Information Tribunal Appeal Number: EA/2005/0002

Freedom of Information Act 2000 (FOIA)

Decided on papers **Decision Promulgated**

……10/10/2005……

Before

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer QC

and

LAY MEMBERS
Jenni Thomson and Henry Fitzhugh

Between

ALISTAIR MITCHELL
Appellant

and

THE INFORMATION COMMISSIONER
Respondent

JUDGMENT

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1 This is an appeal against a Decision Notice of the Respondent dated 17th May 2005, by which he upheld the refusal by Bridgnorth District Council ("the Council") to provide information to the Appellant contained in a document, namely a transcript of proceedings in a criminal trial of a member and two officers of the Council at Wolverhampton Crown Court. Those proceedings, so far as recorded in the transcript, were conducted in public.

2 The Council's refusal relied on the sole contention that the transcript was a document, hence its contents information contained in a document, which was exempt from the requirement for communication by virtue of s.32(1)(c) of the Freedom of Information Act 2000. [1]The Decision Notice under appeal upheld that construction. The Appellant contends that the transcript is, for various reasons, not a document to which s.32(1)(c) applies.

The Factual Background

3 We have been supplied with a short agreed statement of facts dated 11th August 2005. It does not fully cover the background to this appeal but, in so far as it is silent, we do not detect any apparent disagreement as to what happened and we proceed on the assumption that there is no significant dispute as to any factual assertion made by the Appellant.

4 In 2001 a member and two officers of the Council were prosecuted at Wolverhampton Crown Court for offences of perjury. Proceedings were recorded on audio tape by Cater Walsh, court reporters, who had contracted with the Lord Chancellor's Department (as it then was) to provide such services to the Crown Court.

5 Following the conclusion of those proceedings, the Council obtained from Cater Walsh a transcript of the tapes upon payment of a substantial fee. It remained in its possession until late 2004, when it was shredded in accordance with the Council's record deletion policy.

6 By telephone in or about December 2002 and on subsequent occasions prior to 1st January 2005, the Appellant requested a copy of the transcript. He considered, very reasonably in our judgment, that it contained material of legitimate public interest and had been procured with public funds. By letter dated 12th December 2002, the Council refused his request, acknowledging its possession of the transcript but stating that there was no authority to release it to members of the public. It apparently maintained that position throughout the time that it retained

[1] Hereafter, all references to sections of a statute are to sections of the Freedom of Information Act 2000, unless otherwise indicated, and references to "the Act" are references to that statute.

the transcript. Whether authority could have been obtained, if not, why not and whether any policy on nondisclosure was reasonable are questions which we do not need to examine, since the duty to disclose is now governed solely by the Act.

7 The Appellant made a further request on 24th December 2004 to take effect after 1st January 2005, when the relevant provisions of the Freedom of Information Act 2000 came into force. He followed that with various e-mails. The Council's Head of Legal Services responded by letters dated 4th and 7th January 2005, maintaining the refusal on the ground that the transcript was exempt and indicating that it had been destroyed, in any event, in accordance with the Council's document management policy.

8 The Appellant then made a formal written request to the Council dated 17th February 2005 in compliance with s.1. The Council, through its same officer, refused that request on 23rd February 2005, relying exclusively on the alleged exempt status of the transcript.

9 The Appellant complained to the Respondent, pursuant to s.50 on 25th February 2005.

10 The Respondent issued a Decision Notice dated 17th May 2005 upholding the Council's ground for refusal. He further found in favour of the Appellant on another issue with which this appeal is not concerned.

Jurisdiction

11 We consider that the agreed or apparently agreed facts give rise to an issue as to our jurisdiction to which we now turn.

12 Section 1(4) defines information for the purpose of the right conferred by s.1 as:

> "*the information in question held at the time when the request is received*."

The subsequent proviso is inapplicable to this case.

13 By February 2005, when the request referred to by the Appellant in the last sentence of paragraph 6 of his submissions was received by the Council, the transcript was no longer held; it had been shredded. There is no evidence that the whole or any part of the information contained in it was to be found in any other document retained by the Council. It seems to us plain therefore that the Council could have refused the request on the straightforward ground that it did not hold the information requested.

14 For the avoidance of doubt, we find that no request, in whatever form, made before 1st January 2005 could give rise to a right under s.1. Quite apart from any presumption against retrospectivity and the chaotic consequences of the opposite interpretation, the time limit for compliance with a request contained in s.10 clearly indicates such a construction.

