



**Appeal number: EA/2017/0248**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**JAMES RICHARDSON QC (HON)**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
ANDREW WHETNALL  
Dr HENRY FITZHUGH**

**The Tribunal sat in public at Field House, London on 20 September 2018**

**The Appellant appeared in person  
The Respondent did not appear**

## DECISION

1. The appeal is allowed in part and dismissed in part.
2. The Tribunal makes a substituted Decision Notice in the terms described at paragraph 18 below.

## REASONS

### *Background to Appeal*

3. The background to this matter is the Criminal Justice and Immigration Act 2008 and, in particular, Part 2: “General Sentencing Provisions” and section 9: “Purposes etc. of Sentencing of Offenders under 18”. Section 9<sup>1</sup> has never been commenced, although other sections of the Act have been brought into force via a series of commencement orders.

4. The Appellant made a request to the Ministry of Justice (“MOJ”) on 29 December 2015 for information relating to a telephone call which he believes<sup>2</sup> took place between the then-Lord Chief Justice, Lord Judge and the then-Lord Chancellor/Secretary of State for Justice, Jack Straw MP, on the subject of youth sentencing policy.

5. The relevant terms of the information request were as follows:

*“On October 27, 2015....I was informed by...that on Thursday November 5 2009, a 12-minute phone call was scheduled to take place between the then-Lord Chief Justice, Lord Judge and the then-Lord Chancellor/Minister of Justice, Jack Straw, concerning “Youth Sentencing”.*

*In view of this, please provide the following information, covering the period from November 5, 2009 to November 19, 2009....*

- (i) *Confirmation that the phone call...occurred...*
- (ii) *The names and titles of anyone else who listened in...*
- (iii) *Copies of any written communication by any person participating in or listening to the call, as to the contents of the call...*

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2008/4/section/9>

<sup>2</sup> MOJ is unable to confirm if the call took place.

- (iv) *Any written communication subsequently sent by anyone within the Ministry of Justice concerning the contents of the call;*
- (v) *Details of any internal meetings ...held in relation to the communications...*
- (vi) *The name and title of the person who drafted SI 2009 No.3074<sup>3</sup>.*
- (vii) *A full explanation of why and how it was decided that that order would not bring section 9 of the Criminal Justice and Immigration Act 2008 into force”.*

6. The MOJ initially failed to respond to the request at all, so the Information Commissioner issued a Decision Notice in June 2016, requiring it to respond. The MOJ responded in July 2016, stating that it did not hold most of the information requested. It said that it was withholding some information in reliance upon section 36(2)(b) (ii) of the Freedom of Information Act 2000 (“FOIA”). This is an exemption concerned to prevent the inhibition of the free and frank exchange of views for the purposes of deliberation within Government. The MOJ conducted an internal review at the request of the Appellant, which concluded in August 2016 that the earlier response should stand.

7. The Appellant complained to the Information Commissioner in October 2016. The Information Commissioner issued Decision Notice FS50651565 on 19 September 2017, upholding MOJ’s decision and requiring no steps to be taken. The Information Commissioner noted that the relevant “qualified person” for the purposes of s. 36 (2) (iii) (b) FOIA had been the then-Solicitor General, and that his opinion was reasonable. She found that the public interest favoured maintaining the exemption. She was satisfied that no more information falling within the scope of the information request was held by MOJ, noting at paragraphs 17 to 19 that, if there had been a phone call on the date alleged, any notes of it would by the time of the request have been destroyed.

#### *Appeal to the Tribunal*

8. The Appellant’s Notice of Appeal, dated 18 October 2017, relied on grounds of appeal that there “must be” more information held by the MOJ. This assertion relied on his view that the presumed phone call triggered an adjustment to the Commencement Order, which must have left a substantial information trail. He relied on the alleged impropriety of the presumed phone call as supporting a heightened public interest in disclosure of the requested information.

9. The Information Commissioner’s Response dated 23 November 2017 maintained her analysis as set out in the Decision Notice.

10. The Appellant’s Reply dated 17 December 2017 *inter alia* reiterated his view that there had been an interference by judiciary in the democratic process which represented a violation of the separation of powers.

