First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Appeal Reference: EA/2018/0116**

Heard at North Shields County Court and Family Court Hearing Centre, North Shields, on 23 October 2018

Before
The Honourable Lord Pentland

Tribunal Members
Ms Michele Tynan
Mr Michael Flynn JP

Between

Dr Reuben Kirkham

Appellant

and

(1) The Information Commissioner
(2) The Judicial Appointments Commission

Respondents

Representation:

The Appellant represented himself

The Information Commissioner and the Judicial Appointments Commission were not represented

DECISION AND REASONS

INTRODUCTION

1. This case concerns whether there is any right under freedom of information law to receive confidential information supplied by independent assessors about candidates for judicial appointment in England and Wales. With the concurrence of the Lord President of the Court of Session, I was appointed to sit on the case in view of the fact that I hold office as a Senator of the College of Justice in Scotland; I am not (and never have been) a member of the judiciary in England and Wales. On 28 September 2018 the Senior President of Tribunals assigned me to the General Regulatory Chamber of the First-tier Tribunal, pursuant to Schedule 4, paragraph 11(2) of the Tribunals, Courts and Enforcement Act 2007.

2. The present appeal has been brought against a decision notice issued by the Information Commissioner ("the Commissioner") dated 4 June 2018 (FS50718058). By her decision the Commissioner held that the Judicial Appointments Commission ("the JAC") had correctly applied section 44 of the Freedom of Information Act 2000 ("FOIA") in refusing the appellant's request for information on the ground that the JAC was prohibited from disclosing the information under section 139 of the Constitutional Reform Act 2005 ("the CRA"). Since the JAC was prohibited from disclosing the information by that statutory provision, the information was exempt information in terms of section 44(1) of FOIA. Section 44 confers absolute exemption (section 2(3)(h) FOIA). There is no right to receive information to the extent that it is absolutely exempt from disclosure (section 2(2)(a) FOIA).

3. At the hearing on 23 October 2018 we heard oral submissions from the appellant, in amplification of his skeleton argument. He appeared on his own behalf. The Commissioner opposed the appeal in writing; she elected not to be represented at the hearing. The JAC lodged written submissions resisting the appeal. It also resolved not to be represented at the hearing.

INFORMATION REQUESTED AND DECISION MAKING PROCESSES

4. On 22 August 2017 the appellant wrote to the JAC requesting information in relation to five newly appointed High Court Judges. He asked for the following information:

> "(1) The names of the 'independent assessors' selected by the candidates;
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> (2) The names of the 'independent assessors' actually used to assess the candidates;
>
> (3) In respect of the named individuals, whether or not they hold any judicial office (and, if so, what that office might be, as recorded by the Judicial Appointments Commission); and
>
> (4) Copies of the reports of the 'independent assesors' submitted to the Judicial Appointments Commission."

5. On 14 September 2017 the JAC responded to the appellant's request. It confirmed that it held information in relation to paragraphs 1, 2 and 4 of the request, but refused to provide the requested information, citing section 41 (information provided in confidence) of FOIA.

6. In relation to paragraph 3 of his request, the JAC advised the appellant that the information it held was available on its website; it provided him with a hyperlink to this information. It forms no part of the present appeal.

7. On 1 October 2017 the appellant requested an internal review in respect of paragraphs 1, 2 and 4 of his request. On 7 November 2017 the JAC provided an internal review in which it maintained its original position.

8. The appellant contacted the Commissioner on 30 December 2017 to complain about the way in which the JAC had handled his request for information. He argued that section 41 of FOIA could not apply because there was no right to sue.

9. During the course of the Commissioner's investigation, the JAC stated that it wished to maintain that section 41 applied in respect of paragraphs 1, 2 and 4 of the appellant's request; however, the JAC at this stage also cited section 44(1)(a) of FOIA – the exemption applying in the case of statutory prohibitions against disclosure.

