IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2017/0134**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50675690
Dated: 29th June 2017

Appellant: **Gabriel Webber**

Respondent: **The Information Commissioner**

Heard on the papers at: **Darlington Magistrates Court**
Date of Hearing: **27 September 2017**

Before

Chris Hughes

Judge

and

Gareth Jones & Paul Taylor

Tribunal Members

Date of Decision: **19 October 2017**

Subject matter:
Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 June 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This is the second time the Appellant has requested a free copy of "*Erskine May: Parliamentary Practice*" from the House of Commons. On 28 September 2013 he wrote asking:-

   "… I am asking for a copy of the 24th edition (released 2011) of Erskine May Parliamentary Practice"

2. On that occasion it was refused and, following a complaint to the Information Commissioner ("ICO"), the ICO concluded that the House of Commons was entitled to refuse the request relying on s21(1) FOIA which provides (so far as is relevant):-

   "21 ***Information accessible to applicant by other means****.*

   (1)Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

   (2)For the purposes of subsection (1)—

   (a)information may be reasonably accessible to the applicant even though it is accessible only on payment, and…"

3. The House of Commons on that occasion also relied on section 43(2) FOIA which provides:-

   "43 ***Commercial interests****.*

   …..

   (2)Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

4. On 7 February 2017 he wrote to the House of Commons again asking:-

   "Please provide me with an electronic copy of the current (24th?) edition of Erskine May: Parliamentary Practice. My preference is for a PDF format with searchable text."

5. The House of Commons again refused relying on the same grounds and the Appellant again complained to the ICO. The House of Commons explained its position. The book is available for purchase or to access from public libraries. The book is produced by an independent charity which is not a public authority and is published by a commercial publisher under a contract with the charity trustees. It has purchased copies of Erskine May for its own use. It's publication scheme makes clear that Erskine May is not its publication and is not available through its publication scheme:- *"It is published by Lexis Nexis UK and is available through reference libraries and booksellers".* It acknowledges that the cost of the volume may be a deterrent however the copyright is not Parliament's. The ICO upheld the House of Common's argument that the volume was reasonably accessible. She did not come to a formal conclusion with respect to s43(2) but indicated that:- *"it is more likely than not that the disclosure of a copy of the book would also engage the exemption at section 43(2)"*

The appeal to the Tribunal

6. The Appellant argued that the situation had changed since the previous requests because the Speaker of the House of Commons Commission for Digital Democracy ("CDD") had reported in 2015 and had acknowledged that Erskine May was "*inaccessible …to the average citizen*" and recommended that it be made freely available online. Given his circumstances (he states that he is about to embark on five years postgraduate study) the price meant that it was *"utterly beyond his circumstances".* He had searched an academic library database and found that the work was held in 19 academic libraries in the UK. He lives in London and argued that as he was not registered at one of the London Universities which hold Erskine May *"I would have to go through a complex and drawn-out application process, and I would not be certain of my application being approved."* He further argued that even if he did obtain access there would be difficulties with respect to such matters as opening times and *"Library users are normally forbidden from highlighting and underlining books… Academic libraries typically have rules restricting photocopying to e.g. 10%.."* With respect to s43 he argued that Erskine May was of great importance to British democracy and the public interest in having

it available to citizens outweighed the commercial interest, in any event it was written by House of Commons staff and the commercial involvement was coincidental; furthermore the House of Commons was committed to making Erskine May freely available on the internet *"in the next couple of years"* and therefore the commercial value was reduced.

7. In responding the ICO argued that the issue was whether, given that the Appellant lives in London, the fact that he could access Erskine May in a public library in London, the text was reasonably available to him. She was satisfied that *"the time and effort required on the complainant's part to access a library copy of this book is not disproportionate".* She did not accept the Appellant's argument that the importance of the document meant that access to it had to be easier than would be envisaged as reasonable to a less constitutionally significant document. The opinion of the CDD was with respect to the future and it had not, in any event, been applying the statutory test contained in FOIA s21. The Appellant's argument would mean that any volume held by a public authority could be requested, to the detriment of booksellers' and publishers' commercial interests – in this case the interests of the May Memorial fund and Lexis Nexis. The ICO also drew attention to the fact that the Appellant lives in London and that the British Library holds a copy available to the public. The Appellant's arguments that his use of Erskine may would be restricted if he had to borrow it from a library are misconceived:- *"Once again, this is true for any person who uses library books because they do not wish, or cannot afford , to purchase the book for themselves: the FOIA does not exist to enable applicants to avoid the inconveniences of a library."*

8. In reply the Appellant emphasised his view that Erskine May was not a book published by a publisher in the usual way since the staff of the House of Commons had a major role in preparing it. He emphasised his argument that CDD had asserted the book was not accessible. He argued that it was not available to him at the British Library since it was possible that he would not be granted a Reader Pass. He challenged the propriety of a price of £400 for a significant constitutional document.

