr Nicoll to the Cabinet Office for a copy of the “recommendation made by the Honours and Decorations Committee and presented to Her Majesty the Queen that the Pingat Jasa Malaysia [“PJM”] can be exceptionally accepted but it cannot be worn”.
2. The Cabinet Office confirmed to Mr Nicoll that it held a copy of the report of the Honours and Decorations Committee (“the HD Committee report”) that was presented to Her Majesty the Queen but maintained that it was exempt from disclosure under section 37(1)(a) and (b) FOIA (communications with her Majesty and the conferring by the Crown of any honour) and section 35(1)(a) FOIA (formulation of Government policy). In each case the Cabinet Office further maintained that the public interest in maintaining that exemption outweighed the public interest in disclosure.
3. S. 37(1) FOIA provides that Information is exempt information if it relates to:
 - a. communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
 - b. the conferring by the Crown of any honour or dignity.
4. S. 35(1) FOIA provides that Information held by a government department is exempt information if it relates to:
 - a. the formulation or development of government policy,
 - b. Ministerial communications,
 - c. the provision of advice by any of the Law Officers or any request for the provision of such advice, or
 - d. the operation of any Ministerial private office.

5. Mr Nicoll then appealed to the Information Commissioner.
6. The Commissioner served a Decision Notice dated 29 March 2010 in accordance with section 50 FOIA.
7. The Commissioner found that the HD Committee report fell within the scope of section 37(1)(a) FOIA and that the public interest in maintaining that exemption outweighed the public interest in disclosure.
8. Mr Nicoll then appealed by way of a Notice of Appeal received by the Tribunal on 8 September 2010. By its ruling and directions dated 27 September 2010 the Tribunal permitted Mr Nicoll's appeal to proceed out of time. The Tribunal joined the Cabinet Office as a Second Respondent.
9. Mr Nicoll contended in his appeal that the Information Commissioner had misunderstood his request for information and had confused his request for disclosure of the recommendation relating to the PJM contained in the HD Committee report with a request for disclosure of the report itself. Mr Nicoll further contended that although this was information covered by s37(1)(a) FOIA the public interest favoured disclosure rather than non-disclosure.
10. Both the Information Commissioner and the Cabinet Office sought, in their representations to the Tribunal, in response to Mr Nicoll's appeal, to rely not only on section 37(1)(a) FOIA (and the contention that the public interest test favours non-disclosure) but also on section 21 FOIA.
11. The Cabinet Office in its response to Mr Nicoll's initial enquiry did not refer to s.21 FOIA nor was it referred to by the Information Commissioner in his Decision Notice. It may seem rather unfair to Mr Nicoll that the Respondents should seek to rely on exemptions that were not referred to at an earlier stage in this matter. However the decision of the Upper

Tribunal in cases GIA/1694/2010 and GIA/2098/2010 confirms that this is a permissible course of action for the Respondents.

12. S21(1) FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. Unlike s37(1)(a) FOIA, s21(1) FOIA is an absolute exemption – there being no public interest test to consider.
13. Both the Information Commissioner and the Cabinet Office have contended that the recommendation made by the Honours and Decorations Committee and presented to Her Majesty the Queen in relation to the PJM is already in the public domain as a result of a number of already disclosed documents and statements. As a result of the information being in the public domain the Respondents assert that the information is reasonably accessible to Mr Nicoll.
14. The Respondents have referred in particular to the written ministerial statement of 31 January 2006 (this appears at pages A/44-45 of the agreed open bundle), the letter of 21 December 2005 from Sir Robin Janviri (then Private Secretary to The Queen) to Jack Straw, MP (A/114) and the joint statement of the Cabinet Office, Foreign & Commonwealth Office and the MOD published in 2007 (A/84-89)
15. The Tribunal has noted some inconsistencies in the documents and statements in the public arena as to the reported detail of the recommendation made to Her Majesty the Queen by the HD Committee Report. Mr Nicoll in his Notice of Appeal has also, quite fairly in the Tribunal's view, referred to inconsistencies in the chronology of when the recommendation was made, conveyed and accepted. The Tribunal considers therefore that, for the purposes of considering the applicability of s21 FOIA, it is important to clarify that the document which unequivocally and correctly places the recommendation made by the Honours and Decorations Committee and presented to Her Majesty the

Queen in relation to the PJM in to the public domain is the letter of 21 December 2005 from Sir Robin Janvirn to Jack Straw (A/114)

16. The Tribunal notes that Mr Nicoll in his notice of appeal states that he has seen and indeed has a copy of the letter of 21 December 2005 from Sir Robin Janvirn to Jack Straw.

17. Consequently the Tribunal finds that the information sought by Mr Nicoll under section 1 FOIA is information which is not merely "*reasonably accessible*" to him but is actually already in his possession. Thus the information sought by Mr Nicoll is exempt information in accordance with s.21 FOIA

18. As a result of this conclusion and in view of the fact that s21 is an absolute exemption the Tribunal does not consider it necessary to go on to consider the applicability of section 37(1)(a) FOIA (communications with Her Majesty the Queen) and whether the public interest in maintaining that exemption outweighs the public interest in disclosure. The Tribunal does however accept that there was a clear arguable case as to the correct balance between these competing public interests.

19. For the reasons set out above the Tribunal dismisses this appeal.

20. Our decision is unanimous.

Signed

Angus Hamilton DJ(MC)

Tribunal Judge

Dated: Monday 21 March 2011