10. Section 44(1) of FOIA provides as follows:

> "Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
> (a) is prohibited by or under any enactment,
> (b) is incompatible with any EU obligation, or
> (c) would constitute or to be punishable as a contempt of court."

11. By way of explanation about its reliance on section 44 the JAC said the following to the appellant in its letter of 26 February 2018:

> "The relevant enactment which prohibits disclosure is section 139 of the Constitutional Reform Act 2005 (CRA). In summary, this section establishes a duty of confidentiality on those who have responsibilities in relation to matters of selection of judicial office holders.
>
> Under s139(1) of CRA, where information is provided under or for the purposes of a 'relevant provision' that information will be confidential and must not be disclosed except with 'lawful authority'.
>
> The 'relevant provisions' are set out in s139(2) and include part 4 of CRA (Judicial Appointment and Disciplines) and rules and regulations made under part 4 of CRA. The selection process for High Court Judges is contained within such relevant provisions; specifically, within sections 85-94C of part 4 of CRA and those regulations made under that part 4, namely the Judicial Appointment Regulations 2013/2192. These relevant provisions permit the JAC to determine its selection procedure for High Court Judges. Therefore, the names of the assessors and their reports should be considered as confidential information provided under these relevant provisions, and disclosure should only be permitted if disclosure falls within one of the 'lawful authority' exclusions set out in s139(4) of CRA.
>
> Under s139(4) there are five lawful authority exclusions. These are:-
> a) the disclosure is with the consent of each person who is a subject of the information;

b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;
c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c.54) or a decision whether to exercise them;
d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;
e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.

I have considered these exclusions, but do not consider that any apply.

As such I now consider that section 44(1)(a) also applies in respect of your request for information."

12. In her decision notice the Commissioner concluded that the stance taken by the JAC on section 44 of FOIA and section 139 of CRA was well-founded. She held that none of the limited and specific circumstances prescribed in CRA for lawful disclosure of confidential information was satisfied. The section 44(1)(a) exemption was accordingly engaged. The exemption was absolute in character with the result that there was no need to consider whether there might be a stronger public interest in disclosing the information than in withholding it. Having come to that conclusion, the Commissioner decided that there was no need to go on and consider whether section 41 of FOIA also applied.

THE JAC AND ITS SELECTION PROCEDURES

13. Section 61 of CRA established the JAC. It is an independent body responsible for selecting candidates for certain judicial offices, including Judges of the High Court of England and Wales.

14. As is explained on the JAC's website, candidates for judicial office must complete an online application. As part of their application candidates are required to identify independent assessors to act as a professional, personal or judicial referee in order to provide independent comments on a candidate's application and ability to meet the

published competencies relevant to the holding of judicial office. The JAC uses independent assessments provided by independent assessors (i) as a source of evidence to assess the merits of candidates; (ii) to verify that candidates are of good character and (iii) to identify issues to explore further during the selection procedure.

15. The guidance for candidates published by the JAC expressly provides for the confidentiality of information provided by independent assessors. It states:

> "Confidentiality
>
> An assessor may choose to share the content of their independent assessment with you, but the JAC will treat the information as confidential and will not disclose it to you."

16. The JAC's published guidance for independent assessors makes similar express provision for confidentiality in the following terms:

> "Confidentiality
>
> The JAC will treat independent assessments as confidential and in communications with candidates the information provided will not be attributed to you.
>
> If you raise a serious allegation that the JAC believes should be investigated, you will not be identified as the source without your consent.
>
> Unsuccessful candidates can request written feedback on their application but nothing will be attributed to you."

17. The substance of the guidance to independent assessors is reflected in the forms they are asked to complete in respect of a candidate.

ANALYSIS AND DECISION

18. The appellant advanced a number of arguments in support of his proposition that the Commissioner's decision notice was not in accordance with the law.

