FOIA s.32(1)(c) – Absolute exemption: court records

Alistair Mitchell v IC

EA/2005/0002
10th October 2005

Cases:
Harman v The Home Office [1983] AC 280

Marcel v Metropolitan Police Commissioner [1992] Ch 225

Facts
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. Following the conclusion of those proceedings, the Council obtained 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. The Appellant requested a copy of the transcript as he considered that it contained material of legitimate public interest and had been procured with public funds. The Council refused his request, claiming it was exempt from disclosure under s.32(1)(c) FOIA and in any event that it had been destroyed.

The IC upheld the Council's ground for refusal.

Findings
The Tribunal were in no doubt that the tapes themselves were 'documents' for the purposes of s.31(1) since that term is broadly construed in an age offering so many recording media. They held that transcripts of tapes are analogous to copy documents and that they were created for the purpose of proceedings in a particular cause, for example, use in the event of an appeal. They stated that their character is not changed because they are transcribed or later copied for the purposes of interested third parties. They observed that 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.

The Tribunal further rejected the Appellant's submission that the Council, by its letter 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. They held first that 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.

Section 32(1)

The Tribunal considered whether s.32(1) confers upon a record of court proceedings, in whatever form, an absolute exemption from the requirements imposed by s.1.

The Tribunal held that a record of court proceedings did not fall within the absolute exemption provided by s.32(1)(c) when in the hands of a Public Authority which was not a party to the proceedings or subject to any order of the court restricting disclosure.

They stated that s.32(1)(c)(ii), in referring to the document having been created by "a court", meant that it had to have been created by the judge. It conferred exempt status on judicially created documents, such as draft directions and judgments, unless or until they were incorporated into the public proceedings. The judge thereby maintained control over access to such material up to the point when it was delivered in open court in final form. That construction of the sub-section excluded a transcript from its application. This construction was consistent with the Tribunal's understanding of the policy underlying the provision. The transcript was a record of proceedings that took place in public. There was no indication that the courts themselves sought to restrict dissemination and no reason why they court might require to control access to it. Nor was there any plausible reason for barring anybody who was prepared to defray reasonable costs from reading what had happened during the proceedings.

Conclusion

The Tribunal allowed the appeal and found that the IC's Decision Notice was not in accordance with the law. However, the Decision Notice was not substituted as the information was no longer held by the Council and it therefore had an unanswerable case for refusal. Substituting the Decision Notice would be tantamount to requiring an authority to reacquire information, which the Tribunal noted was a bizarre concept which seemed at odds with the purpose of the Act.

Observations

(i) A request made before the date when the Act came into force (1 January 2005) did not give rise to a right to receive information under the Act;
(ii) A Court was not itself a "public authority" for the purposes of the Act;
(iii) Explanatory notes published by a Government Department as an aid to interpretation are of limited value since they exemplify, rather than define, and represent, in any event, the thinking of the executive and not the legislature;
(iv) The same policy justifications for non-disclosure seemed to apply to all of the classes of absolutely exempt information;
(v) There might be stronger arguments for refusing disclosure of documents filed or served by parties to litigation (e.g. pleadings, witness statements, lists of documents, material served under an obligation to disclose and documents such as skeleton arguments), to which subsections (a) and (b) might apply because they may be confidential and the court may require existing rules and practice directions to govern their availability to the public.