

**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**B E T W E E N: -**

**MAYA FORSTATER**

**Appellant**

**-and-**

**(1) INFORMATION COMMISSIONER**  
**(2) MINISTRY OF JUSTICE**  
**(3) THE JUDICIAL COLLEGE**

**Respondents**

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**INFORMATION COMMISSIONER'S SKELETON ARGUMENT**  
**For Hearing: 20 October 2021**

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- References to pages of the bundles are as follows: to the Open Hearing Bundle [OPEN/\*] and to the Agreed Bundle of Authorities [AUTH/\*].
- The Tribunal also has before it a Closed Hearing Bundle, to which no reference is made in this Skeleton Argument.
- References to paragraphs of the Witness Statement of Amelia Wright on behalf of R2 and R3 take the form [Wright §\*].

**Suggested pre-reading** in addition to the parties' Skeleton Arguments: (i) Decision Notice [OPEN/1]; (ii) Grounds of Appeal [OPEN/19-23]; (iii) Amended Response of R1 [OPEN/36-47]; Response of R1 and R2 [OPEN/50-57]; Witness Statement of Amelia Wright [OPEN/77-93].

**I. INTRODUCTION**

1. The Appellant seeks information about a particular course of training delivered to members of the judiciary in England and Wales. It is common ground that the judiciary is not a public authority for the purposes of the Freedom of Information Act 2000 ("FOIA"). The request was handled by the Second Respondent (the "MoJ"), which contends that it does not hold the requested information for the purposes of FOIA, since any relevant information it does hold is held solely on behalf of the judiciary.
2. In her decision notice ("DN"), the First Respondent (the "Commissioner") agreed with the MoJ.

3. In this appeal, the Appellant contends that the relevant public authority is the Third Respondent (the “**JC**”), and all of the grounds of appeal are based on that premise.
4. The Tribunal will first need to address that question. If the Tribunal concludes that the MoJ is the relevant public authority (as the Commissioner submits it should), the substantive question in the appeal is whether the requested information is held by the MoJ solely on behalf of “*another person*” i.e., the judiciary, such that it is outside the scope of FOIA.
5. The Commissioner submits that the Grounds of Appeal (“**GoA**”) proceed on the incorrect premise that the JC is subject to FOIA and is the relevant authority. She further submits that none of the grounds identify a sustainable error in the DN.

## **II. FACTUAL BACKGROUND**

6. On 18 March 2020, the Appellant wrote to HM Courts & Tribunals Service (“**HMCTS**”) and requested the following information (the “**Request**”) [**OPEN p69**]:

“...dates and details of Trans Awareness Training delivered to the ET & AIT by Gendered Intelligence.

Including:

- Cost of the training
- Contract/agreement/TORs for commissioning the training
- Copies of any presentation material and/or hand outs used
- Which judges attended the training...”

7. On 31 March 2020, David Hall of the JC responded (on an MoJ letterhead) rejecting the Request on the following basis:

“The information requested is not held by the MoJ. Statutory responsibility for the provision and content of training for the judiciary rests with the Lord Chief Justice as Head of the Judiciary in England and Wales, and the Senior President of the Tribunals, in line with the Constitutional Reform Act 2005. This maintains the independence of the judiciary which also means that the government does not provide guidance or policy on how judges should operate in court. The judiciary are not a public body for the purposes of FOIA (they are not listed under Schedule 1 of the Act) and requests concerning training materials, the content of training for the judiciary, the providers of training and the names of judicial office holders who

attend specific training events are therefore outside the scope of FOIA.” [OPEN p70]

8. On 2 June 2020, the Appellant requested an internal review of “Her Majesty’s Courts and Tribunals Service/Judicial College’s handling of my FOI request...Please confirm or deny whether this information is held by the Judicial College (which is covered by FOI) and provide the information please.” [OPEN p72]
9. Following an internal review, on 30 June 2020 the JC (again with an MoJ letterhead) confirmed its rejection of the Request. It stated that [OPEN p73-74]:

“All information on judicial training that is held by the Judicial College, is only held on behalf of the judiciary of England and Wales, who are exempt from the provisions of the FOIA 2000 by not being cited as a public authority in Schedule 1 of the FOIA. Which is why it is not held by the MoJ.”

10. Following an investigation into the Appellant’s complaint to the Commissioner, the Commissioner issued the DN [OPEN pp1-11]. She found that the relevant public authority is the MoJ, and that the requested information was held solely on behalf of the judiciary such that the Appellant was not entitled to it under FOIA.

### **III. LEGAL FRAMEWORK**

#### ***The general right of access***

11. Section 1 FOIA sets out the general right to access information held by public authorities, as follows (in relevant part):

“(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

12. Where the duties under section 1(1)(a) and (b) would otherwise apply, they are subject to the absolute and qualified exemptions set out in Part II of FOIA.<sup>1</sup>

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<sup>1</sup> Section 32 FOIA, for example, provides an exemption in respect of information held in court records. This exemption is absolute: see section 2(3)(c).

