IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0119
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50256367
Dated: 1st June 2010

Appellant: **Robert Brown**

Respondent: **Information Commissioner**

Additional Party: **Ministry of Justice**

Heard at: Field Court, London

Date of consideration: **23, 24 November 2010**

Date of decision: 30th December 2010

Before

Christopher Hughes OBE
Judge

and

Michael Hake and Dave Sivers
Members

Appearances:

Appellant:	**Appeared in Person**
Respondent:	**Robyn Hopkins**
Additional Party:	**Richard O'Brien**

Subject matter: FOIA S.50 Decision notice by Commissioner, appeal under S57.
Cases: Linda Bromley and Others and Information Commissioner v Environment Agency (EA/2006/0072)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 1 June 2010.

Christopher Hughes

Judge

Dated this 31st day of December 2010

Reasons

Introduction

1. This appeal to the Tribunal arose as a result of litigation conducted by the Appellant which reached the Court of Appeal in which the Appellant wished to obtain access to the wills of certain recently deceased members of the royal family. The Tribunal was informed that this litigation is still before the Courts and a number of issues are being considered within that litigation. This Tribunal was concerned with one specific issue which came to light in the course of the litigation and which the Appellant pursued through a FOIA request.

2. On 8 February 2008, the Court of Appeal handed down its judgment in *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother* [2008] EWCA Civ 56. That judgment contained, at §28, the following summary statement by the presiding judge in that case, the Lord Chief Justice, Lord Philips of Worth Matravers:

> "Before and after the death of Princess Margaret there were discussions between the Palace, Farrers, the Attorney General's Secretariat, and the Attorney General and the court which reviewed what Mr Hinks described as the practice of sealing royal wills. The senior district judge was involved who sought the views of the former President. Ultimately "a quite lengthy document" was agreed that was reviewed and approved by the former President. The process that this contained involved a system of "checks and balances" that was highly confidential. The primary object of the process was to protect the privacy of the sovereign. Thus when the two applications came before the former President she had an understanding of the background that she would not otherwise have had."

3. According to material supplied by the Appellant, the "quite lengthy document" referred to above had been mentioned during the trial giving rise to the hearing in the Court of Appeal. The Appellant relied on the transcript of the trial where a document, tentatively described as a "practice direction" is referred to in exchanges between counsel and Sir Mark Potter, the then President of the Family Division.

4. In the light of the information he had gathered from the proceedings in Court January 2009, the Appellant approached Her Majesty's Courts Service ("HMCS") with requests under FOIA for "the document known as the 'practice direction' for the closure of the Royal Wills". HMCS responded on 19 January 2009 stating that no such practice direction exists within HMCS.

5. The request for information which is the subject of this appeal was made initially in a letter dated 5 March 2009 to the Master of the Rolls for the "quite lengthy document" referred to in the extract from the Court of Appeal's judgment set out above. The Personal Secretary to the Master of the Rolls replied on 17 March 2009, in similar terms to the response of HMCS to the January 2009 request.

6. On 23 March 2009, the Appellant emailed the relevant officer of the Data Access & Compliance Unit of the Ministry of Justice ("MOJ"), attaching his letter to the Master of the Rolls of 5 March 2009. His email emphasised that this application for the "quite lengthy document" was new and distinct from his previous applications for the "the document known as the 'practice direction' for the closure of the Royal Wills". He received an automated reply acknowledging his email. Over the following months the Appellant made a number requests for the information but received no substantive reply. Finally on 16 November the MOJ re-issued its response of 19 January 2009.

7. On 17 November 2009, the Appellant informed the MOJ that he considered the two requests distinct and that he did not consider his request for the "quite lengthy document" to have been answered by the MOJ's letter of 19 January 2009.

8. On 30 November 2009, the MOJ wrote to the Appellant to attempt to clarify the position with respect to various issues including the request contained in the letter to the Master of the Rolls dated 5 March 2009 and submitted to the MOJ on 23 March 2009. The MOJ explained that it had misunderstood and therefore proposed to treat the Appellant's request as having been made on 17 November 2009.

