IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0148

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

The Information Commissioner's
Decision Notice No: FS 50358355
Dated: 22 June 2011

Appellant:	Institute of Chartered Accountants of England and Wales
1st Respondent:	Information Commissioner
2nd Respondent:	The Ministry of Justice

Determined on the papers

Before

David Marks QC
Tribunal Judge

Dave Sivers

Michael Jones

DECISION

The Tribunal dismisses the Appellant's appeal against the Decision Notice of the Information Commissioner ("the Commissioner") dated 22 June 2011 No FS50358355.

REASONS FOR DECISION

General

1. This appeal deals with an exemption under the Freedom of Information Act 2000 (FOIA) which is only infrequently the subject of an appeal to this Tribunal. The Appellant on behalf of the Institute of Chartered Accountants of England Wales (ICA or ICAEW) made a request in connection with a relevant individual who will be called X for present purposes and sought information regarding X's Certificate of Conviction from Her Majesty's Court Service (HMCS).

2. The relevant public authority is the Ministry of Justice (MoJ). The MoJ responded in writing neither confirming nor denying that it held the information relying upon section 32 of FOIA. It is perhaps appropriate to set out the terms of that section in relevant part at this point, and as set out in the relevant Decision Notice, namely:

   "(1) 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

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in –

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

(4) In this section –

(a) "court" includes any tribunal or body exercising the judicial power of the State,

(b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,

(c) "inquiry" means any inquiry or hearing held under any provision contained in or made under, an enactment, and

(d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies."

Background

3. The effective background to the request can be taken from the opening part of the Commissioner's decision notice. The ICA has for many years received information from the courts in relation to its members or former members. The ICA has maintained that in so doing it is fulfilling its duties under its relevant Royal Charters in protecting the public interest in carrying out its regulatory duties.

4. On 5 August 2010 the Appellant on behalf of the ICA (when reference is made to the Appellant he will be treated as in effect being the equivalent of the ICA) wrote to the HMCS stating that:

> "[x] is a former member of this Institute. As such, he is entitled to apply for readmission at any time. I should therefore be grateful if you would supply me with a copy of the Certificate of Conviction relating to him …"

5. By letter dated 9 August 2010, the MoJ responded citing section 32(3) and section 40(5) of FOIA stating that it could neither confirm nor deny that HMCS held the information he Appellant was seeking.

6. For the sake of completeness, reference should be made to section 40(5) of the Act which provides as follows:

"The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either –

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a)

would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subjects right to be informed whether personal data being processed)."

7. On 20 August 2010, the Appellant asked for further consideration to be given to his request. He included an article from the Sheffield Star, which is a newspaper, regarding the matter, to support his argument that relevant information was already in the public domain and the subject of public comment.

8. In September 2010 the HMCS responded, upholding its original decision and relying again on sections 32(3) and 40(5). In early September 2010, the Appellant then contacted the Commissioner to complain about the way his request had been handled. At the end of September, the Commissioner wrote to the Appellant with advice and assistance.

9. On 1 November 2010 the Appellant contacted the Commissioner again addressing two particular points which will be revisited later in this judgment, namely, whether and to what extent the requested information was "a record of decision, not documents prepared for the purposes of court proceedings" and secondly, the effect, if any, of the information requested already being in the public domain.

10. The Decision Notice notes that in February 2011 the Commissioner contacted the MoJ and requested further information in respect of this matter.

The Decision Notice

11. In his Decision Notice at paragraph 13 and following, the Commissioner began by considering whether, as was apparently claimed by the Appellant, a Certificate of Conviction is a document created by a court for the purposes of court proceedings within the sense and meaning of the statutory phrase.

12. He observed that a court could issue such a Certificate under section 113 of the Powers of Criminal Courts (Sentencing) Act 2000. The Commissioner stated that it necessarily followed that the Certificate was a document created by the court. As will be seen, this point has not really been pursued in this appeal.

13. The Commissioner then considered whether the Certificate can be said to have been created "for the purposes of proceedings in a particular cause or matter". The Commissioner applied what is called the dominant purpose test (as to which reference will be made further below) to determine whether the dominant purpose of the Certificate is to record a decision that is made in proceedings.

14. The Commissioner determined that such Certificate was, and is, a "key part" of the administration of a particular court case that was thereby created for the purposes of proceedings in a particular cause or matter.

15. At this point, the Appellant expressed his disagreement. The Appellant maintained that to fall within the relevant definition of section 32, the document had to be created "in order to further the proceedings in a cause or matter", i.e. it had to be created during the course of the proceedings as part of the process, and in particular, as part of the process which drove or drives those proceedings forward. Reliance was placed on a dictionary definition of the word "proceed" said to be found in the Oxford English Dictionary and said to be "linked" with an action which is to be "carried on or continued". The Appellant

therefore maintains that the Certificate did not form part of any form of continuance or progression of any cause or action: it was merely a record of what occurred after the conclusion of proceedings.

16. The Commissioner then referred to an earlier decision of this Tribunal in *DBERR v ICO and Peninsula Business Services Ltd* (EA/2008/0087) (see particularly at paragraphs 27-29 especially at paragraph 28) and also noted that section 32(1) could continue to apply if the information originally obtained from the court record was later used for a different purpose.

17. The Appellant countered this by saying that section 32(3) of FOIA did not apply to records of decisions of the court in "open session". The Commissioner responded by saying that although cases in court in open session are deemed to be in the public domain, once a decision has been made about a case and the file closed, the information will no longer be in the public domain.

