



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0284

**Heard at Fleetbank House, London, EC4Y 8JX
On 26 and 27 April 2018**

**Before
CHRIS RYAN
JUDGE
ALISON LOWTON
PIETER DE WAAL
TRIBUNAL MEMBERS**

Between

MS MARGOT GIBBS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE FINANCIAL REPORTING COUNCIL

Second Respondent

DECISION AND REASONS

Attendances:

For the Appellant: Jack Castle

For the First Respondent: Peter Lockley

For the Second Respondent: Christopher Knight

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Background

1. This appeal turns on the extent to which the Financial Reporting Council (“FRC”) is a public authority for the purposes of the Freedom of Information Act 2000 (“FOIA”) and therefore bound by FOIA section 1 to disclose information to anyone making a valid request.
2. The FRC is a company limited by guarantee. It is run by a Board which currently comprises 15 non-executive and Executive Directors. Its Articles of Association provide for a minimum of 11 Board members, for the Chair and Deputy Chair to be appointed by the Secretary of State and for all other appointments to be made by the Board on the nomination of an independent assessor.
3. The FRC has a number of roles, all generally related to the maintenance of high standards in corporate governance and corporate reporting in the UK. Those of its functions that are relevant to this appeal are as follows:
 - a. The settling of audit standards, issuing of accounting standards, reviewing compliance with those standards, applying to court if defective accounts or reports are issued and investigating misconduct by statutory auditors. These derive directly from the Companies Act 2006 (“CA”) and the Statutory Auditors and Third Country Auditors Regulations 2016/649 (“SATCAR”) and we will refer to them as “Statutory Functions”.
 - b. The role, prior to June 2016 (when SATCAR came into effect), of conducting independent disciplinary investigations into those cases of suspected misconduct by statutory auditors, which were referred to it by a relevant chartered accountancy body (in the role of a supervisory body recognised by the Secretary of State). It is of particular relevance to this appeal that the supervisory bodies include the Institute of Chartered Accountants in England and Wales. The FRC assumed this role under contractual arrangements with each of the relevant supervisory bodies. They had an obligation to enter into

such an arrangement but had freedom of choice as to who to appoint. This arrangement continues to apply to public interest audit misconduct investigations commenced before 17 June 2016. We will refer to this function as “the Accountancy Scheme Function”.

- c. Since 2012, the role of recognising, or removing recognition from, the supervisory bodies whose members may be eligible to act as statutory auditors. This is a statutory power granted by Part 42 of the CA to the Secretary of State but delegated to the FRC under CA section 1252. We refer to it as the FRC’s “Delegated Part 42 Functions”.
 - d. From June 2016, the role of investigating cases of audit misconduct, which a relevant supervisory body refers to it. In this case SATCAR has imposed on the supervisory bodies an obligation to make such referrals to the FRC, as the “competent authority” for the purpose. We refer to this as the “Competent Authority Functions”.
 - e. The FRC has also assumed some oversight responsibilities for the regulation, by the chartered accountancy bodies, of their accountant members. This is a voluntary role undertaken under agreements with those bodies. We refer to this as the “Voluntary Oversight Function”.
4. The supervisory bodies fund the Competent Authority Functions. In relation to the other audit, corporate reporting and corporate governance and stewardship functions, the FRC is funded by voluntary levies paid by those subject to the relevant function. No part of the funding is currently provided by government.
 5. HBOS plc (“HBOS”) was a publicly listed financial institution which suffered serious losses at the time of the 2008 financial crisis. It received financial support from the UK Government at the time and was subsequently taken over by Lloyds TSB. It had received an unqualified audit opinion in February 2008 in respect of the year ended 31 December 2007.
 6. In 2013 the FRC’s Conduct Committee completed an investigation and concluded that there were no reasonable grounds to suspect that there had been misconduct in the auditing of HBOS. The investigation had been carried out, as all parties to this Appeal have accepted, as part of the Accountancy Scheme Function.

The request for information, its rejection by the FRC and the Information Commissioner’s investigation of that rejection.

7. On 22 February 2017 the Appellant asked the FRC to provide certain specified information on the decision of its Conduct Committee referred to.
8. The information request was made under FOIA, which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions that apply.
9. The FRC refused the information request in a letter to the Appellant dated 12 April 2017. It set out its reasons in these terms:

“Section 1252(3) of Companies Act 2006 designates the FRC as a public authority for the purposes of [FOIA] in relation to the exercise of the statutory functions under Part

42 of the Companies Act 2006 delegated to it by the Secretary of State. These include the independent oversight of the regulation of the auditing profession by the professional accounting bodies; the independent supervision of the Auditors General; and the registration of third country auditors (**Designated Functions**). The FRC is not designated as a public authority in relation to the exercise of any of its other statutory or non-statutory functions – including the FRC's provision to the [supervisory bodies] of independent arrangements for public interest disciplinary matters (**independent disciplinary arrangements**).