9. On 15 December 2009, the MOJ sent the Appellant a substantive response to his March 2009 request for the "quite lengthy document". It stated that the Master of the Rolls, to whom the Appellant's letter of 5 March 2009 was addressed, was not a public authority. The Appellant's request of 23 March 2009 was, however, treated as being made to HMCS, for which the MOJ has responsibility. The MOJ confirmed that neither it nor HMCS held the "quite lengthy document".

10. On 30 December 2009, the Appellant requested an internal review of the MOJ's decision In his request he claimed that the MOJ's response had been framed in the way it was because it knew that "the document is held by the Master of the Rolls, the Lord Chief Justice, the Senior District Judge, other judge, person or persons, or institution or

institutions, acting on their behalf". He explained that he was objecting to what he considered to be the withholding of documents based on their being held by the Master of the Rolls or other persons not considered subject to FOIA.

11. On 11 February 2010, the MOJ informed the Appellant that, after an internal review, it was satisfied that the requested information was not held. It stated that it had been unable to find any trace of the document requested by the Appellant and was satisfied that it was not held by them.

12. In June 2009 the Appellant first complained to the Information Commissioner about the MOJ's failure to respond to the request initially sent to the Master of the Rolls and then to the MOJ. Following an investigation the IC issued a Decision Notice on 1 June 2010.

13. The IC found that:-

    (i) The Appellant first submitted a valid FOIA request on 23 March 2009 when his letter to the Master of the Rolls was forwarded to the MOJ however the submission of the request to the Master of the Rolls earlier that month was not a valid request since he is not a public authority for FOIA purposes.

    (ii) The MOJ's failure to respond substantively to the Appellant's request of 23 March 2009 until 15 December 2009 therefore placed it in breach of section 10(1) FOIA.

    (iii) The Commissioner was satisfied, on the balance of probabilities, that the MOJ had carried out an appropriate search for the "quite lengthy document".

    (iv) The Commissioner concluded, on the balance of probabilities, that the information was not held by MOJ/HMCS. The Commissioner considered that the evidence, including the evidence of the court proceedings, did not demonstrate that the MOJ held the document. The MOJ had conducted a sufficient search, during which it had identified the existence of the requested information within another public authority. There was no basis for suspecting that the MOJ was concealing its holding of the document.

    (v) The MOJ's failure to inform the Appellant of its discovery, through its enquiries of Farrer & Co (the solicitors acting for the Executors of the wills in question), that the document he had requested was held by the Attorney General's Office constituted a failure to conform to the 'Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities'

functions under Part I of the Freedom of Information Act 2000', issued under section 45 of FOIA.

The Appeal

14. The Appellant was dissatisfied with this outcome and lodged an appeal. The Appellant raised six issues in his appeal:-
    - The IC had failed to consider the Master of the Rolls non-judicial functions in relation to the applicability of FOIA to him.
    - The IC failed to provide sufficient evidence to justify his finding that adequate searches had been made.
    - The IC failed to give sufficient weight to evidence that the document is likely to be held or have been held by the Courts Service or the Judiciary on behalf of the Courts Service.
    - The decision notice failed to adequately censure the MOJ for delay and poor administration.
    - The IC demonstrated a lack of objectivity, showed bias and the regular contact with Government departments had dulled his objectivity.
    - The IC failed to consider the delays and to consider whether an enforcement notice was justified.

15. The ICO and the MOJ resisted all grounds of the appeal and submitted detailed arguments on each point.

16. In addressing the core question underlying the appeal – whether or not the MOJ held the "quite lengthy document" which the Appellant sought; the ICO relied on a series of exchanges which it had with the MOJ and the information which the MOJ had supplied about its attempts to find the document. In the course of these exchanges the MOJ explained that:

    (i) It contacted the Knowledge Information Liaison Officer at the Royal Courts of Justice ("RCJ"), referring that officer to the relevant passage in the Court of Appeal judgment set out above.

