



NCN: [2024] UKFTT 966 (GRC)

Case Reference: EA/2023/0483

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

**Heard by: Cloud Video Platform  
Heard on: 16 October 2024  
Decision given on: 29 October 2024**

**Before**

**JUDGE HAZEL OLIVER  
MEMBER PIETER De WAAL  
MEMBER ROSALIND TATAM**

**Between**

**RICHARD HOLT**

Appellant

**and**

**(1) INFORMATION COMMISSIONER  
(2) MINISTRY OF JUSTICE**

Respondents

**Representation:**

For the Appellant: In person

For the Respondent: Did not attend

For the Second Respondent: Mr Laverack, counsel

**Decision:** The appeal is Dismissed

## **REASONS**

### **Mode of hearing**

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

### **Background to Appeal**

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 17 October 2023 (IC-242885-P6K8, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns a request for a copy of an original will made to the Ministry of Justice (the “MoJ”).

3. On 20 May 2023, the Appellant wrote to the MoJ and requested the following information (the “Request”):

*“This request is made under the Freedom of Information Act 2000.*

*Please provide me with a copy of the original will for [name redacted] as identified in the National Probate Calendar as follows:*

*[Details redacted]*

*To confirm, I would like a copy of the original will that contains the original signatures of the testator and the witnesses. I already have a copy of the registered will, which I have obtained from the Probate Search Service website at: <https://probatesearch.service.gov.uk/>. The original will is a different document to the registered copy and will contain original signatures.”*

4. The MoJ responded on 8 June 2023 and said that the application for a will does not fall under the freedom of information process, and advised that it may be possible to obtain some of the requested information from the probate registry. Following an internal review the MoJ wrote to the Appellant on 21 June 2023 stating that it did not hold the requested information.

5. The Appellant complained to the Commissioner, noting contradictory responses to the request. The Commissioner decided:

- a. The MoJ was the appropriate public authority (the original request was addressed to HM Courts and Tribunal Service, which is an executive agency of the MoJ).
- b. The MoJ physically holds the requested information, but not for the purposes of FOIA. It holds the information in the course of exercising its functions as a court, rather than in its capacity as a public authority.

## **The Appeal and Responses**

6. The Appellant appealed on 12 November 2023. His grounds of appeal are:

- a. The exemption under section 32 FOIA (court records) does not apply to historical records under section 63(1). This applies as the will is over 20 years old, and wills become public records after granting of probate.
- b. The interpretation of recorded information goes beyond the wording, and includes details such as the design, layout, handwriting and signatures on a document.
- c. The MoJ cannot rely on section 21 FOIA (information reasonably accessible to the applicant), because this does not apply to information in original wills - they are not available via the relevant online/postal service and there are no procedures in place for public inspection.
- d. A fellow genealogist has obtained a photocopy of an original will under FOIA.
- e. The information contained in original wills is used for purposes other than court documents.

7. The Commissioner's response maintains that the Decision Notice was correct. He says that his investigation was solely to determine whether the information held by the MoJ was held in its role as a public authority. He decided that whilst the information was held by the MoJ, it was in their role as a court and not as a public authority. The information falls outside the scope of FOIA. The MoJ also informed the appellant of the correct route to request the desired information. Wills are held by a third-party contractor on behalf of the MoJ but in a court capacity rather than that of a public authority, and any requests for wills from storage must be sent through to one of the probate services.
8. The MoJ was joined as a party to the proceedings. The MoJ's response says:
- a. The MoJ is a public body for the purposes of FOIA. The Probate Registry is not. The MoJ is responsible for administration of the Probate Registry under HM Court and Tribunals Service ("HMCTS").
  - b. The Appellant accepts that he has received the information as he has obtained a copy of the registered will, meaning it was accessible by other means.
  - c. The information is held as part of a judicial function – the grant of probate is a process engaging the court's independent function. The MoJ is not responsible for the manner in which the independent jurisdiction of the probate registry is performed or for its judicial functions.
  - d. The reason that the Probate Registry holds the will is as evidence necessary for the purpose of issuing a grant of probate, which is clearly an example of material within the judicial sphere of their operations.
  - e. The fact that a record is a historical record does not mean that a record which would otherwise fall outside FOIA is suddenly within the scope of its provisions.
9. The Appellant's reply to the MoJ's response makes the following points:
- a. Original wills contain unique information that is different from information contained in office copies of those wills.
  - b. HMCTS is an executive agency of the MoJ and falls within its remit for the purposes of FOIA.
  - c. Probate records are held by the MoJ for the purposes of FOIA by their own admission in previous decision notices of the Commissioner.
  - d. The MoJ/HMCTS use wills as commercially tradable information, as shown by contractual arrangements with Smee & Ford (a paid-for legacy notification service), meaning it is held in a public authority capacity.
  - e. Probate documents are "public records" under the Public Records Act 1958 ("PRA"). They have been transferred to the National Probate Records Centre, a "*place of deposit*" as appointed under Section 4(1), and have been selected for permanent preservation under the PRA. It was the Lord Chancellor's directions, under Section 124 of the Senior Courts Act 1981, that removed the requested information from the courts to a place of deposit.
  - f. FOIA replaced the access regime to information contained in public records, formerly found under Section 5 of the PRA. It is believed that the intention of these Acts was to create an eventual right of access to all public records, and in the case of public records held by bodies not subject FOIA, that FOIA would come into force once those records were transferred to a place of deposit.