...

As information in relation to the FRC's exercise of its role under independent disciplinary arrangements is not covered by the Act, we are not required by the Act to provide the information you seek."

10. Following an internal review of that decision, the FRC informed the Appellant on 11 May 2017 that it upheld its refusal because the decision:

"...was made by the Conduct Committee under the FRC's Accountancy Scheme. That function falls outwith Part 42 Companies Act 2006 and so is not covered by the [FOIA]."

11. The Appellant complained to the Information Commissioner who investigated the FRC's refusal. On 7 November 2017 she issued the Decision Notice from which this appeal emanates. She decided that the requested information related to the Accountancy Scheme Function and that this fell outside the scope of the FOIA.

The appeal to this Tribunal

12. On 4 December 2017 the Appellant appealed the Information Commissioner's decision to this Tribunal under FOIA section 58. Her Grounds of Appeal criticised the Decision Notice on the following grounds:

- a. The information request should have been considered as at the date when the request was rejected. That was 21 April 2017, some time after the change in FRC's functions under SATCAR in June 2016. This, it was said, made it unquestionably a public authority for FOIA purposes at the relevant date.
- b. At that relevant date the FRC was a public authority within the meaning of FOIA because it was a "governmental department" for the purposes of section 84. This was said to be because, since 2016, it has exercised statutory functions of the Crown pursuant to section 2(1) and (2) of the European Communities Act 1972 (to implement EU law on statutory audits) and Part 42 of the CA (to investigate, enforce and sanction any inadequacies in statutory audits).
- c. Additionally, or in the alternative, the Secretary of State had designated the FRC for the purposes of FOIA section 5 under either the Statutory Auditors (Amendment of Companies Act 2006 and Delegation of Functions etc) Order 2012 or SATCAR.
- d. Finally, as the requested information was held by the FRC at the date of the information request the Information Commissioner should have ignored, as irrelevant, the fact that it was created or came into the FRC's possession at some earlier date.

13. By Case Management Directions issued by the Tribunal Registrar on 20 December 2017 the FRC was joined as a party. Both the FRC and the Information Commissioner filed

detailed written Responses to the Appellant's Grounds of Appeal and the FRC also filed a witness statement signed by Anne McArthur its General Counsel and Company Secretary, which described the nature and functions of the FRC and other information which, she submitted, demonstrated its independence from government. There was no serious dispute as to the accuracy of the statement, only the significance of the facts recorded in relation to the issues at stake on the Appeal. The Appellant also filed a witness statement, which provided additional information about the Conduct Committee's investigation and set out the Appellant's views on the degree of government control over the FRC. The facts were largely uncontroversial and the submissions that were also included are covered in our analysis of each party's case below.

14. The Appeal was heard on 26 and 27 April 2018. Jack Castle represented the Appellant, Peter Lockley the Information Commissioner and Christopher Knight the FRC.
15. By the time of the hearing some of the arguments that had been canvassed previously had changed or been abandoned. In the rest of this decision we summarise the various arguments presented to us, the law on which each was based and the conclusion we have reached.

The issues arising in the Appeal and the relevant law in respect of each.

FRC covered by the FOIA because it is a Government Department.

16. The Appellant argued that, as SATCAR implemented in this country obligations imposed by the EU Audit Regulation (573/2014), and did so using powers under the European Communities Act 1972, the appointment of the FRC to perform the "Competent Authority Function" for the purpose of SATCAR's enhanced enforcement processes meant that it exercised statutory functions on behalf of the Crown. In this way it had become a "government department", and hence a public authority to which the FOIA applies.
17. The definition of a "public authority" for the purpose of the disclosure obligation under FOIA section 1 is found in section 3. The relevant part reads:

"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 ..."

18. The FRC is not listed in Schedule 1. However, the schedule does provide that a "government department" is to be regarded as a public authority for the purpose of freedom of information disclosures and FOIA section 84 defines a government department as "*any...body or authority exercising statutory functions on behalf of the Crown*".

