



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

Appeal Reference: EA/2018/0026

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50757463

Dated: 07 January 2018

Date of Hearing: 19 June 2019

**Before
JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)
MR ANDREW WHETNALL AND MR MICHAEL JONES**

**Between
JAMES BURLEY**

Appellant

**-and-
THE INFORMATION COMMISSIONER**

Respondent

**-and-
MINISTRY OF JUSTICE**

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 31(1)(c) Law Enforcement – Administration of Justice

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. In 2015, The Ministry of Justice (MoJ) commissioned a small research project to look at the possible impact that unrepresented defendants had on the administration of justice. To achieve this, the MoJ's Analytical Services Directorate conducted telephone interviews with 15 Crown Court Judges and 6 CPS Crown Court Prosecutors. These interviews were recorded and transcribed. This resulted in the production in February 2016 of an internal draft report 'Unrepresented defendants: Perceived effects on the Crown Court in England and Wales and indicative volumes in the magistrates' courts' ("the draft report").
2. Subsequently a 7-page summary was prepared ("the final report"). The final report did not contain any quotes from the transcriptions of the interviews. Following requests under FOIA, the MoJ disclosed the final report.
3. As a result of a leak, the draft report was published online. In response to request under FOIA, both the final report and the draft report were disclosed.
4. Mr Burley works for a charity, the Centre for Criminal Appeals, which is concerned with miscarriages of justice. On 1 May 2018, Mr Burley requested:
 - a. All interview transcripts of interviews conducted for the purposes of the Ministry of Justice's 'Unpublished Analytical Summary 08/2016' on 'Exploratory research into unrepresented defendants in the Crown Court in England and Wales - perspectives from a small sample of practitioners' with personal data such as interviewees names redacted. I

understand that this should consist of 21 interview transcripts – 15 with Crown Court judges and 6 with CPS Crown Court prosecutors’.

5. The MoJ replied on 21 May 2018 stating that it held the transcripts but that these were being withheld under S41 FOIA (Information provided in confidence). On review, this decision was confirmed.
6. Mr Burley complained to the Information Commissioner (IC) on 19 June 2018. In submissions to the IC, the MoJ relied on both S41 and S31(1)(c) (Administration of justice). In response, Mr Burley stated that he did not accept that this exemption applied, stating “if the transcripts reveal a lack of independence or fairness on behalf of judges or prosecutors in specific cases, there is in fact strong public interest in this being known. Indeed, disclosure would seem to actually aid the administration of justice by exposing a lack of independence or fairness on behalf of judges and prosecutors and allowing this to then be addressed”.
7. The IC investigated the complaint and upheld the MoJ’s decision on 7 January 2019. In her decision, the IC held that the MoJ could not rely on S41, because the transcripts could be redacted to conceal the identity of the participants but decided that the exemption in S31(1)(c) applied and the public interest in maintaining this exemption outweighed the public interest in disclosing the transcripts.
8. On 2 February 2019, Mr Burley appealed to this Tribunal. In his grounds of appeal, at paragraph 9, he stated that the IC ‘has failed to establish that disclosure of the redacted transcripts would lead to a very significant and weighty chance of prejudice to the administration of justice that is “real, actual or of substance”’. The identity of those involved was not an issue and that the participants had been warned that the material may be subject to the provisions of FOIA and that guidance suggested participation such as these interviews did not compromise the administration of justice as long as the

information was about the operation of the courts. He said that there had been no apparent adverse effect following the leaking of the draft report.

9. In addition, he stated that 'the IC's assessment that the public interest lies against disclosure of the redacted information is incorrect, and in particular ignores the especially strong public interest in transparency in view of the background circumstances set out at paragraph 5 above.'
10. The background circumstances Mr Burley refers to are the publication of extracts of the draft report on 'Buzzfeed News' and his understanding that the IC had opened a criminal investigation, which was then closed, into the MoJ's handling of an earlier request.
11. The Tribunal added the MoJ as the second respondent in the appeal.