## **Applicable law**

10. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (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.*

.....

**58 Determination of appeals**

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
  - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

11. Courts and tribunals are not public authorities for the purposes of FOIA - they are not listed in Schedule 1 FOIA, which sets out the public authorities and related bodies which are subject to the regime (and have not been designated a public authority under section 5(1)).

12. Under section 124 of the Senior Courts Act 1981 ("SCA"), "*All original wills and other documents which are under the control of the High Court in the Principal Registry or in any district probate registry shall be deposited and preserved in such places as may be provided for in directions given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection.*" This provision gives a right to inspect an original will.

13. Under section 125 of the SCA, "*An office copy, or a sealed and certified copy, of any will or part of a will open to inspection under section 124*" can be obtained on payment of a fee. This provision gives a right to obtain a copy of a will. Such requests are largely dealt with online by providing a digital copy. The copy of a will is not necessarily identical to the original will, as it may be typed or formatted differently and will not contain original signatures. The Request in this appeal is for the original will deposited under section 124, not a copy under section 125.

## **Issues and evidence**

14. The issues are:

- a. Was the requested information held by the MoJ in its capacity as a public authority under FOIA?
- b. If so, was the requested information reasonably accessible by other means under section 21 FOIA?

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, which we have read.

- b. A supplementary bundle of supporting documents from the Appellant, which we did not read in advance of the hearing but asked the Appellant to direct us to specific pages during his oral submissions that we consulted afterwards.
- c. Oral submissions from the Appellant and MoJ at the hearing.

## **Discussion and Conclusions**

16. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

17. The desired outcome stated by the Appellant in his appeal is:

*"I am seeking one (or both) of the following two outcomes:*

- 1. Decision Notice overturned and the requested information provided under the Freedom of Information Act.*
- 2. Application of the Freedom of Information Act clarified and clarification of the process to access original wills and other related documents confirmed by the Tribunal, with the requested information provided under such legislation as may be applicable.*

*Whatever the outcome, I would like to know the process I should follow in order to exercise my right of access to original wills and other related documents and be provided with the requested information. I would like to be able to make future requests for similar information without issue and receive the requested information in a reasonable amount of time."*

The Tribunal's role is limited to deciding whether the Commissioner's decision was in accordance with the law in relation to FOIA. We cannot assist with processes that fall outside FOIA, and are unable to provide clarification on other processes or legislation as requested by the Appellant. We do note that, as directed by Judge Hughes, on 7 August 2024 the MoJ provided a letter to the Appellant explaining how he could inspect the original will by making a request to the relevant probate registry and paying a fee of £22.

18. The Appellant has obtained a registered copy of the relevant will, but he is seeking a copy of the original will as held in long-term storage. The current system is for original wills to be stored indefinitely. Original wills are submitted as part of an application for probate to the Probate Service (which is part of the Family and Chancery Divisions of the High Court). Once probate has been granted, they become a public document which can be inspected unless they have been "sealed" by a judge or probate registrar.