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<sup>3</sup> The Criminal Justice and Immigration Act 2008 (Commencement No 13 and Transitional Provisions) Order 2009.

11. The issues for the Tribunal to decide in considering the appeal against the Decision Notice were: (i) whether, on the balance of probabilities, the MOJ held any more information within the scope of the request and (ii) whether the exemption claimed was engaged by the withheld material and, if so, whether the public interest favoured disclosure. We remind ourselves that the scope of the information request is narrow in seeking only information covering the period between 5 and 19 November 2009.

### *The Hearing*

12. The appeal was listed for a half - day oral hearing on 20 September 2018. The Appellant appeared in person. The Information Commissioner did not appear but sent the Tribunal her open and closed written submissions.

13. The Tribunal was provided with an open hearing bundle comprising about 400 pages, including the parties' skeleton arguments. We were also provided with a closed bundle of 10 pages, which contained the withheld material itself and correspondence which was revelatory of it. The Chamber's Registrar had directed that the information in the closed bundle be held subject to rule 14 (6) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

### *Argument*

14. The Information Commissioner's written submission was that the only information held by MOJ falling within the scope of the Appellant's request was a letter from the Rt Hon Jack Straw MP (then Lord Chancellor and Secretary of State for Justice) to the Rt Hon The Lord Judge (then the Lord Chief Justice of England and Wales) dated 11 November 2009. This was expressly stated to be written to Lord Judge in his role as Chair of the Sentencing Guidelines Council.

15. In her submissions to the Tribunal, the Information Commissioner expressed the view that, whilst s.36(2)(b) (ii) of FOIA was engaged by the withheld material, the public interest favoured disclosure. She considered that the Decision Notice had failed to draw a distinction between the public interest in maintaining the exception in relation to the Lord Chief Justice's role as head of the Judiciary for England and Wales, and the public interest in transparency in relation to the Lord Chief Justice's public-facing role as Chair of the Sentencing Guidelines Council. She now favoured disclosure of the letter dated 11 November 2009 in the public interest.

16. The Appellant submitted that, in view of the Information Commissioner's change of position, the Tribunal would "*disclose an innocuous document*". He asked the Tribunal to find that it was inconceivable that there is not more information held in the archived Bill papers. He said that a new Justice Minister might ask why the section had not been implemented and there must be a paper trail to refer to somewhere. Asked by the Tribunal why he thought that any such a paper trail would contain information falling within the limited temporal scope of his information request, the Appellant was adamant that the alleged phone call was the point at

which there had been a *volte face*. He said he had not made a further FOIA request for information which might have been held over a wider time frame.

### *Conclusion*

17. We remind ourselves of the two issues to be addressed, as set out at paragraph 11 above. As to issue (i), whether more information is held, we conclude as follows. In order to allow the Appellant's appeal as to whether more information falling within the scope of his information request is held by MOJ, we would have to be satisfied of this on the balance of probabilities. We note the Appellant's strongly-held views but we have no evidential basis for reaching the conclusion he urges upon us. We are not so satisfied. The appeal is therefore dismissed as to this ground.

18. As to issue (ii), our conclusion in respect of the withheld information before us is as follows. We agree with the Information Commissioner's submission that whilst the MOJ correctly identified the engagement of FOIA, the public interest favours disclosure for reasons of transparency in relation to the Lord Chief Justice's role as Chair of the Sentencing Guidelines Council. The appeal is allowed on this ground and we now make a substituted Decision Notice to the effect that the letter dated 11 November 2009 in our closed bundle must be disclosed by MOJ to the Appellant within 28 days of promulgation of this Decision.

19. We note that we have not heard MOJ's arguments in relation to the Information Commissioner's changed approach, but it has been aware of this appeal for over a year and has chosen not to make any submissions to us directly. If it objects to our substituted Decision Notice, it may apply (a) to be joined as a party, (b) for permission to appeal and (c) for a stay of this Decision pending appeal.

**(Signed)**

**ALISON MCKENNA**

**CHAMBER PRESIDENT**

**DATE: 17 October 2018**

**PROMULGATION DATE: 18 October 2018**