15 That being so, we considered whether it was open to us to dismiss this appeal on that short point, though not invited to do so by the Respondent. The appellate

jurisdiction of this Tribunal derives solely from s.58. Section 58(1)(a), which is the provision relevant to this appeal, reads 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,*
>
> *… 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*."

16 Paragraph 2 of the Decision Notice served by the Respondent refers only to the question of exempt status under s.32 (1)(c). We conclude that our powers are limited to a review of the lawfulness of the Notice, whether or not there may be other grounds apparently available to (in this appeal) the Council or the Commissioner to justify the refusal. Thus, even if the evidence permitted such a conclusion, we should not have been entitled to consider the possibility that the transcript enjoyed exempt status by virtue of s.21 (information accessible by other means). We observe, but do not decide, that the Commissioner may not be similarly constrained when serving a Decision Notice, given the terms of s.50(4). If that is correct, he may consider that some complaints can be determined by reference to undisputed facts not relied on by the complainant or the public authority.

17 In deciding whether this appeal should be allowed we therefore ignore the fact that the Council did not hold at the material time information for the purposes of s.1. That it did not may, however, be relevant to our decision as to whether another Notice should be substituted, should we find that the Notice erred in law.

The Decision Notice

18 So far as material to this appeal the Notice found that the exemption in s.32 had been correctly applied by the Council, adding that s.32(1)(c) was the relevant provision. It concluded by pointing out that the exemption was absolute and therefore not subject to the public interest test (see s.2(3)).

19 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."

20 The Appellant, in his Notice of Appeal, a subsequent letter and his submissions advances two arguments specific to this case, namely:

(i) That whatever the status of the original tapes, a printed transcript or a copy of the first transcript, produced at the behest of a third party, the Council is not, itself, a "*document created by (i) a court … for the purposes of proceedings in a particular cause or matter".*

(ii) That the Council, by its letter of 12th December 2002, in which it acknowledged that it held the transcript, conceded that it did not enjoy exempt status since, if it did, no duty to disclose that fact arose.

21 As to (i), we are in no doubt that the tapes are themselves a "document" for the purpose of s.32(1), as the Respondent contends, since that term is broadly construed in an age offering so many recording media. It would be remarkable if exemption depended on whether a tape was recorded or a stenographer produced a shorthand note. Transcripts of tapes are analogous to copy documents. We further conclude that they were created for the purpose of proceedings in a particular cause, for example, use in the event of an appeal. In our view, their character is not changed because they are transcribed or later copied for the purposes of interested third parties. What matters is the purpose for which the original tapes were created. Transcripts or copies are not to be regarded as new documents created for a different purpose.

22 As to (ii), we reject the submission that the Council's response of 12th December 2002 did or could have affected the status of the transcript, if it was, before that acknowledgment, exempt. First, the Council's response was not subject to the provisions of s.1 which came into force over two years later. Secondly, a public authority has the right, if it chooses, but not the duty to disclose its possession of exempt information. Hence disclosure is not a concession of non-exempt status. Finally, the status of information under statute is a question of law, as to which a concession made by a public authority, if that is what it was, is irrelevant.

The Application of S.32(1)

23 We now consider whether s.32(1) confers upon a record of court proceedings, in whatever form, an absolute exemption from the requirements imposed by s.1. It is apparently common ground - and it is certainly our opinion - that s.32(1)(c) is the provision, if any, which would apply in this case.

24 The Appellant in his submissions draws attention to the public nature of the hearing recorded, the absence of any injunction against disclosure and, to a limited extent, the court's own approach to access to such material. The Respondent refers the Tribunal to the terms of the section and implies that its applicability to this information is plain. We should have been assisted by some further argument as to why Parliament enacted s.32, hence whether it applies to this transcript.

25 The whole thrust of the Act is to confer a general right to information held by public authorities, subject to specified exemptions, either absolute or qualified. Standing back from the detailed provisions of the Act, it is far from clear to us why, as a matter of policy, anybody wishing to read a transcript of court proceedings, which took place in public, should not be able to do so (subject to reasonable notice and the defraying of reasonable costs).

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 which it contains is still less obvious. We therefore turn to the Act to see whether the apparent rationale for the s.32 exemptions or the wording of the section nevertheless require the construction for which the Respondent contends.

27 It may be useful first to consider how the Act deals generally with exemption from the duties to confirm or deny and to inform. As is well-known, s.2(1) and (2) create two categories of exempt information: that which is exempt in all circumstances ("absolute exemption") and that which is exempt where the balance of public interest favours exclusion of those duties ("qualified exemption").

