IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2014/0302

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50554849
Dated: 25 November 2014

Appellant: John E Brown

Respondent: Information Commissioner

On the papers

Date of decision:

Before
CHRIS RYAN
(Judge)
and
MICHAEL HAKE
PIETER DE WAAL

Subject matter: Absolute exemptions - Court records s.32

Cases: ***Peninsula Business Services Ltd v Information Commissioner and Secretary of State for Justice*** **[2014] UKUT 284 AAC**
Alistair Mitchell v Information Commissioner (EA/2005/002 10/1/2005)
Ministry of Justice v Information Commissioner (EA/2007/0120 and 0121)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0302**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. The Appellant has a concern about the way he perceives that Leeds County Court ("the Court") deals with applications for injunctions in family cases involving children. He feels that if he can obtain statistics about injunction applications during the year ended 31 December 2006 he will be able to demonstrate that his concerns are well founded. He therefore lodged a request for information with the Ministry of Justice ("MOJ") on 10 July 2014. So far as relevant to this Appeal it read as follows:

   > *"1 How many applications did Leeds County Court receive in the year ending 31 December 2006 ex parte without notice for a non-molestation order (injunction) [Family Law Act 1996 S45(3)].*
   > *2. How many of those applications were granted at the ex parte without notice hearing.*
   > *3. How many injunctions in that year were made by Leeds County Court of its own motion for 'relevant children' as defined in the FLA and how many were made for 'children' over the age of 18.*
   > *4. How many of such injunctions made a finding of physical violence and therefore contain a power of arrest (a penal notice).*
   > *5. How many of such applications were made by McCormicks (now Clarion) solicitors then of 4 Oxford Row, Leeds."*

   We will refer to each of those requests by number and, collectively, as "the Requests".

2. The Requests were made under section 1 of the Freedom of Information Act 2000 ("FOIA"). That section imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

> *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

3. The MOJ refused to disclose the requested information. It said that it had already provided the information requested under Request 1 (a point that the Appellant subsequently conceded) and stated that the rest of the information was exempt from the obligation to disclose because of the operation of FOIA section 32(1). In relevant part that section reads:

> *"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) …*
> *(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."*

4. The Appellant complained to the Information Commissioner about the way in which the Requests had been dealt with by the MOJ. Following an investigation into the complaint the Information Commissioner issued a Decision Notice on 25 November 2014. It noted that the MOJ had based its refusal on section 32(1)(c) and recorded the following facts:
   a. Parties to proceedings before the Court lodged documents in hard copy in the early stages of a case;
   b. Information derived from those documents was then transferred to a database that underlay an electronic case management system called Familyman;
   c. The Familyman system was used to facilitate the Court's management of each set of proceedings as it progressed through the court processes from instigation to final disposal;
   d. The hard copy documents lodged during the period covered by the Requests had been destroyed by the time they had been submitted, in accordance with the Court's normal document management procedures; and
   e. The statistical information requested by the Appellant was extracted from the records of the individual cases, held on the Familyman system, in which an ex parte non-molestation injunction had been applied for.

5. The Information Commissioner decided that the MOJ had been entitled to rely on section 32(1)(c) in refusing to disclose the requested information. His decision was based on findings that the entry of the relevant information into the Familyman system constituted the creation

of a "document", that those of such documents which contained the withheld information had been created for the purpose of proceedings in particular matters and the information was held only by virtue of having been contained in such documents (in that it was not held elsewhere by the MOJ). The Decision Notice also recorded that, as section 32 creates an absolute exemption, there was no requirement, once it had been found to be engaged, to carry out a public interest balancing test to determine if the exemption should be maintained.

6. On 6 December 2014 the Appellant lodged with this Tribunal an appeal against the Decision Notice. He opted to have his appeal determined on the papers, without a hearing, and we have therefore made our determination on the basis of the Grounds of Appeal, a Response document filed by the Information Commissioner and an agreed bundle of documents provided to us by the parties.

7. The Appellant explained, in his Grounds of Appeal, the detail of his complaints about the Court and the urgent need he had for the information to be disclosed. None of those arguments are relevant to this appeal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Our jurisdiction is limited to determining whether or not the requested information falls within the meaning of section 32. It follows that we are not permitted to take into account the broad points of principle which the Appellant has put forward. They might have come into play if the relevant exemption had been a qualified one, but FOIA section 2(3)(b) makes it clear that it is an absolute one.