19. First, the appellant contended that in the event of wrongdoing it was permissible to disclose confidential material so long as to do so would be appropriate according to a Human Rights Act analysis. He submitted that section 139 of CRA permitted the disclosure of information that could potentially expose significant wrongdoing. The appellant stressed that his argument was based on article 10 of the European Convention on Human Rights ("ECHR") - the right to freedom of expression. He said that it was significant that his request related only to successful applicants, although he added that he considered that all references provided for High Court vacancies should be made public. According to the appellant's argument, the reference in section 139(4)(b) to disclosure for the exercise of functions under a relevant provision was apt to extend to disclosure that was necessary for the effective exercise of article 10 rights. The appellant contended that a public interest analysis should be conducted in determining whether the information he requested should be disclosed to him. He said that the Tribunal should balance article 8 and article 10 rights when considering whether section 139 applies.

20. We reject the appellant's arguments on this branch of his case. Section 139 of CRA creates a statutory bar against disclosure of information which it identifies as being confidential unless one of the statutory gateways in sub-section (4) is satisfied. The structure of section 139, insofar as relevant for the purposes of the present case, is straightforward. The effect of the pertinent provisions may be summarised as follows. Sub-section (1) imposes a statutory prohibition against any person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a "relevant provision" from disclosing it except with lawful authority. Sub-section (2) makes clear that amongst the "relevant provisions" are the provisions contained in Part 4 of CRA; those provisions include sections 85 to 94C relating to the appointment of High Court Judges. Regulations and rules made under Part 4, such as the Judicial Appointment Regulations 2013 (SI 2013/2192), are also "relevant provisions". Sub-section (3) defines information as confidential information if it relates to an identified or identifiable individual. The information requested by the appellant relates to identified or identifiable individuals: the names

of the assessors selected by the candidates, the names of the assessors used for the purposes of the appointments process, and the assessors' reports on the candidates. Accordingly, there can be no doubt that the requested information is confidential information for the purposes of section 139.

21. Sub-section (4) provides that confidential information is disclosed with lawful authority only if and to the extent that any one of five specified gateways applies. The terms of the gateways were set out in the JAC's letter of 26 February 2018 to the appellant (quoted in paragraph 11 above). The appellant submitted that gateway (b) applied in the circumstances of the present case because article 10 of ECHR was a "relevant provision"; at another point in his submissions the appellant suggested that article 10 was relevant for the purpose of interpreting what amounted to a "relevant provision". In our judgement, these arguments are misconceived. The "relevant provisions" for the purposes of section 139 are specified in sub-section (2); they do not include article 10 or indeed any other provision in the ECHR or the Human Rights Act 1998.

22. We note also the terms of section 139(5) of CRA. This provides that an opinion or other information given by one identified or identifiable individual (A) about another (B) is information that relates to both and must not be disclosed to B without A's consent. This provision applies to paragraph 4 of the appellant's request in which he seeks disclosure of the assessors' reports on the candidates. Such information cannot, absent the engagement of one of the statutory gateways, be disclosed to the candidate unless the assessor consents.

23. More broadly, we consider that the appellant's argument that the JAC, the Commissioner and the Tribunal require to carry out a public interest balancing exercise in determining whether to release the requested information is unsound. The question which arises under section 44 of FOIA is whether disclosure of the information is prohibited by or under any enactment. In our view, section 139 clearly prohibits disclosure of the requested information since none of the "lawful

authority" gateways is satisfied in the circumstances of the present case. In short, gateway (a) is not satisfied because neither the assessors nor the candidates have consented to disclosure of the requested information. Gateway (b) is not satisfied because the requested disclosure is not for the exercise by any person of functions under a "relevant provision". As to gateways (c), (d) and (e), none of these is applicable on the facts of the case; the appellant did not suggest otherwise. It follows from the fact that none of the gateways applies that there is an operative and effective prohibition under section 139 of CRA against release of the requested information in the circumstances of the present case. The scheme of section 139 is that the scope of the prohibition is marked out by reading sub-sections (1) and (4) together. Unless disclosure comes within one of the gateways it is prohibited. It is obvious that Parliament took the view that, subject to certain tightly defined exceptions, sound public policy demanded that a strong level of confidentiality should attach to the identities of and the assessments provided by independent assessors for the purposes of the judicial appointments process. That is the policy underlying section 139 of CRA. The policy is translated into statutory form by the creation of a prohibition against disclosure; that being so, the policy is one that the freedom of information scheme set up by FOIA entirely respects.