    (ii) That officer explained that HMCS had received and responded to a previous request worded as being for a "practice direction for the closure of the Royal Wills", which differed from this request for the "quite lengthy document".

(iii) The RCJ conducted a search for the "quite lengthy document" without success.

(iv) Ms Wright, of the Data Access & Compliance Unit at the MOJ, then met with a Senior District Judge at the RCJ, who confirmed that he was not aware of the existence of this document within HMCS.

(v) The MOJ then contacted Farrer & Co, the solicitors involved in the trial(s) referred to earlier in this Response during which the "quite lengthy document" had been mentioned, asking for further information which may assist in locating the "quite lengthy document". The MOJ was informed that the "quite lengthy document" was dated 2002 and that the Attorney General held a copy.

(vi) Based on this refined description, the MOJ then researched HMCS but were still unable to locate the "quite lengthy document".

17. The ICO concluded "In the light of the fact that the public authority had identified the requested information and that it was held by the Attorney General's Office, the Commissioner is satisfied, on the balance of probabilities, that the public authority had carried out an appropriate search within the public authority."

18. In the light of this search history and its results the ICO and MOJ submitted that on the balance of probabilities the information sought was not held by the MOJ.

19. The question for the Tribunal is whether the Commissioner erred in finding that, on the balance of probabilities, the MOJ did not hold the requested information.

Oral evidence

20. In determining this question in addition to the documentary evidence supplied by the parties the Tribunal considered the oral evidence of Richard Goodman Head of Disclosure for MOJ and Luigi Leo who discharges the role of "Knowledge Information Liaison Officer" at the Royal Courts of Justice. Between them they gave a clear exposition of the systematic way in which the search for the document was carried out. The areas within the Courts Service where it was possible that such a document would be or would be likely to be kept were identified, The Probate Registry, the Royal Courts of Justice and the Principal Registry of the Family Division. This focussed approach identified the Senior District Judge of the Family Division as the person most likely to have knowledge of documents similar to the one sought. He was able to establish that

all documents relevant to the sealing of royal wills were held in one place. From a consideration of the documents he had identified and following consultation with solicitors acting in the litigation concerning the wills (in order to obtain specific information about a document not fully described in the litigation) it was established that none of the documents in the file was of the correct date to be the document sought by the Appellant.

21. Although the Appellant raised a number of arguments concerning the search he was unable to present any evidence to suggest that the document was held by the MOJ. He relied on the absence of detailed records of the searches conducted by the MOJ. A formal written of every step in the search process is not a requirement of the public authority. The individual who had on the spot responsibility for the search, Mr Leo, was confident and clear in his evidence. He had a practical understanding of how to approach the challenge of searching within the Royal Courts of Justice for a document described in the Court of Appeal as a "quite lengthy document" but not otherwise fully characterised. His answers were ready and clear and he was frank in his acknowledgement of matters of which he was unaware. His researches into the nature of the document and his knowledge of the RCJ, its organisation and staff were effective in bringing about a clearer understanding of the document and finding the file in which it would have been kept, if it had been held. The Tribunal found his evidence persuasive and convincing. The Tribunal is therefore satisfied that an adequate search for the document was conducted.

Findings

22. Given that such a search was carried out the Tribunal needs to consider, in the light of this finding, whether on the balance of probabilities the MOJ did hold the document at the relevant time.

23. The evidence indicates that the document was created in 2002 in consultation with the then President of the Family Division. The Tribunal is satisfied that, at that stage, if the document had been kept by the then President, it would have been retained with the other documents relating to royal wills which were identified by the Senior District Judge. The relevant file was kept in a locked safe under the control of the Senior District Judge. He had been in post since 2004. He confirmed during the search process that he did not recognise the document and was satisfied that the material requested was not within the

file that he held. The Tribunal is therefore satisfied on the balance of probabilities that the document was at the time of the search there was no retention of the document within the MOJ; the evidence strongly indicates that from 2004 and in all likelihood before that the document was not held within the MOJ.

