Tribunals Service
Information Tribunal

ICO Reference Number: FS50150314
Information Tribunal Appeal Numbers: EA/2007/0120 & 0121

Freedom of Information Act 2000 (FOIA)

Determined without an oral hearing

Decision Promulgated 29 July, 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer Q.C.

and

LAY MEMBERS

David Wilkinson
and
Andrew Whetnall

B E T W E E N:

THE MINISTRY OF JUSTICE

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Decision

FOIA is the Freedom of Information Act, 2000. References to sections are to the provisions of FOIA.

Decisions

1 These appeals are allowed. The Appellant is therefore not required to take any action to comply with the Decision Notices.

Reasons for the Decisions

The Requests

2 These conjoined appeals arise out of two requests for audio records of proceedings, in one case of a criminal trial at Northampton Crown Court and, in the other, of a hearing in the Family Division of the High Court. The requests were made respectively by the defendant in the criminal trial, which ended on 18th. October, 2002, Mr. Christopher Peachment, and by a party to the family proceedings, which lasted from 19th. – 23rd. June, 2006, Mr. John Seiden.

3 Mr. Peachment made his request on 2nd. February, 2006 to the Department of Constitutional Affairs (the "DCA"), which was then the government department with responsibility for the court service. It followed approaches to the Crown Court, which involved a refusal by the trial judge, Mr. Recorder Bright, to sanction the provision of a recording. Mr. Peachment wanted an audio recording rather than a transcript. There was no appeal pending.

4 Mr. Seiden requested a CD recording of the proceedings to which he was a party by letter dated 24th. August, 2006. He cited FOIA. He had already sent a request for the transcript.

5 Both requests were refused and the refusals were maintained following internal reviews. Reliance was placed by the DCA. on section 32 of FOIA, which provides an absolute exemption from the duty to provide information. It further invoked section 21, though not until the review stage in the Peachment case. Mr. Seiden was told that he must apply to the judge, Mr. Andrew Moylan Q.C., who had been sitting as a Deputy High Court judge. (He was eventually given access to the recordings with the assistance of the Appellant.)

6 Both requesters complained to the Information Commissioner ("the IC").

The Decisions of the IC

7 In both Decision Notices, the IC rejected the Appellant `s claims as to the application of s.32(1) of FOIA, ruling that a transcript or audio recording of proceedings did not fall within the sub – section. In so ruling, he followed the decision of this Tribunal in the early appeal of *Mitchell v I.C. EA/2005/0002*. He further ruled that the exemption conferred by s.21 (information reasonably accessible by other means) did not apply. He found the Appellant in breach of the time limits on responding to requests imposed by s.17. There is no appeal against those last findings.

The Evidence and the Submissions

8 The evidence before us consisted of a statement from Mr. Ben Connah, Head of the Access Rights Unit of the Appellants, to which were exhibited extracts from Hansard and from DCA Guidance notes on FOIA and correspondence between the relevant courts and the Appellant on the one hand and the requesters and advisors on the other.

9 We received in advance of the hearing the IC `s Decision Notice, the Grounds of Appeal, the IC `s Reply and the Appellant `s "Written submissions". When we convened to consider our decisions, we were informed that both parties had intended to lodge additional submissions. With some reluctance we agreed to receive them. We discussed the issues nevertheless and formed provisional conclusions, which we were willing to review in the light of further written argument. We later reconvened by telephone conference to deliberate further, following the lodging of responsive submissions dated 24th. (Appellant) and 26th. (IC) June, 2008. In the event, those submissions did not alter our provisional conclusions, dealing as they did, in large measure, with secondary issues, which we have not found it necessary to determine. In saying that, we do not intend to disparage in any way the quality or potential relevance of the supplementary arguments advanced on both sides.

The case for the Appellant

10 Put shortly, the Appellant argues that *Mitchell* was wrongly decided or, at least, did not tackle the critical question ; who created the record ? Alternatively, it asserts that s. 21 was an unanswerable bar to Mr. Seiden `s request. It contends that on a straightforward reading of s.32(1), a recording or a transcript of the proceedings are covered by the exemption and that a consideration of the legislative policy behind s.32(1) reinforces that construction. It is fair to say that, having, very understandably, followed *Mitchell*, when reaching his decisions, the IC has not strenuously pressed us to follow it.