The Hearing

12. All the parties requested and agreed that this appeal be decided by way of a paper determination.
13. It was directed by the Tribunal that this appeal should be linked to another appeal by Mr Burley on a different application (EA/2018/0261). It was considered preferable that both Mr Burley's appeals were heard on the same day by the same panel. The Tribunal heard the other appeal at an oral hearing on 19 June 2019. The panel then went on to consider this appeal.
14. The Tribunal had an open bundle and a closed bundle. The closed bundle contained the 21 transcripts which the panel were able to read and consider.
15. In addition, there is a response from the MoJ and a written statement from Christina Golton, Senior Principal Social Researcher at the MoJ. She includes in the exhibits to her statement, a statement from Caroline Logue, Principal Social Researcher at the MoJ. The statement of Caroline Logue was prepared

for a separate appeal (EA/2018/0292). Her statement included additional information relating to the background, nature and process of the research.

16. In that statement Ms Logue sets out that she was the day to day analytical lead for the research project. She describes difficulties in getting sufficient judges to participate in the project for various reasons including a reluctance to be interviewed. She states that other researchers have experienced this reluctance of judges to go on record and share experiences. She states that the disclosure of these interviews risks prejudicing the administration of justice both in this case and because disclosure of the interviews would inhibit judges and prosecutors from taking part in future research projects, which would prejudice the administration of justice.
17. Ms Golton, in her statement, sets out that the team was provided with a list of prosecutors who had agreed to be involved. These prosecutors were provided with the same consent form and information as the judicial interviewees.
18. The consent form had the following declarations
 - a. "I consent to being interviewed by the Ministry of Justice Analytical Services regarding my experiences of unrepresented defendants.
 - b. I understand that a report that summarises the findings of the interviews will be written. The report will be seen by MoJ and HMCTS staff and by representatives from across the criminal justice system, including the judicial office. The report will not be published although it may be subject to Freedom of Information Requests. We will not identify individuals by name in the report, although we will likely mention the viewpoints of different roles and professions, for example the majority of judges interviewed believed that....
 - c. I agree that my interview can be recorded and that this anonymous recording can be transferred to a professional transcription service."

19. Mr Burley submits that because the judges and prosecutors were aware that the interview material could be the subject of a FOIA request and because guidance on undertaking these types of exercises states that they are in the public interest there is no prejudice and it is unlikely that the publication of the redacted interviews would discourage future participation. Mr Burley cites the absence of evidence that judges and prosecutors have been discouraged from participation by the publication of extracts by BuzzFeed News as support for his view that the redacted interviews should be disclosed and that such disclosure is in the public interest.
20. The Tribunal considered that it was fair and just to consider this appeal on the papers because of the information provided, the detailed arguments and submissions, the written evidence and because it was in accordance with the parties' wishes.

Findings, Reasons and Conclusions

Prejudice or likely prejudice to the administration of justice

21. The Tribunal finds that Section 31(1)(c) FOIA applies to this application. This is not disputed by Mr Burley. He argues that there would be no prejudice, nor would there be likely to be prejudice to the administration of justice if redacted transcripts were disclosed. This is a qualified exemption and Mr Burley says that, if Section 31(1)(c) is engaged, disclosure is in the public interest.
22. The judiciary is an independent body and its independence from government and parliament is one of the central constitutional principles. Its independence is essential to the rule of law, and to the authority and legitimacy of the judiciary. Research, like the project undertaken by the MoJ's own research staff, is governed by judicial guidance. Prior approval has to be obtained from the appropriate Judicial Head. Judges cannot be approached directly without this approval.

23. Even with this approval, judges are often wary of voicing their opinions in case it results in undermining judicial independence and the perception of judicial independence. In Ms Logue's witness statement (para 20- 22) she states that it was difficult to get sufficient number of judges to participate in the interviews because 'some judges do not wish to go on record and share their experiences, even where the SPJ has given approval and assurances are given in relation to confidentiality and no intention to publish'.
24. The CPS has published guidance concerning its own conduct, 'Statement of Ethical Principles for the Public Prosecutor'. This guidance sets out the prosecutors must "strive to be, and to be seen to be, consistent, independent, fair and impartial".
25. This research, prompted by concerns from the judiciary about the impact of unrepresented defendants on the administration of justice, was small and never intended for publication. Although both the draft report and the report have been disclosed neither has been published by the MoJ. The participants were told that there would be no disclosure of the transcripts of the interviews. That assurance does not alter the fact that the MoJ must show that there would be prejudice or be likely to be prejudice to the administration of justice if the transcripts were disclosed. The evidence, which the Tribunal accepts, is that disclosure of the transcripts would risk contravening the principle of independence and impartiality. The disclosure would be to the public as a whole and there is a risk that disclosure would undermine these important principles of independence and impartiality.
26. The Tribunal also finds that there would be a greater unwillingness from judges and prosecutors to take part in any future project or research if the transcripts of the interviews were disclosed. The Tribunal also accepts that those judges and prosecutors agreeing to take part in future research would be circumspect in their views if they thought the transcripts were going to be disclosed.