24. While the Appellant until a late stage relied on the comments in the High Court and Court of Appeal to argue that this indicated that the Judges in the wills litigation had seen the document, a close analysis of the text of the decision gave no grounds for such a conclusion – a point the Appellant conceded in the hearing. The Tribunal was satisfied that there were no grounds for believing that, during the course of the Wills litigation, the document came into the possession of either the judges or the MOJ.

25. These two circumstances (the creation of the document, the Wills litigation) are the identifiable points at which the document could have come into the possession of the MOJ. There is no evidence upon which the Tribunal could conclude that, at those times, it did. The question before the Tribunal is whether the document was in the possession of the MOJ at 23 March 2009. The Tribunal is satisfied, based on the adequacy of the search in 2009 and the absence of evidence that the document came into the possession of the MOJ prior to then, that the "quite lengthy document" was not held at the time of the Appellant's request.

26. The Tribunal was informed, towards the end of the hearing, that a copy of the document concerned was supplied to the MOJ by the Attorney-General's Office in early November 2010. The document was supplied in connection with a review the MOJ is carrying out of probate procedure. The Appellant had previously been aware that the document was held by the Attorney-General and indeed had submitted a request to the Attorney-General for the disclosure of the information.

27. Turning now to the specific grounds listed in the grounds of appeal:-

GROUND 1

28. The Appellant argued that proper consideration should be given to the wider responsibilities of the Master of Rolls which go beyond his role as a judge and in particular his statutory responsibility for Chancery records. It is clear from the legislative history that this responsibility it as matter of antiquarian interest and relates to the court records of Chancery prior to the re-organisation of the Courts in the 19th century. While

the Master of the Rolls has many responsibilities in addition to presiding in the Court of Appeal, as a simple question of statutory construction he is not a person listed as a public authority under Schedule 1 of the FOIA and therefore he is not a person to whom an application under FOIA lies. In any event when the application was received in his office in March 2009 it was appropriately transferred to the MOJ which does have responsibilities under Schedule 1 of FOIA. The subsequent delay in handling the application was due to the MOJ and the responsibilities of the Master of the Rolls do not enter into the matter. Accordingly the Tribunal was satisfied that this head of the appeal was entirely without merit.

Ground 2

29. "The IC failed to provide sufficient evidence to justify his finding that adequate searches had been made". The Tribunal noted that there was significant evidence before the IC upon which he made his decision. Tribunal has concluded (see above) on all the evidence before it (much of which was before the Information Commissioner) that, on the balance of probabilities, the information sought was not held by the MOJ at all the relevant dates raised during the hearing. Accordingly this ground of appeal does not succeed in persuading the Tribunal to set aside the IC's decision.

Ground 3

30. "The IC failed to give sufficient weight to evidence that the document is likely to be held or have been held by the Courts Service or the Judiciary on behalf of the Courts Service." The question before the Tribunal was whether or not on the relevant date (for these purposes 23 March 2009 when the request was forwarded from the Office of the Master of the Rolls) the information was held. The test the Tribunal applied is that laid down in *Bromley* the balance of probabilities and has satisfied itself that the information was not held at that date (see above). The Tribunal heard detailed evidence of the searches which had been made and the specific and highly valuable contribution of one member of the Judiciary to ensuring that the search was effective. During the course of the hearing the Appellant reconsidered the relevant transcript and judgement from the High Court and Court of Appeal proceedings and concluded that they did not amount to evidence that any members of those courts had indeed seen the document sought in the course of the Appellant's litigation. In the light of this the Appellant abandoned his argument with respect to the judiciary.