***“Public authority”***

13. Section 3(1) FOIA defines “*public authority*” as follows:

“(a) subject to section 4(4), any body which, any other person who, or the hold 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 in section 6.”<sup>2</sup>

14. Section 4 FOIA provides a power to the Secretary of State or the Minister for the Cabinet Office to amend Schedule 1 FOIA by order. Under section 4(5), this includes removing a body or officer which has ceased to exist.

***“Holds”***

15. As to the meaning of “*holds*”, section 3(2) FOIA provides as follows:

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

16. This provision was considered by the UT in *University of Newcastle upon Tyne v IC and the British Union for the Abolition of Vivisection* [2011] UKUT 185 (“*BUAV*”) [AUTH pp26-41], cited with approval by the Court of Appeal in *Department of Heath v IC* [2017] 1 WLR 3330 at [54] per Sir Terence Etherton MR [AUTH pp62-63]).

17. At §§21-22 of *BUAV*, the UT approved the following analysis of the FTT in the same case below, that the effect of section 3(2) is to:

“confirm the inclusion of information within the scope of FOIA s.1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s.1 only if it is held solely on behalf of the other: if information is held to any extent on behalf of the authority itself, the authority ‘hold’ it within the meaning of the Act. The effect

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<sup>2</sup> None of the parties has sought to argue that sections 4(4), 5, or 6 are relevant in this case.

of paragraph (b) is that the authority ‘holds’ information in the relevant sense even when physically someone else holds it on the authority’s behalf.” [Underlining added]

18. The UT also held the following passage from the FITT decision to contain and accurate statement of the law<sup>3</sup>:

“[47]... ‘holding’ is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s.1 would not apply merely because information is contained in a document that happens to be physically present on the authority’s premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority...” [Underlining added]

19. The question of whether a public authority “holds” information for the purposes of FOIA must be judged in relation to each piece of information under consideration (*Department of Heath v IC* (above) at [54] [AUTH pp62-63]).

#### ***Complaints to the Commissioner***

20. Section 50(1) FOIA provides:

“Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.” [Underlining added]

21. Therefore, the first issue for the Commissioner on receiving a complaint under section 50 is to identify the relevant public authority within the meaning of section 3. She has no jurisdiction to determine the compliance of an entity which is not subject to FOIA.

#### **IV. THE APPEAL**

22. There are three grounds of appeal, which can be summarised as follows:

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<sup>3</sup> See §27 of the UT judgment.

- (1) the Commissioner erred in considering that the question in the case was whether the requested information is held by the MoJ, to any extent, for its own purposes;
  - (2) the Commissioner erred in not addressing whether the information is held by the JC to any extent for its own purposes; and
  - (3) the Commissioner erred in taking account of the fact that the training of judges is under judicial control and direction.
23. It appears to be common ground between the parties to the appeal that once the relevant public authority has been identified for the purposes of section 1 (and section 50) FOIA, the correct test to apply for the purposes of section 3(2) FOIA is whether the information is held by that public authority otherwise than solely on behalf of another organisation, per the test in *BUAV* – or, to put the same question another way, whether it is held by the public authority to any extent for its own purposes.
24. All of the grounds of appeal proceed from the premise that the relevant public authority is the JC. For the reasons explained below, that premise is incorrect. In short, the JC is not a public authority for the purposes of FOIA.
25. The relevant public authority is the MoJ. In reality, therefore, the question in this case is whether the requested information was held by the MoJ to any extent for its own purposes, or whether it is held solely on behalf of the judiciary such that it is not “held” within the meaning of section 3(2).
26. That is precisely the question addressed by the Commissioner in the DN: see §25 [**OPEN p5**].
27. Accordingly, the Commissioner submits that none of the grounds of appeal disturb her decision in this case. For the reasons given in the DN, the Commissioner submits that she was correct to conclude that the requested information was not “held” by the MoJ for the purposes of FOIA. The Commissioner relies in this appeal on her reasoning set out in the DN. The three grounds of appeal are addressed below in turn.

## ***Ground 1***

28. The substance of ground 1 is the contention that the Commissioner incorrectly identified the relevant public authority.
29. The GoA state, at §7, that *“the appeal proceeds...on the basis that the Judicial College is the public authority which holds the disputed information and should disclose it.”* [OPEN p20]. This is contrary to the Commissioner’s conclusion at §15 of the DN that the relevant public authority is the MoJ [OPEN p3].
30. For this reason, the Appellant argues that the Commissioner was wrong to ask whether the information was held by the MoJ. Rather, the Appellant argues, the Commissioner should have considered whether the information was held by the JC.
31. The premise of the Appellant’s ground 1 is incorrect.
32. As to the factual background in this case, is not in dispute that the responses to the Request (which was initially directed by the Appellant to HMCTS) were signed on behalf of the “Judicial College” [OPEN pp70; 73]. Further, when requesting an internal review, the Appellant asked for confirmation of whether the requested information was held by the JC [OPEN p72]. However, the Request was handled and responded to throughout by the MoJ. The response to the Request and internal review used the MoJ letterhead and addressed the question of whether the information was *“held”* by the MoJ.
33. In any event, there is no relevant public authority here besides the MoJ:
  - a. As a matter of law, the question of whether an entity is a public authority is governed by the statute itself. The duty in section 1 FOIA only applies to public authorities as defined in section 3(1). Further, under section 50 FOIA, the Commissioner’s role is to determine whether (in any specified respect) a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of the Act.
  - b. The first step for the Commissioner when considering a complaint under section 50 is, therefore, identifying the relevant public authority.