19. As the Appellant's representative accepted, the statutory language required him to show both that the FRC was performing a statutory function and that in doing so it was operating as a Crown Servant i.e. it was subject to an appropriate level of control by HM Government.
20. The Appellant argued that the Competent Authority Functions were undertaken as a statutory function on behalf of the Crown. This arose, it was said, from the control imposed on it by the Crown, including:
 - a. The Government's power to review FRC's performance;
 - b. The FRC's obligation to report to Parliament from time to time and to provide information to relevant Select Committees;
 - c. The FRC's dependence on government support if its voluntary funding arrangements failed to provide the necessary resources to carry out its functions;
 - d. The power of the government to appoint the Chair and Deputy Chair of the FRC Board.
21. As the Appellant's representative made clear, this is an issue of fact. We are satisfied, on the basis of the evidence about the FRC's status and organisation (included in the witness statement of Ms. McArthur, summarised in paragraphs 2-5 above and not challenged by the Appellant), that the FRC operates independently from the government, as a regulator should.
22. In *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584, a case on which the Appellant relied, the House of Lords stated that the question of whether a body was a servant of the Crown depended on "the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties ..." The words which we have underlined direct us to ask whether the overall relationship between the FRC and the government, including its establishment and continued existence, as well as the degree of influence that the government may exercise over it, undermine its independence when performing its functions as regulator.
23. The evidence satisfied us that the FRC is run by its board, which has at least a 9:2 majority over government appointees. It is not dependent on the government for either funding or management support. The elements of alleged control to which the Appellant directed us do not undermine, to any material extent, the FRC's independence when it carries out those of its activities that may properly be characterised as statutory functions.
24. Our confidence in that conclusion is not diluted by the fact that, as the Appellant explained, the Office for National Statistics ("ONS") has consistently designated the FRC as part of "central government". The Respondents invited us to regard this classification as irrelevant. We think it is. The terminology and factors determining the characterisation relied on are quite different and it may be that the ONS rely on functions, other than the Competent Authority Functions (or, at an earlier stage, the Accountancy Scheme Function), to justify its categorisation. The task for us is, not to

follow the opinion of others (if and to the extent that it may have relevance), but to form our own view based on the relevant statutory provisions and the evidence presented to us. This is what we have done in reaching the conclusion recorded in paragraph 23.

25. The Appellant's case on this ground of appeal faced a further difficulty, in that the requested information was created in 2013, over two years before the Competent Authority Function was created.
26. For the sake of completeness, we should add that FOIA section 4 sets out a procedure for amending Schedule 1. In relevant part it reads:

"Amendment of Schedule 1.

(1) The Secretary of State or the Minister for the Cabinet Office may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule but as respects which both the first and the second conditions below are satisfied.

(2) The first condition is that the body or office—

(a) is established by virtue of Her Majesty's prerogative or by an enactment or by subordinate legislation, or

(b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

(3) The second condition is—

(a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, or

(b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department or by the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

... "

The FRC has not been added and clearly would not satisfy either of the conditions in section 4 that might have enabled it to be added to FOIA Schedule 1. Neither of the parties to this Appeal has argued otherwise.

FRC a public body, for FOIA purposes, because of functions delegated to it.

27. It is apparent from FOIA section 3, quoted in paragraph [17] above, that a body may come to fall within the FOIA if, although not listed in Schedule 1, it *“is designated by order under section 5 ...”*

28. FOIA section 5 is entitled *“Further power to designate public authorities”* and is in these terms:

“(1) The Secretary of State or the Minister for the Cabinet Office may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who –

(a) appears to the Secretary of State or the Minister for the Cabinet Office to exercise functions of a public nature, or

(b) ...”

29. FOIA section 7(5) provides that, in the event of a designation under section 5(1)(a), the designation order must:

“... specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the authority but does not relate to the exercise of those functions.”

30. In this case the FRC was designated under powers given under CA section 1252. It falls within Part 42 of the CA. Part 42 is headed *“Statutory Auditors”* and provides detailed rules aimed at ensuring that only properly supervised and appropriately qualified persons conduct statutory audits and that they do so with integrity and independence. It contains no provisions about the investigation of individuals who fail to meet those standards.

31. The broad effect of section 1252 is to enable the Secretary of State to delegate particular functions to certain bodies and to provide that, on delegation, the delegatee would become a designated body for the purpose of FOIA section 5. The FRC (as the *“competent authority”* for this purpose) was included among those to whom functions could be delegated.

32. In relevant part CA section 1252 reads:

“Delegation of the Secretary of State’s functions

(1) *The Secretary of State may make an order under this section (a “delegation order”) for the purpose of enabling functions of the Secretary of State under this Part to be exercised by a body designated by the order.*

(2) *The body designated by a delegation order may be either –*

(a) a body corporate which is established by the order, or

(b) subject to section 1253, a body (including the competent authority, and whether a body corporate or an unincorporated association) which is already in existence (“an existing body”).

(3) *A delegation order has the effect of making the body designated by the order designated under section 5 of the Freedom of Information Act 2000 (c. 36) (further powers to designate public authorities).*

(4) ...

...