24. Section 44(1)(a) of FOIA provides that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Accordingly, in the present case the requested information is exempt information. By virtue of section 2(3)(h) of FOIA section 44 is to be regarded as conferring absolute exemption. Where there is an absolute exemption there is no entitlement under FOIA to receive the information; this is made clear by section 2(2), which disapplies the right of access created under section 1(1). It is a key principle of the statutory freedom of information regime that in the case of information which is deemed to be absolutely exempt from disclosure, there is no scope for the carrying out of a balancing exercise on the question whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information; this is the clear import of section 2(1) and (2) of FOIA.

The appellant's submissions cannot be reconciled with these fundamental aspects of the statutory schemes under CRA and FOIA. In effect, he asks for the statutory schemes to be reshaped by ignoring the rules on the effect of absolute exemptions. In our view, there is no lawful basis for doing this.

25. It is important also to understand that, unlike section 41 of FOIA, section 44 does not require there to be any analysis of whether disclosure of the information would constitute an actionable breach of confidence. Thus, there is no basis under the scheme set up by section 44 for consideration of the availability of a public interest defence, incorporating a balancing exercise between article 8 and article 10 rights. In marked contrast to section 41, section 139 of CRA contains a broad definition of confidential information in sub-section (3); the criteria for conferring confidentiality laid down there differ greatly from those which are required for there to be an actionable breach of confidence, namely that the information has the necessary quality of confidence and that it was imparted in circumstances conferring an obligation of confidence. The contrast is reinforced by sub-section (8) of section 139 which makes clear that a contravention of the section is actionable as a breach of statutory duty. It is not a defence to a claim for breach of statutory duty that the breach was in the public interest.

26. We would add that we do not consider that there is any free-standing requirement to interpret or apply section 44 of FOIA in a way that is, as the appellant put it, in line with the Human Rights Act. The correct focus in the context of such an exercise would not be on FOIA, but on CRA (c.f. *Kennedy* v *Information Commissioner* [2015] AC 455). There is, in any event, as the law currently stands in England and Wales, no general obligation incumbent on a public authority under article 10 to disclose information (*Sugar* v *BBC* [2012] 1WLR 439; *Kennedy* supra per Lord Mance at paras 43-100). In our view, the JAC and the Commissioner have correctly understood and applied the statutory schemes established under CRA and FOIA; that being so, there is no legitimate scope for a separate Human Rights analysis to be carried out over and above the proper application of the relevant domestic

legislation. Even if there was room for undertaking the type of very broad balancing exercise advocated by the appellant, we do not see how it could conceivably result in the disclosure of the requested information. The public interest considerations supporting the confidentiality of the independent assessment component of the judicial appointments system are particularly strong and compelling. The system must guarantee a robust level of confidentiality so that assessors feel secure in providing evaluations that are characterised by the highest possible degree of independence, objectivity and impartiality. This vital aim would not be promoted if confidentiality was weakened by requiring disclosure of information relating to independent assessors or their assessments. Were this to happen there could be a risk that assessments might become less frank and direct in future. In our view, the public interest is well-served by the present rules.