The questions for the Tribunal

9. There are two simple issues; is the House of Commons entitled to rely on s21(1) on grounds that the book is reasonably available? Also, s the House of Commons entitled to rely on s43 – that its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person?

Consideration

10. In its response to the Appellant's request for an internal review of the House of Common's decision that Erskine May was exempt from disclosure under FOIA, the House of Commons Librarian wrote:- *"If you cannot afford to purchase a copy, you can consult a copy at your local library or, as you say you are undertaking a course of postgraduate study, your university library. The very purpose of the public library service is to make available to the general public publications which they might not otherwise be able or willing to buy; the fact that it might involve a modest investment of time and effort on your part to consult a library copy of a book does not mean that it is not reasonably available to you."* It seems to the tribunal that this injects a very welcome note of pragmatic realism into the Appellant's somewhat overblown arguments.

11. Whether something is reasonably available is a matter of fact and is related to the personal circumstances of the individual. The Appellant now lives in London approximately 11 stops on the London Underground from the British Library, one of many publicly funded libraries where Erskine May is shelved. There are no grounds for thinking that he would be refused access to that library. Although he claims that there is no evidence that he would be granted access, the fact is that despite the ICO having found four years ago that it was available through libraries the Appellant has produced no evidence that he has been refused access. Erskine May is clearly reasonable accessible to him.

12. In addition it should be noted that Parliament provides a large amount of information (in the form of on-line documents) about its workings, the print-out listing of these runs to 25 pages.

13. The Appellant's arguments with respect to s43 are equally fallacious. The point is very simple; Lexis Nexis publish a large amount of legal material. It charges for that material. If a public body provided that material free under FOIA then its commercial interests would be harmed. The position is no different from any other substantial legal text where the publisher has a substantial commercial interest to be protected. Given the publication of a large amount of information on the Parliament website and the availability of Erskine May in libraries, the public interest in over-riding the commercial interest is small.

14. In dealing with this request the House of Commons clearly set out its position to the Appellant in a number of communications, including pointing out that he had repeated a request already dealt with in 2013 and informing him that they (communication 3rdApril 2017):-*"were working with the May memorial fund and the Lexis Nexis to make the next (25th) edition of Erskine May even more readily available to the general public by publishing it freely online. This will be subject to the necessary contractual agreement about intellectual property being reached between the trustees and Lexis Nexis".*

15. In responding to the ICO the Librarian recounted this history and drew the ICO's attention to section 50(2). This provides (so far as is relevant):-

"(2)On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

…..

(c)that the application is frivolous or vexatious, or…"

16. The Librarian went on to comment:-

"I explained to Mr Webber that the House is working with the May Memorial Fund and the publishers of Erskine May, to ensure that the next edition of the book will be available online, free of charge. Despite this, and despite apparently understanding that our legal position remained the same, Mr Webber has chosen to pursue his complaint with the resulting burden to the ICO and the House, at public expense.

The issue is clearly one for the Commissioner, but bearing in mind that an identical request from Mr Webber has already been the subject of a Decision Notice, I would question whether this application is frivolous or vexatious in terms of the burden on the public authorities concerned and whether it has value or serious purpose."

17. The tribunal endorses that view. It was open to the ICO to curtail this profligate waste of public resources by using her power under s50. She had a duty to consider exercising this power and she should have exercised it.

18. The decision notice correctly concluded that the information was reasonably accessible to the Appellant. Furthermore it is exempt under s43. This appeal is singularly without merit. It is also a misuse of the statutory right to information. The appeal is dismissed.

19. Our decision is unanimous.

Judge Hughes
[Signed on original]

Date: 19/10/2017