8. The Appellant's Grounds of Appeal did make some attempt to address the engagement of section 32(1)(c). They did so in the following terms:

> *"S 32(1)(c) of the FOIA 2000 cannot possibly apply to my request under the Act. In the case of a court (court recorder) it only applies to documents created by a court for the purpose of proceedings e.g. judgement and orders of the court which have not been published. The information I require is purely statistical. It does not enable me to identify parties or obtain personal information.*
> *I would refer the Tribunal to the decision in Alistair Mitchell v Information Commissioner (EA/2005/002 10/1/2005) where it was held that the section only referred to judicially created documents. It did not apply to a court transcript.*
> *The information I require is not exempt with the meaning of S.32. Even if I am wrong in law why does MOJ not supply it and*

save huge amounts of public money being unnecessarily expended?"

9. We pause to mention that we are not bound by other decisions of this Tribunal and that the decision in *Mitchell* is, in any event, inconsistent with the decision of a different panel of the Tribunal in *Ministry of Justice v Information Commissioner (EA/2007/0120 and 0121).*

10. The Information Commissioner's Response to the Appeal placed heavy reliance on a decision of the Upper Tribunal of the Administrative Appeals Chamber reported as *Peninsula Business Services Ltd v Information Commissioner and Secretary of State for Justice* [2014] UKUT 284 AAC. The Upper Tribunal judge in that case upheld the decision of a differently constituted panel of this Tribunal, which had found that a request for information about the identity of respondents to Employment Tribunal claims could be refused in reliance on section 32. (The section applies to tribunal proceedings, as well as court proceedings, by virtue of the wide definition of "court" to be found in section 32(4)).

11. The information requested in *Peninsula* had been obtained from hard copy documents lodged with the Employment Tribunal. It had then been copied into an electronic case management system called Ethos. It will immediately be apparent that the facts of the case are very close to those of this case and the Upper Tribunal's decision that the word "document" in section 32 applies in this context as much to an electronic record as to hardcopy is binding on us. So also is its decision that the exemption covers information extracted from material lodged with the court in hard copy form, on the basis that it fell within section 32(1)(a) in its original form and must therefore also continue be protected from disclosure by section 32(1)(c) when translated into an electronic record.

12. There is, therefore, binding authority requiring us to decide that any relevant information in Familyman, which was obtained from hard copy materials provided by the parties and is not held elsewhere, would fall within this part of the language of the exemption.

13. The Information Commissioner established that the Court had destroyed the hard copy documents before the Requests had been submitted. None of the information was therefore held elsewhere than on the Familyman system and the electronic record was the only source of the information requested i.e. the information was held by the Court only by virtue of being contained in that record.

14. That would have been enough to dispose of Request 1 (were it still being pursued) and it is enough to dispose of Request 5.

15. The position in respect of information falling within Requests 2 – 4 inclusive is not as straightforward. That information was not derived

from materials filed by the parties, but was recorded directly into the case management system by the Court's staff as relevant events occurred. The link between subsections (1)(a) and (c) does not therefore exist in respect of that information.

16. In *Peninsula* the Upper Tribunal stated that it is "*a matter of evidence and fact as much as of law*" to determine what constitutes the relevant "document" in a case. On the facts of that case it was a matter of speculation as to whether "…*ETHOS is one document or a small series of documents or – the practical reality – a series of large datasets held in a common form software programme accessible in different ways to produce different screened results…".*

17. The information sought in these Requests could only be obtained by interrogating the electronic record maintained by the Court in respect of each of its cases. The fact that each of those records formed a part of a larger database, which has general administrative purposes extending beyond the requirements of a particular cause or matter, does not alter that fact. It follows that each element of the information requested was held at the relevant time in an (electronic) document that had been created by the court or a member of its administrative staff for the purpose of a particular cause or matter.

18. We conclude, therefore, that these Requests also relate to information that is exempt under section 32(1)(c). (The MOJ had in fact relied only on section 32(1)(c)(i) during the Information Commissioner's investigation, but we accept the Information Commissioner's argument that it is sub-section (c)(ii) that applies and that we are not precluded from placing reliance on it given the absence of the MOJ from the appeal process and the fact that, had it been joined, it would have been free to refine its case in this way). The Information Commissioner was therefore correct in ruling that the MOJ had been entitled to refuse the Requests and the appeal should therefore be dismissed.

19. Our decision is unanimous.

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Chris Ryan
Judge
5th May 2015

Promulgated 6th May 2015