28 The categories of information enjoying absolute exemption are, unsurprisingly, strictly limited. Indeed, s.2(3) spells out, lest the wording of subsequent provisions might leave any doubt:

> "*For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption …*"

The emphasis is ours. It may be helpful to identify the broad categories of information identified by s.2(3) and consider, in summary form, in each case, the possible rationale for exemption.

29 Leaving aside s.32 for the moment, they are these:

- Information reasonably accessible by other means (s.21);
- Information supplied by the Intelligence Services (s.23);
- Information, disclosure of which might breach Parliamentary Privilege (s.34);
- Information held by either House of Parliament, disclosure of which would interfere with the effective conduct of parliamentary business (s.36(7));
- Personal information (s.40(1) and (2) (Part II));
- Information provided in confidence (s.41);
- Information, disclosure of which is prohibited by statute, community obligations and court orders (s.44).

A brief review of the classes of sensitive information identified in Part II of the Act, to which absolute exemption is denied, strengthens the impression that Parliament

intended to confer absolute exemption only where there was an obvious overriding need for it or common sense demanded it.

30 We discern in the above classes of absolutely exempt information several apparent policy justifications:

- Ready availability of information from other sources, hence no practical justification for imposing the statutory duty on the authority;
- Serious national interest in security and effective governance;
- Public interest in respecting undertakings to preserve confidence;
- Regulation of access to particular information by other pre-existing statutory schemes (eg, the Data Protection Act 1998) and/or by the courts.

31 We remind ourselves that a court is not itself a "public authority" within s.3(1) (see Schedule 1) so that we are considering court records held by public authorities either as litigants, third parties subject to a court order or, as in the present case, interest parties.

32 Section 32(1) applies to three classes of court document. Paragraphs (a) and (b) seem to relate to documents filed or served by the parties or by a third party pursuant to an order of a court, eg, a summons requiring production of a document, either in civil or criminal proceedings. Paragraph (c) refers to documents created by a court or a member of the administrative staff of a court.

33 Documents to which paragraphs (a) and (b) relate will routinely include pleadings, witness statements and exhibits served as part of a litigant's (or in criminal proceedings most often the prosecution's) case as well as lists of documents, material served under an obligation to disclose and documents such as skeleton arguments prepared by the advocates. Some of those documents may be of a confidential nature; many will have been served pursuant to the obligation to disclose relevant material which carries with it a general prohibition on collateral use by the recipient: see ***Harman v The Home Office [1983] AC 280, CPR Part 31 Rule 22 and Part 32 Rule 12*** and, in relation to material disclosed in criminal proceedings, ***Marcel v Metropolitan Police Commissioner [1992] Ch 225 and Criminal Justice Procedure and Investigations Act 1996, s.17***.

34 A related but distinct rationale for exemption is that the courts alone should control access to documents produced or created by the parties and served on the court and other parties, so that existing statutory procedures and rules, such as the Civil and now the Criminal Procedure Rules and practice directions should continue to govern availability. That explanation may echo in some degree those which underlie the exemptions for parliamentary material and information to which the Data Protection Act 1998 applies.

35 Whichever the rationale - and it is possible that both apply - the same must, in our opinion, underlie the exemption conferred in s.32(1)(c). We therefore ask ourselves: what documents did Parliament have in mind here? The answer is

made no easier by the antithesis enacted between documents created by a court and a member of the administrative staff of a court.

36 The Appellant relies on the explanatory notes issued by the Home Office, the government department charged with the introduction of this legislation, as an aid to the interpretation of this paragraph. The example given there is "bench memoranda", a term unfamiliar to this Tribunal but one which evidently indicates documents issued by the judge to the parties, perhaps with a view to discussion as to the application of relevant legal principles to the case in hand. An obvious instance of such a document in a criminal case is the draft directions to the jury on issues of law which judges routinely issue to advocates, inviting comment or contradiction before the summing-up.

37 Explanatory notes are of limited value as an aid to construction since they exemplify rather than define. Moreover, they represent the thinking of the executive, not of the legislature. Nevertheless, we conclude that the kind of document discussed is a good example of the type to which s.32(1)(c) applies. Whether or not issues of confidentiality arise, we consider that there are obvious reasons for letting the judge control access to a document which he may have created as a provisional draft for possible amendment in the light of the submissions of the advocates. 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[2]. 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.

