



Appeal number: EA/2016/ 0209

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

JULIA CLARK

Appellant

- and -

**THE INFORMATION COMMISSIONER
MINISTRY OF JUSTICE**

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
Ms MARION SAUNDERS
Mr JOHN RANDALL**

Determined on the papers, the Tribunal sitting in Chambers on 8 February 2017

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant was involved in divorce proceedings in the High Court in 1998. In 2004, when reviewing files received from her former solicitors, she discovered three A4 size notebooks containing handwritten notes about her case. She is concerned to establish whether these are the Judge's notes. She sent copies of extracts from the notebooks to the Lord Chief Justice, and received a reply from Sir Nicholas Wall (then President of the Family Division) in which he asked her to return the notebooks to his office. She says that she received legal advice that she had no obligation to do so, and has retained the notebooks. She hopes they may be of use in a pending application to the Court of Appeal.

3. The Appellant made a request to the Ministry of Justice ("MoJ") on 25 January 2016 for samples of the Judge's handwriting so she could establish whether the writing in the notebooks was that of the Judge. She later clarified that her request was for writing and numbers written "on" a document, rather than for information contained "in" a document.

4. MoJ refused the request in reliance upon the following sections of the Freedom of Information Act 2000 ("FOIA"): s. 32 (1) (c) (i) (court records) and s. 40 (2) (personal information). It also informed the Appellant that the Judge (now retired) had been asked to comment and had stated that the notes in the notebooks are not in his handwriting.

5. The Information Commissioner issued Decision Notice FS50627899 on 10 August 2016, upholding MoJ's decision in respect of s. 32 (1)(c)(i) FOIA. The Decision Notice did not find it necessary to consider s. 40 (2) FOIA.

Appeal to the Tribunal

6. The Appellant's Notice of Appeal dated 5 September 2017 relies on grounds that the Decision Notice was wrong because the handwriting samples are required as evidence before the Court of Appeal and the interests of justice therefore require disclosure. She attaches copies of her correspondence about this matter with Members of Parliament, the MoJ, and the President of the Family Division of the High Court of Justice.

7. The Information Commissioner's Response dated 6 October 2016 maintained the analysis as set out in the Decision Notice. MoJ did not file a Response, indicating that it relied on the Information Commissioner's submissions.

8. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 79 pages, including submissions made by both parties, for which we were grateful. The Tribunal was also provided with a closed bundle, containing an extract from the Judge's notebook in another case.

The Law

9. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

10. In this case, the Decision Notice found that MoJ was entitled to rely upon s. 32 (1) (c) (i) FOIA. Where engaged, this provides an absolute exemption from disclosure falling under s. 2 (2) (a). The public interest test under s. 2 (2) (b) is not therefore applicable.

11. S. 32 (1) FOIA provides 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 any 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”.

12. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

13. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

14. We are satisfied that any examples of the Judge’s writing taken from a court file would engage s. 32 (1) (c) (i) FOIA. As this is an absolute exemption, we have no power to apply the “interests of justice” test that the Appellant requests. The information requested is exempt from disclosure.

15. We are concerned that MoJ in this case has disclosed to the Information Commissioner and the Tribunal an extract from the Judge’s notebook as a “sample of the withheld material” (paragraph 19 Decision Notice). We agree that an extract from the Judge’s notebook may not be disclosed in relation to a freedom of information request, but we take the view that information in a Judge’s notebook falls into a different category of information from court records.

16. Information contained in a Judge’s notebook is not “created by the court or its administrative staff” but created by the Judge. This important point of principle is referred to in Philip Coppel’s book *Information Rights Law and Practice* 4th edition at page 701. Such information therefore falls outside of s. 32 (1) (c) (i) FOIA. To that extent, we disagree with paragraph 23 of the Decision Notice, although that disagreement is immaterial to the outcome of this appeal.

17. We go further in saying that we do not regard a Judge’s notebook as “held” by MoJ for the purposes of FOIA. As such, we take the view that it should not have been disclosed at all, even as closed material. In reaching that conclusion, we have considered the judgment of the President of the Queen’s Bench Division in the case of *R. (McIntyre) v Parole Board* [2013] EWHC 1969 (Admin) in which the Court stated at [23]that:

"The notes constituting the record are quite distinct from notes taken by the chair for his or her own use or notes made by a judge or chair where there is an audio or visual recording of the proceedings. Such notes do not constitute the record. Nor do they constitute personal data. They are made by the judge or chair or panel member solely for the purpose of assisting in and in preparation for the reaching of the reasoned decision; they are not a record of the proceedings. Their absolute confidentiality is integral to the independent and impartial decision making function of a judge or tribunal or panel member and the proper administration

of justice. They are in effect notes made for the preparation of the judgment. They are no different to a preliminary draft of a judgment. If such notes are held by an administrative officer or on a computer system operated by an administrative body for the judge, tribunal or panel member, they are held on behalf of the judge, tribunal or panel member and remain under the sole control of the judge, tribunal or panel member. No person has a right of access to them. They must never be disclosed or provided to any person" .

18. For the reasons given above, this appeal is dismissed.

(Signed)

ALISON MCKENNA

DATE: 9 February 2017

PRINCIPAL JUDGE