27. The appellant's second line of argument was that by taking the judicial oath the judges have in fact provided consent in the case of wrongdoing. We observe that whilst the appellant asserted that there was evidence of wrongdoing in the case of one of the appointed judges, it would be entirely inappropriate for us to enter into any form of inquiry into such allegations or indeed to say anything more about them in the context of the present statutory appeal. The appellant's argument that the judicial oath evidences consent to disclosure of confidential information is manifestly untenable and we have no difficulty in rejecting it. We do not consider that by swearing the judicial oath a judge can somehow be taken to have impliedly agreed to open up for public scrutiny confidential information generated in the course of his or her appointments process.

28. Thirdly, the appellant maintained that the JAC ought to have tried to obtain consent from the relevant candidates or from the independent assessors. In our view, there was no requirement, under section 44 of FOIA or otherwise, for the JAC to take any such step. It seems to us that the JAC was plainly correct (and certainly well-entitled) to take the view that consent was very unlikely to be given in circumstances where the assessors had been assured that the whole process and in particular their

contributions to it were to be confidential. In any event, it is no part of the Commissioner's responsibilities or those of the Tribunal to review whether the JAC's approach to this question was correct or reasonable. The role of the Commissioner is to consider whether a request for information has been dealt with in line with the requirements of Part I of FOIA. The Tribunal's task under section 58(1)(a) is to determine whether the Commissioner's decision notice is in accordance with the law. This argument fails.

29. Fourthly, the appellant proposed that the Tribunal should itself approach the candidates and the assessors and seek to persuade them to consent to disclosure of the confidential information. He suggested at the hearing that he should be permitted to prepare a note setting out why the information should be disclosed; the note would then be sent by the Tribunal to the judges and assessors. We do not consider that this would be an appropriate course for the Tribunal to take. As already explained, our role is to consider whether the Commissioner's decision notice is in accordance with the law (see section 58 of FOIA). It is not for us to embark on the type of investigative exercise urged upon us by the appellant. It would be inappropriate and wrong for the Tribunal to do so. Accordingly, we reject this line of argument.

30. Finally, the appellant submitted that the requested information could have been provided to him in a redacted form (for example, by blanking out the names of the assessors or excluding parts of their assessments). Even if this were to be done, however, the information would still constitute confidential information because of the terms of section 139(3) of CRA. The whole contents of an assessor's report on a candidate obviously relate to an identified or identifiable candidate and thus fall within sub-section (3) of section 139. In our view, redaction would not be compatible with section 139 of CRA. Any information relating to an identified candidate or to an independent assessor which was supplied to the JAC in the course of an appointments process is deemed to be confidential by section 139 and cannot lawfully be disclosed except where one of the specified gateways is satisfied.

We do not consider that the JAC is obliged to provide documents which contain nothing more than fully redacted text. Such an exercise would be pointless and would convey nothing meaningful. This argument must be rejected.

31. Since we are satisfied that section 44 of FOIA applies in the circumstances of the present case, it is unnecessary for us to go on to consider the applicability of section 41.

32. For completeness we should record that in the course of the hearing the appellant tendered a number of additional documents:

- Schedule 2 of the Tribunals, Courts and Enforcement Act 2007;
- Practice Statement issued by the Senior President of Tribunals on 27 February 2015;
- The Hansard report of a meeting of the Committee for Justice of the Northern Ireland Assembly on 7 November 2013, at which a member of the Northern Irish judiciary gave evidence about his experience of the judicial appointments system in that jurisdiction;
- An article from the New York Times of 14 December 2017 entitled: "Who will Judge the Judge?";
- Section 105 of the Utilities Act 2000;
- The JAC's published competency framework for the office of High Court Judge;
- A bundle of court and tribunal decisions (and some other papers) intended to show, according to the appellant, that one of the judges appointed had committed wrongdoing.

We have considered these documents, but are satisfied that they add nothing of significance to the appellant's case.

33. For these reasons the appeal is dismissed.

34. Our decision is unanimous.

Signed:

The Hon. Lord Pentland

Judge of the First-tier Tribunal

Date of Decision: 1st November 2018

Date Promulgated: 2nd November 2018