(10) *Where a delegation order is made, Schedule 13 has effect with respect to –*

(a) the status of the body designated by the order in exercising functions of the Secretary of State under this Part,

(b) the constitution and proceedings of the body where it is established by the order,

(c) the exercise by the body of certain functions transferred to it, and

(d) other supplementary matters ...”

33. Schedule 13 (“*Supplementary provisions with respect to delegation orders*”) provides, at paragraph 2, that, in relation to an existing body (as the FRC was):

“The body is not to be regarded as acting on behalf of the Crown and its members, officers and employees are not to be regarded as Crown servants.”

34. The relevant Delegation Order is the Statutory Auditors (Amendment of Companies Act 2006 and Delegation of Functions etc.) Order 2012/1741. It came into force on 2 July 2012 and provided, under Article 7(1), that the FRC (referred to in the Order as the “designated body”) “*is designated for the purpose of enabling it to exercise functions of the Secretary of State under Part 42 [of the CA]*”. The order goes on to specify those of the Part 42 functions that were not delegated but retained by the Secretary of State as well as those that were to be exercised either concurrently by the Secretary of State or only with the permission of the holder of that office.

35. The Appellant argued that the effect of SATCAR was to re-designate the FRC’s previously delegated powers. It therefore operated as a delegation for the purposes of

CA section 1252 and had the effect, (in the terms of the Appellant's skeleton argument) of *"integrating them [i.e. the delegated powers] with the powers of the competent authority as far as those powers are connected to the Secretary of State's functions in Part 42 Companies Act 2006"*.

36. In our view this is an unsustainable attempt to compress two regulatory processes, operating at different times and in markedly different ways. SATCAR includes commencement provisions, which make it clear that it did not have retrospective effect. There is no scope, in those circumstances, for any one of the FRC's functions to *"reach in"* to any of its other functions, as the Appellant's skeleton argument suggested.
37. FOIA section 3 makes it clear that there are only two ways in which a body may come to be categorised as a public authority, listing or designation. Equally clearly, designation in this case has been effected by a particular Order, the terms of which specify the powers which were delegated and make it clear (consistent with the requirements of FOIA section 7(5)) that the designation that resulted was limited to the FRC in its role as the performer of those functions. The same subsection makes it expressly clear that information held by the FRC in relation to any of its other functions is not covered by the FOIA. Broadening the scope of the delegated powers would require a new Order. None has been promulgated and the introduction by SATCAR of a new regime for investigating auditor misconduct did not have any effect on either the Delegated Part 42 Functions or the Accountancy Scheme Function.
38. The information which the Appellant seeks is held by the FRC in relation to the exercise of the Accountancy Scheme Function. It is not held in relation to either the Delegated Part 42 Functions (which concern supervisory bodies and not individual auditors) or the Competent Authority Functions (which do concern individual auditor investigations but did not arise until years later and are of a quite different nature). The FOIA does not therefore apply.

Other issues raised by the Appellant

39. We understood the Appellant to argue, also, that the requested information had, in any event, a sufficient connection with, or link to, a function for which the FRC had been designated that it should be regarded as having, (in the terms of the Upper Tribunal decision in *UCAS v Information Commissioner and Lord Lucas* [2014] UKUT 0557 (AAC)) *"...a sufficiently direct link, sufficient proximity, [with] the exercise of the Designated Function..."*. The principle which the Upper Tribunal set out does not help the Appellant when applied to the facts of this case because, for the reasons we have given, the Delegated Part 42 Functions are markedly different from the Accountancy Scheme Function. The similarities between the Accountancy Scheme Function and the Competent Authority Functions, arising out of the fact that they both address the performance of individual auditors, are not relevant to this analysis because the Competent Authority Functions were not delegated to the FRC by the Secretary of State but imposed directly by SATCAR.
40. The Appellant also argued that, as the date on which information falls to be communicated to any person requesting it under FOIA is the date on which the request is made, that date must also be the one at which the nature and functions of the public authority are considered. So in this case it would be the functions performed by the FRC at the date of the request that mattered, not those that it may previously have

performed. It seems to us that the argument was likely to face a number of difficulties but it is not necessary to explore them because, for the reasons we have given, the key issue is whether the information related to a designated function or not. The Accountancy Scheme was not a designated function and the requested information therefore falls outside the scope of the FOIA regardless of when it was created or requested.

Conclusion

41. For the reasons we have given the requested information does not relate to, or have sufficient connection with, any function of the FRC for which it has been designated as a public authority for the purposes of the FOIA. The Information Commissioner was therefore right to conclude in the Decision Notice that the information request had been correctly refused and the appeal from that Decision Notice must be dismissed.
42. Our decision is unanimous

Signed
Chris Ryan
Judge of the First-tier Tribunal
Date: 12 October 2018

Promulgation date: 15 October 2018

Amended on 30th October 2018