27. The Tribunal accepts the importance of obtaining the views of judges and prosecutors in the working of the criminal justice system. They are both key participants and their experience, knowledge and perspective is valuable in the assessment of the operation of the criminal justice system and how it should be changed to maintain the standards that it aspires to.
28. The MoJ submits that the prejudice to the administration of justice is both in the present disclosure of the transcripts and also in the effect this disclosure would have on further research of this nature. The Tribunal accepts this submission.
29. The research was concerned with gauging the effect of policy changes and reforms to legal aid within the criminal justice system. This is a controversial area. Opinions put forward by judges and prosecutors are more likely to be perceived as not impartial and, if disclosed to the public at large, are likely to prejudice the administration of justice because such disclosure would create a perception that judges and prosecutors were not impartial and independent because of views expressed in this sensitive area.
30. The Tribunal accepts the MoJ submission that the personal and candid views of the participants, if published, would undermine the public's perception of independence and impartiality of the judiciary and the CPS. Not only that, it would significantly inhibit participation in future research and that would also prejudice the administration of justice.
31. The MoJ submission also refers to the BuzzFeed News article, which describes the draft report as containing 'explosive testimony from senior judges about the impact on the justice system of people appearing in court without a lawyer.' This is a description of judges entering the debate in a sensitive and controversial area and risks prejudicing the administration of justice.
32. The Tribunal find that publication of the transcripts may result in attempts at identifying the specific member of the judiciary. The Tribunal has read the

transcript interviews in the closed bundle. Even if redacted, the description of cases and other details may be sufficient for someone, sufficiently motivated, to attempt to identify those taking part by 'jigsaw identification'. The interviews deal with actual personal experiences in some detail. Even if names are redacted, there remains a possibility that other details in the transcript could be used with other information to identify interviewees.

33. A further argument put forward by the MoJ is that disclosure would undermine all of the judiciary and the CPS by reducing the public perception of their independence and impartiality. Disclosure is to the public at large and it is likely that the public would perceive the disclosed views as being the views of the judiciary and the prosecutors. There would be prejudice to the administration of justice from the disclosure of views on this controversial area and this would undermine the public's perception of the independence and impartiality of the judiciary and the CPS.

34. The Tribunal accepts the other submission that disclosure would reduce the likelihood of co-operation by the judiciary and the CPS in future research. It is likely that, if there was disclosure that the appropriate Judicial Head would refuse permission, and, even if permission were granted, judges would be more likely to refuse to take part and those agreeing would be circumspect in the views they put forward. The same would be true of prosecutors. In this situation, there would be a prejudice to the administration of justice. Policy development needs to be able to obtain the candid views of practitioners if the administration of justice is to remain fair and impartial.

35. For the reasons set out above and in the IC's response and the submission of the MoJ the Tribunal find that S31(1)(c) applies.

Public interest test

36. Mr Burley's argument for disclosure is that transparency of the actions of public servants through disclosure of their views increases accountability and

transparency and therefore enhances trust. In respect to this appeal, greater transparency would enhance trust in the judiciary and the CPS. Mr Burley also argued that there is also a strong public interest in disclosure, if that reveals views that are not consistent with the standards expected of the judiciary and the CPS. In either case, he submits, there is public interest in knowing these views.

37. However, the Tribunal is satisfied that the public interest in non- disclosure outweighs any public interest benefit derived from disclosure. There may be public interest in seeing the transcripts of interviews with judges and prosecutors, but there is greater public interest in maintaining the independence and impartiality of the judiciary and the CPS. There is also public interest in the MoJ obtaining full, uncensored views of these practitioners to aid the development of reform and improvement in the criminal justice system. The Tribunal accepts the reasoning of the IC and the MoJ in the assessment of public interest.
38. In the circumstances, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 31 July 2019

Promulgated Date: 01 August 2019