Ground 4

31. "The ICO failed to accurately and fully reflect the timeline of events, and as a result the decision notice misrepresents events and fails to adequately censure the MOJ for delays, and the poor quality of administration". There is no obligation on the ICO to chronicle every twist and turn of the path in investigating how a public authority has discharged its obligations. The narrative set out by the ICO is amply sufficient for the purpose of investigating the Appellant's complaint. The Tribunal noted that the ICO had made an adverse finding against the MOJ in the decision notice with respect to a failure to comply with the duty laid down by s10(1) of FOIA to respond within 20 days to a request for information. It further recorded that the MOJ was in breach of the code of practice. In the light of this the Tribunal is satisfied that in this respect the ICO properly discharged his responsibilities. This ground of appeal has no merit.

Ground 5

32. "The ICO demonstrated a lack of objectivity in the conduct of their investigations." In his submissions the Appellant identified an excessive reliance on the MOJ by the ICO in investigating the matter and an expression of sympathy (during the course of the investigation) for the difficulties which the MOJ encountered. However the ICO made adverse findings against the MOJ and concluded that the delays involved were unacceptable. The Appellant failed to adduce any substantive evidence of lack of objectivity.

Ground 6

33. "The ICO failed in the DN to fairly assess and record the delays and administrative failings of the MOJ, or to consider if in the wider context an enforcement notice may be merited". The statutory framework of FOIA is clear. S57(1) provides for an appeal against a decision notice either by the complainant (as in this case) or the public authority. Where an information notice or enforcement notice has been served the public authority may (under S57(2)) also appeal against that. There is no free-standing right of a complainant to appeal against a decision **not** to issue an information or enforcement notice. Accordingly this ground of appeal is invalid.

Conclusion

34. As a result of our findings the Tribunal concludes that the ICO was correct in determining that the information sought was not held and accordingly we uphold the decision notice.

35. Our decision is unanimous.

36. An appeal against this decision must be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunals website at: www.informationtribunal.gov.uk

Christopher Hughes OBE

Judge Dated: 31st December 2010

IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

RULING on an APPLICATION for PERMISSION to APPEAL
By

Mr Robert Brown

1. This is an application dated 6 December 2010 by Mr Robert Brown for permission to appeal against the decision of the First Tier Tribunal (Information Rights) ("FTT") dated 31st December 2010.
2. That decision dismissed the appeal of Mr Brown and upheld the Information Commissioner's (IC) Decision Notice FS50256367 of 1 June 2010.
3. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that in form this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules").
4. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application do not raise an error of law for the reasons stated below.
5. The Appellant believes the Tribunal (and the Information Commissioner) erred in concluding that the Ministry of Justice, the Additional Party in the original appeal, did not hold the information he was requesting at the relevant time.
6. His original appeal to the Tribunal was dated 28 June 2010 in respect of information requested from the Additional Party in March 2009.
7. The Tribunal concluded that his requests were for information which was not held by the Additional Party at the relevant time.
8. The Appellant in his lengthy Application for Permission to Appeal disputes the findings of the FTT including arguments of law, adequacy of reasons by the FTT and the absence of a transcript obstructing his ability to appeal.
9. The FTT found that the information was not held and gave detailed, logical and cogent reasoning based on the evidence for its decision.
10. The arguments as to law are general points of constitutional or theoretical interest but do not go to the subject matter of the case; whether the information was held or not. The absence of a transcript of proceedings is not a procedural flaw which vitiates the proceedings.
11. The Appellant raises no new issues which ought to be heard by the Upper Tribunal and the claim that the FTT decision did not provide sufficient reasons is completely without foundation.

12. The Tribunal is not persuaded that its original decision was incorrect in fact or in law. It follows that the appeal has no prospect of success and that permission to appeal is refused.

13. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended Mr Brown has one month from the date this Ruling was sent to it to lodge the appeal with the Upper Tribunal (Administrative Appeals Chamber).

C Hughes OBE

Information Rights Judge

8 February 2011