### ***Was the requested information held by the MoJ in its capacity as a public authority under FOIA?***

19. This depends on whether the original will is held by a court as part of a judicial function, in which case FOIA does not apply. The MoJ is a government department that has overall responsibility for the justice system. HMCTS is an executive agency of the MoJ. HMCTS functions in more than one capacity - as a court officer when conducting business for the court (under the direction of the court), and as a public authority for other matters (such as reporting and analytics of court services). HMCTS is only subject to FOIA when it is acting as a public authority. Similarly, the MoJ can hold

information as a public authority under FOIA, but it may also hold information in a different capacity – particularly where this information is held by a court as part of court records.

20. The MoJ’s position is put quite simply. It says that original wills are held under section 124 of the SCA, which expressly refers to the “control of the High Court”. This is a judicial function. The SCA sets the function by which original wills are held and made available for inspection, and this is not changed by the way in which they are held in practice. The MoJ has overall responsibility for the Probate Registry under HMCTS (which is why the MoJ is the respondent to this appeal), but original wills are held under the control of the High Court.

21. The Appellant has put forward a number of detailed arguments in both written and oral submissions. Having considered these arguments carefully, we find that the MoJ did not hold the requested information in its capacity as a public authority under FOIA. We set out below our conclusions on the key arguments made by the Appellant.

22. ***The Public Records Act 1958 and designated “place of deposit”***. The Appellant says that original wills are held in a designated “place of deposit” under the PRA. FOIA replaced much of the regime for access to public records when it came into force. He argues that original wills do fall within FOIA because they are held in a place of deposit under the PRA. He suggests that this access regime is separate from the SCA. He says that the SCA provisions on inspection are to allow people to contest a will, and this is different to the rights of access under the PRA. He argues that the SCA cannot take precedence over the PRA and the regime under FOIA, and they are independent provisions.

23. In response the MoJ says that the PRA cannot override the basis on which original wills are held under the control of the High Court. Section 124 SCA requires original wills to be deposited and preserved, and this is done by storing them in a place of deposit under the PRA. This does not mean that they are held under FOIA.

24. The Appellant referred us to various documents which show how original wills are held in a place of deposit under the PRA. Having considered these documents and his submissions, we agree that this is how original wills are currently held. However, this does not automatically mean that all documents held under the PRA are subject to FOIA.

25. Many public records stored in this way will be covered by FOIA - as is shown by section 15 FOIA which sets out special provisions for public records that have been transferred to the Public Records Office or another place of deposit. But, the scope of “public records” under the PRA is wider than the scope of information that is covered by FOIA. Paragraph 4 of Schedule 1 to the PRA expressly provides that records of courts and tribunals are public records for the purposes of the PRA. Information held by courts is not, however, covered by FOIA.

26. The point that not all records held under the PRA are covered by FOIA is shown by some of the documents that the Appellant referred us to in the supplementary bundle. For example, page A355, guidance from the National Archives on FOIA from 2004. Point (ii) says, “*Public records are held by places of deposit on behalf of the Lord Chancellor, who expects The National Archives (TNA) to ensure that suitable arrangements are made by places of deposit for compliance with the FOI Act where it relates to information in these records*” [emphasis added]. We agree with the Appellant that FOIA has had a significant effect on records held under the PRA and places of deposit. However, this is only where the information held in the records is itself covered by FOIA. If the

records are not held by a public authority that is subject to FOIA, they are not brought into the freedom of information regime simply by the fact they are held under the PRA in a place of deposit.

27. We therefore find that original wills can be held in a place of deposit under the PRA without this meaning they are subject to disclosure under FOIA. There is no issue about whether the SCA or PRA/FOIA takes precedence. Instead, we accept the MoJ's position that a designated place of deposit under the PRA is the way in which the obligations in section 124 SCA to deposit and preserve original wills are fulfilled. As explained by the MoJ in their response to the appeal, an original will has to be provided to the Probate Registry as part of the process of applying for probate. This is the reason that original wills are held and preserved. These documents still remain under the overall control of the High Court. This means that they are not subject to FOIA, because they are held by a court as part of its judicial function.