11 In advancing the contention as to the ambit of s.32(1), the Appellant put before the Tribunal evidence and argument which had not been available to the Tribunal in *Mitchell*. It referred to the current procedural rules of the relevant courts, which to some degree govern the provision of transcripts and to the parliamentary debate in the House of Lords in which the rationale for s. 32 was discussed. Mr. Connah, gave evidence in writing as to the contractual arrangements covering the preparation of and access to transcripts and tapes and the role of the Appellant and of Her Majesty `s Court Service, an executive agent of the Appellant, .in relation to the courts and the custody of court records.

The law

12 Section 1(1) of FOIA imposes a general duty on public authorities to communicate information to individuals on request. A court is not a public authority but the Appellant and its predecessor, as government departments, are (see *Schedule 1 Part 1*).

13 Both sections 32(1) and 21 provide absolute exemption from that duty (see *s.1(1)(b*)).

14 Section 32 (1) reads as follows :

" Information held by a public authority is exempt information if it is held only by virtue of being contained in –

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by -

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter."

Section 32(4) gives a wide construction to "court".

13 Section 21 provides :

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

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

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

(b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*

(3) For the purposes of subsection (1)- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment. (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within

subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

The Facts

14 They are short and uncontroversial. All proceedings in the High Court and the Crown Court are recorded on tape. They are transcribed, as and when appropriate. The Appellant, through HMCS, contracts with various independent companies for the recording and transcription of those proceedings. Those companies retain the tapes after the hearing. They do so plainly as agents of the HMCS and the Appellant, which, therefore, holds this information for the purposes of s.32(1). Where simultaneous transcription is used, the arrangements do not vary in any way material to these decisions.

15 The standard reporting contract makes detailed provision for access to transcripts and the charges that may be made and for reference to the judge where approval is required. Clause 9.7 and 9.8 require the contractor to ensure that, where supplied to persons other than the parties, transcripts of proceedings in which anonymity has been accorded to a child or a complainant of a sexual offence do not contain material which might lead to their identification. Whilst the content of such contracts is interesting and useful background information, we doubt whether it can assist in the interpretation of the governing statute.

Our Decisions

16 No distinction can be made for present purposes, between a tape recording and a transcript. That was the view taken in *Mitchell ;* it accords with commonsense and Rule 10.15(7) of the Family Procedure Rules.

17 The Appellant has argued quite naturally from its standpoint as the public authority responsible for the operation of the courts, including all tribunals caught by the definition in s. 32(4). Section 32(1) applies, however, to all public authorities within Schedule 1 Part 1 which happen to hold information in the circumstances specified in s.32(1) and (2).

18 There are cogent reasons why an authority should not disclose to the world information within 32(1) (a) or (b), which cover material deployed in and for the purposes of live or even past litigation. However, statute and rules of court procedure adequately protect such information from unauthorised disclosure so that FOIA s.44(1) would be an adequate shield for the requested authority.

19 The s. 32(1) exemption, applies, however, even where the authority is entirely at liberty to disclose, for example because the court consents or, as can happen under s.32(1)(c), because it was never subject to an embargo on disclosure in the first place.

20 *Mitchell* exemplifies the anomaly, assuming for present purposes that the Appellant `s contention is correct. The public authority had apparently obtained, presumably funded by its taxpayers, a full transcript of the trial of certain officers and councillors. None of the policy arguments applicable to the Appellant could be urged in favour of a refusal to disclose the record of proceedings in the form in which the council had obtained it. This Tribunal observed at paragraph 26 :

"Where the transcript is held, not by the court but by a public authority, subject to the Act, neither a party to the litigation nor subject to any order of the court, the reason for granting exemption to the information it contains is still less obvious."

21 Problems as to the statutory protection of anonymity (see paragraph 15), if they had arisen, would have been avoided by the contractor `s compliance with clause 9.8 of the standard contract. Yet, if this appeal succeeds, such an authority has an incontestable defence to disclosure.