38 We now consider the application of these principles to transcripts of the proceedings of the court. They are records of proceedings, to all of which any adult could freely have listened. Plainly, no issues of legitimate privacy or confidentiality arise. Neither, in our view, are they examples of a record, access to which is seen as a mater for control by the court itself.

39 Transcripts of civil proceedings are, by virtue of paragraphs 6.3 and 6.4 of Practice Direction 39 to CPR Part 39, obtainable by a non-party upon payment of a prescribed fee, which is, we assume, chargeable for economic reasons, not as a curb to access. The Criminal Procedure Rules 2005 contain no provision relating to access. We are unaware of any statutory limitation or relevant practice direction and, as already indicated, cannot, in the absence of any contrary rule, envisage any plausible reason for barring anybody prepared to defray reasonable costs from reading what happened in a public trial.

40 Therefore, we find no indication that the courts themselves seek to restrict the dissemination of transcripts of public hearings; nor do we see why they should. The fact that the Council, not itself a party to the criminal proceedings at Wolverhampton Crown Court, could readily obtain a copy on payment of a substantial fee suggests the opposite. If the court is not concerned to restrict

[2] For example, a note from an usher to the judge, indicating a problem with a juror.

access to a transcript which it holds, by itself or its agent the reporter, we cannot conceive what policy consideration could dictate exemption for such information in the hands of a third party public authority which has obtained it from the agent, unless it were ready access by other means. That is not the case here, on the agreed evidence.

41 Those arguments relate to the policy of the Act. It may be said, however, that the wording of the paragraph, properly considered, permits no other view than that transcripts are exempt. That contention depends on the proper construction of the words in s.32(1)(c) "*created by … a court*". That depends on the meaning to be given in this context to "a court". We have no doubt that the tapes were created for the purposes of the relevant proceedings, not least as a record for the purpose of any appeal.

42 Documents can, of course, be created by computers but generally only where, however long the chain of communication, a human being has originated the process through an instruction, electronically communicated. Documents created by members of court staff are dealt with in s.32(1)(c)(ii) so that the creator for the purposes of subparagraph (i) must be somebody outside their ranks. In our opinion, this can only be the judge, for whom the term "court", or more often "the court", is a familiar synonym. Such an interpretation confers exempt status on documents which he produces, such as draft directions and judgments, unless or until they are incorporated into the public proceedings of the court and are recorded as such on tape in a transcript. He thereby controls access to such material up to the point when it is delivered in open court in final form. That seems to us to accord with common sense and sound public policy. We acknowledge that such a construction results in "a court" being given a different meaning in s.32(1)(c) from s.32(1)(a), where the reference is to the institution. It may also be said that Parliament could easily have used the term "a judge", if our construction is correct. We are nevertheless driven to the conclusion that s.32(1)(c)(i) must refer to judicially created documents, though the drafting could have been clearer.

43 Such a construction plainly excludes a transcript from the application of s.32(1)(c), not because the person recording proceedings is employed by an outside agency but because he is not the judge.

44 We therefore find that the construction suggested by considerations of policy is further justified by a closer analysis of the wording of paragraph (c).

The Decision of the Tribunal

45 We therefore rule, pursuant to s.58(1)(a), that the Respondent's Decision Notice is not in accordance with law. We are then faced with the rather odd alternatives of allowing the appeal or substituting any Notice that the Respondent could have served on the Council (under s.50). We say odd because the order on a successful appeal will presumably often involve both allowing the appeal and substituting such a Notice.

46 If the transcript were still held by the Council, we should undoubtedly have substituted a Notice requiring that the Appellant be granted reasonable access to it, sufficient for him to digest its sizeable content. Aside the Act, we cannot see

why a public authority should refuse such a request, whether or not it has a right to do so. Whether we should have imposed or have the power to impose the further requirement sought by the Appellant, to lodge a copy in a public authority, is far more debatable.

47 However, it is no longer held by the Council. We observed above that, in our opinion, it therefore had an unanswerable case for refusal. That is a conclusive argument, in our judgment, against serving any Notice requiring the Council to obtain and supply a fresh copy, even if we had the power to do so. That would be tantamount to requiring an authority to reacquire information, a bizarre concept which seems at odds with the purpose of the Act. If an authority destroyed a document in bad faith to defeat a proper request, it could be prosecuted under s.77.

48 We accordingly allow this appeal but substitute no Notice requiring action by the Council.

Costs

49 No application is made and no order would be appropriate.

David Farrer QC
Deputy Chairman

Jenni Thomson
Lay Member

Henry Fitzhugh
Lay Member

19th September 2005