28. **Original wills are no longer held by the court.** In a related argument, the Appellant says that the original wills are held in custody under the PRA and are not held by the court. He points to section 4(6) of the PRA, which says, "*Public records in the Public Record Office or other place of deposit appointed by the Secretary of State under this Act shall be temporarily returned at the request of the person by whom or department or office from which they were transferred.*" He argues that this shows the court no longer has control over the documents, because they have to make a request for them to be temporarily transferred. We do not agree that this provision means that the High Court no longer has control over original wills. They are held in a place of deposit in accordance with section 124 SCA, which expressly makes it clear that this is "*subject to the control of the High Court and to probate rules*".

29. **The MoJ has ultimate control over original wills, as shown by a recent consultation document.** The Appellant says that the MoJ recently issued a consultation document about changing law and policy to allow destruction of original wills after a certain period of time, and this shows they are under the ultimate control of the MoJ rather than the High Court. This consultation on "Storage and retention of original will documents" was published on 15 December 2023. It was presented to Parliament by the Lord Chancellor and Secretary of State for Justice. We do not agree that this consultation undermines the position that original wills are held by the courts. For example, the Ministerial Foreword states, "*At the moment there are no limits to how long courts hold these original will documents and they are held long past the period when a challenge might be brought*" (page A488 in the supplementary bundle). The consultation is on government proposals to change the length of time for which original wills are held by the courts, primarily in order to save public money. The MoJ holds overall responsibility for the justice system, and so proposals on reforming the work of the courts fall within its remit. This does not mean that the original wills themselves are held by the MoJ as a public authority rather than by the High Court.

30. **Probate records are held by the MoJ for the purposes of FOIA by their own admission in previous decision notices of the Commissioner.** The Appellant provided us with information about two previous decisions of the Commissioner which concerned requests for probate records. In both cases the MoJ appears to have accepted that FOIA applied but refused disclosure on the basis of exemptions. One request was for copies of wills for members of the Royal Family, refused under section 44 FOIA as the wills were sealed. We note that this involved a request for copies rather than for original wills. The other request was for all probate documents sent to a probate registry for a particular will, refused under section 32 FOIA (court records). This would presumably have included the original will.

31. It is unclear why the MoJ did not take the same position in these complaints to the Commissioner as in this appeal. However, we are not bound by these previous decisions of the Commissioner. We also note the MoJ's point that a public authority may decide to rely on different legal arguments to resist disclosure in different proceedings. There are no previous First-Tier Tribunal decisions on this point that we or the parties are aware of. We have considered only the facts and submissions in this particular appeal in order to decide whether FOIA applied to the Request. The Appellant also raised the point about a fellow genealogist having been sent a copy of an original will under FOIA. Again, this was a decision by an individual probate registry which is not binding on this Tribunal (and we also note that the document was provided by post with no covering letter, so it is unclear whether it was supplied under FOIA or on a different basis).

32. ***The information contained in original wills is used for commercial purposes.*** The Appellant says that original wills are held by the MoJ as a public authority because the information in them is used for commercial purposes and not purely as court records. He points to a contract between the MoJ and the private company Smee & Ford, which provides access to electronic records under a contract for the purposes of beneficiary notification of charities. We do not agree that this necessarily means that the MoJ holds the information as a public authority. In any case, this does not provide a right of access to an original will as requested in this case – it relates to access to electronic records of wills, which is a different issue. The Appellant explained that for wills after 2021 this might be a scanned copy of an original will, but otherwise it would be a different registered/office copy. It is clear that the original wills themselves are provided to a court during the probate process and are held on that basis. That is what the Request was for and what this appeal is about, not registered/office copies of wills or other scanned/electronic records.

***If so, was the requested information reasonably accessible by other means under section 21 FOIA?***

33. The MoJ has argued that the information was accessible to the Appellant through the process for inspecting an original will. The Appellant provided evidence that he has attempted to access original wills from a number of district probate registries, only one of these referred him to the same process as explained by the MoJ during these proceedings (see paragraph 17 above), and it appears he has not yet successfully inspected an original will using this process. We have not made a finding on this point because we have found that FOIA did not apply to the requested information.

**Outcome**

34. We appreciate that the Appellant may find the situation frustrating because he has found it difficult in practice to exercise the right to inspect an original will at various different probate registries. However, the fact that the system is not working well administratively is not a reason to apply FOIA to the information.

35. We therefore find that the requested information was not held by the MoJ in its capacity as a public authority under FOIA. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 25 October 2024

Promulgated

Date: 29 October 2024