- c. For present purposes, that means a public authority listed in Schedule 1 FOIA.
  - d. The JC is not listed in Schedule 1. Nor is the Judicial Office, of which the administrative staff of the JC are a part. The Judicial Office is an administrative arms-length body of the MoJ [**Wright §15, OPEN p82**]. The MoJ provides administrative support in the Judicial Office's functions.
  - e. It can therefore only be the MoJ which is the public authority here.
  - f. Schedule 1 *does* list the "Judicial Studies Board", but the MoJ has provided evidence that that organisation ceased to exist on 31 March 2011 [**Wright §14, OPEN p82**]. It therefore cannot simply be equated with the JC, whether as a matter of statutory construction or otherwise. Ms Wright states that the Cabinet Office has begun working with the MoJ to remove reference to the JSB from Schedule 1 at the next opportunity pursuant to the powers under s4(5) FOIA [**Wright §53, OPENp93**].
34. There was, therefore, no error of law in the Commissioner's conclusion that the MoJ was the relevant public authority. To the contrary, it would have been an error for the Commissioner to conclude that the JC was the correct public authority, as the Appellant contends. It would similarly be an error for the Tribunal to so conclude in this appeal.
35. It follows that the Commissioner asked the correct question, namely whether the requested information was held by the MoJ, to any extent, for its own purposes [**DN §25, OPEN p5**].

## ***Ground 2***

36. The rejection of ground 1 is dispositive of ground 2. Ground 2 is based on the same premise as ground 1 i.e., that the relevant public authority was the JC. The Appellant accordingly contends that the Commissioner erred in failing to consider whether the requested information is held by the JC to any extent for its own purposes.
37. For the reasons given above in respect of ground 1, the Appellant's premise is incorrect. The JC is not a public authority for the purposes of FOIA. It follows that the Commissioner was correct not to address the question of whether the JC held the requested information under FOIA.

38. As set out above, the correct question is whether or not the MoJ holds the requested information solely on behalf of the judiciary. That is the question the Commissioner addressed in the DN.

### *Ground 3*

39. Again, this ground proceeds on the assumption that the relevant public authority is the JC. The purpose of the JC is the training of the judiciary; accordingly, the Appellant argues that the JC must hold the requested information for its own purposes such as to be caught by section 3(2) FOIA.

40. However, as set out above, that assumption is misplaced.

41. Rather, since the relevant public authority is the MoJ, it was appropriate (and indeed necessary) for the Commissioner to consider the nature of the relationship between the JC and the judiciary, and between the JC and the MoJ. This is part of the factual context against which the question of whether and to what extent the MoJ holds the information solely on behalf of another must be considered.

42. As was recognised by both the FTT and the UT in *BUAV* and by the Court of Appeal in *Department of Health v IC*, it is necessary to consider the connection between the information and the public authority.

43. It is for that reason that the Commissioner correctly took account of the fact that the training of judges is directed by the judiciary (which is not a public authority for the purposes of FOIA). This fact goes to the division between the substantive and the administrative purposes for which JC information may be held.

44. This reasoning is evident from reading §§49-51 of the DN in their entirety [**OPEN p9**]. It was in the context of the factors listed at §§49 and 50 that the Commissioner considered the fact that information about the training of judges is under the direction of the judiciary. The GoA do not contend that there is any error in the factors set out in those paragraphs, which are drawn from the Commissioner's own guidance on section 3(2) [**AUTH p133**].

45. The distinction between administrative and substantive purposes in the present context has been further explained in Ms Wright's Witness Statement. The requested information

in issue relates to specific training delivered to the judiciary i.e., to a substantive matter. (The Appellant does not, for example, seek high-level information about the administration or functioning of the JC). As Ms Wright explains:

- a. with limited exceptions, judicial training is designed and delivered by members of the judiciary [**Wright §31, OPEN p87**];
- b. Judicial Course Directors retain oversight and responsibility for the training process and are responsible for deciding upon and engaging external speakers, including matters such as dates of availability and subjects to be addressed [**Wright §36, OPEN p88**]; and
- c. training materials are stored and accessed electronically on the JC Learning Management System, access to which is only available to judicial office holders and limited officials who require it to support judicial training [**Wright §37, OPEN p88**].

46. Accordingly, the Commissioner submits that she correctly concluded that the requested information is held solely on behalf of the judiciary and is therefore not “held” by the MoJ for the purposes of section 1 FOIA.

## **V. CONCLUSION**

47. For the reasons above, the Tribunal is invited to dismiss the appeal.

**KATHERINE TAUNTON**

12 October 2021

**11 KBW**