22 It is difficult to see why Parliament enacted an absolute exemption here which would apply to all public authorities, without regard to the balance of public interest, rather than limiting it to the authority which, from time to time, had responsibility for the court system. In neighbouring sections, such as s. 33 (authorities with audit functions) and section 35 (government departments), the exemptions, qualified in those cases, were expressly confined to particular bodies.

23 Since, as it appears to us, the only route to removal of this anomaly would be amendment of FOIA, we do not foresee its early resolution.

24 If a tape recording falls within s.32(1), it must be within (c) :-

> *any document created by -*
> *(i) a court, or*
> *(ii) a member of the administrative staff of a court.*

25 In *Mitchell*, the Tribunal ruled that it was not created by the court for the purposes of (c)(i), interpreting "court" as meaning the judge.(paragraph 42). That ruling is not unequivocally challenged here ; rather it is argued by the Appellant, without dissent from the IC, that the Tribunal did not tackle the question whether (c)(ii) applied.

26 At paragraph 37 of *Mitchell,* the Tribunal stated *:*

> *"As to subparagraph (ii), the extent of the class of documents created by members of the administrative staff to which the exemption applies is not immediately obvious. It cannot, we think, extend to public orders of the court such as witness summonses or orders under the Contempt of Court Act, 1981. It must refer to internal documents such as notes to a Judge from a court officer relating to the conduct of a particular case. It is not difficult to*

see good reasons for leaving to the judge the decision how far, if at all, such material should be published."

27 Neither the evidence as to contractual arrangements nor the arguments of the Appellants were before the Tribunal in *Mitchell.* Indeed, the role of the DCA was entirely unexplored ; the public authority under scrutiny was the Wolverhampton District Council.

28 We have the advantage of clear evidence as to the contractual arrangements governing the use by the Appellant of independent reporters and as to the apparent rationale of the exemption, despite what we have said in paragraphs 17 – 22.

29 We have accepted the submission that the contractor holds the tapes as agent for the Appellant. That being so, we agree that the member of his staff who recorded the tapes can properly be regarded as a member of the administrative staff of the court. "Administrative" is a very broad term. His or her status as a member of the court staff cannot be dependent on the terms on which he or she is engaged.

30 The arguments based on policy support the Appellant `s argument, where the public authority is the Appellant. Whether or not we should consider Lord Falconer `s explanation of the legislative purpose of s. 35 when presenting the bill to the House of Lords, given the restrictions on the use of such material set out in *Pepper v Hart [1993] A.C. 593*, it is not difficult to discern a desire to retain judicial control over material created for the purposes of litigation, especially where it is produced under compulsion or never exposed to public view.

31 The Civil and, as amended, the Criminal Procedure Rules provide for limited judicial control over transcripts. Rule 65.9 of the Criminal Procedure Rules imposes a duty on the transcriber to supply transcripts for the purposes of an appeal and forbids the provision of records of public interest immunity

hearings without leave. Rule 5(4) of the Civil Procedure Rules permits the provision of pleadings and judgment on payment of a fee. Rule 10 .15(6) of the Family Procedure Rules 1991 prohibits the dissemination of any material created for the proceedings without judicial leave. This latter rule, which was not considered by the Tribunal in *Mitchell,* lends the clearest support to the Appellant `s argument as to the policy behind section 32(1).

32 We conclude, therefore, that a tape recording is a document created by a member of the administrative staff of a court and that *Mitchell* was wrongly decided.

The remaining issues

33 That being so, these appeals succeed. Grateful as we are for the assistance furnished on other issues, we have come to the conclusion that there is nothing to be gained in those circumstances by investigating further the arguments as to the application to these facts of s. 21, let alone sections 6 or 9.

34 We are the more ready to skirt discussion of s.21 because the test of reasonable accessibility is, in every case, on the wording of s.21(1), specific to the applicant. Hence the expression of views confined in relevance to these appeals is likely to be of little future value.

Signed:

D.J.Farrer Q.C.
Deputy Chairman
29 July, 2008