18. Here the Commissioner also stated that the information would be held in the relevant document created by the administrative staff of a court and further reflecting the express language of the section. Moreover, it would have been created for the purpose of proceedings in a particular matter. It would be held only by virtue of being contained in the document created for the purpose of those proceedings in a particular matter. Section 32(1)(c)(ii) and section 32(3) were therefore engaged. There was no question of any public interest. The exemption was an absolute one.

Notice of appeal and the evidence

19. The Tribunal has received evidence from the ICA in the form of a witness statement prepared by a Legal Adviser in the Professional Standards Directorate of the Institute, a Mr Fin O'Fathaigh. The witness statement expressly forms the basis of the Notice of Appeal.

20. The witness statement refers in further detail to a number of matters which have already been alluded to. It sets out the relevant history of the Institute and discusses the various objects enshrined and reflected in its original Royal Charter of 1888 and in a Supplemental Royal Charter granted on 21 December 1948. With all due respect to the care with which the statement has been prepared, the Tribunal nevertheless feels it is unnecessary to set out the objects of the Institute in any further detail.

21. It is perhaps well known that a principal underlying function of the Institute, acting through its various organs, is to ensure that high standards of professional conduct are maintained and that the requirements of the Institute's Ethical Code and Regulations are met by members and firms.

22. The Institute comprises in excess of 136,000 members across the world. Its disciplinary arrangements are set out in its Disciplinary By-laws which provide for the complaint handling process and the constitution of and procedures for the various professional conduct committees. The witness statement deals with three aspects of the disciplinary process. First, it deals with the assessment process which deals with about 2,000 complaints. The second process comprises the investigative process conducted by employed Chartered Accountants with a range of skills and experience relevant to the function they have to fulfil. The third process is the disciplinary process. This process involves the use of various Tribunals. Such Tribunals can deal with complaints in a variety of ways which are perhaps self-evident, ranging from dismissal of the complaint to the imposition of a range of penalties. There is a right of appeal. It is said that about 60-70 cases each year will be referred to the Institute's Disciplinary Committee. The subject matter of these complaints will vary, but will include convictions both for criminal offences and for offences which occur outside professional work.

23. Again, perhaps self-evidently, complaints can be and are brought where a member has been convicted of a criminal offence. Where the member has been convicted of an indictable offence in England and Wales or of an offence corresponding to one which is indictable within that jurisdiction by a court of competent jurisdiction elsewhere, the complaint can be proved by the use of Disciplinary Bye-law 7(1) which provides that the conviction will be conclusive evidence of the commission by the member of an act or default likely to bring discredit on himself, the Institute or the profession as a whole.

24. It is said that in the majority of cases where a member has been convicted of an indictable offence, the Investigation Case Manager will seek to investigate and report the complaint to the Investigation Committee as quickly as possible, given the nature and seriousness of the complaint. It is then said that the Case Manager will obtain a copy of the certificate of conviction and the relevant Judge's sentencing remarks. At paragraph 28 of the statement, it is said in clear terms that:

> "The certificate of conviction is the crucial piece of evidence in the complaint."

25. The witness statement then goes on to deal with the procedure which follows upon the institution of a complaint and the way in which the Investigation Committee goes about its functions.

26. In particular, it is pointed out that the relevant Tribunals "tend to deal" with conviction complaints relatively quickly because the Investigation Committee need only find that the member has been convicted in respect of an indictable offence in England and Wales or, insofar as a conviction occurs outside England and Wales, that the court involved was in a competent jurisdiction. It is pointed out in the statement that "regrettably" there has been a "steady stream" of conviction cases brought to the attention of the Investigation Committee. Since January 2010, 18 cases have been referred to the Disciplinary Committee.

27. The remainder of the witness statement then deals with legal arguments.

<u>The rival contention</u>

28. To the Tribunal it appears that the Appellant makes the following submissions, some of which have been referred to above.

29. First, it is claimed that there is previous Tribunal authority regarding section 32 (none of which technically is of course binding upon this present Tribunal) principally in the form of a decision called *Mitchell v Information Commissioner* (EA/2005/0002), especially at paragraphs 31 to 37. In particular, it is stated that the Tribunal in that case said that section 32(1)(c) could not extend public orders of the court such as witness summonses or orders under the Contempt of Court Act 1981. The Tribunal in *Mitchell* went on to say at paragraph 37:

"It must refer to internal documents such as notes to a judge from the court officer relating to the content of a particular case. 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."

30. It is therefore contended by the Appellant in considering the class of documents created by administrative staff for the purposes of section 32(1)(c) that the Tribunal in the *Mitchell* decision had "at the forefront of their minds what can best be described as "procedural documents" pleadings, witness statements, exhibits and bench memoranda but excluded material such as witness summonses or orders made under the Contempt of Court Act 1981".

31. As already indicated above, the Appellant then contended that it "clearly" followed the Certificate of Conviction could only be "created" "once the proceedings had been concluded" and therefore must fall within the class of documents described as "public orders of the court".

32. Second, it was argued that the purpose of section 32 of FOIA is to secure the privacy of certain documents such as witness statements or other sets of material. It could not have been Parliament's intention that the record and outcome of the proceedings in the form of a Certificate be hidden from the public eye.

33. Finally, reliance was placed on the fact that of necessity criminal proceedings are, by and large, held in public. Reliance was placed on public interest considerations, in particular, the need for a body such as the Institute to carry on, and be seen to be able to carry on, its proper obligations and functions.

34. The Commissioner put forward the following contrary assertions. Again, the key aspects of the Commissioner's findings have already been highlighted with regard to the contents of the Decision Notice.

35. First, it is said that the natural meaning of section 32(1) is that the exemption there referred to continues to apply beyond the completion of the proceedings. Reliance was placed on a decision of the Court of Appeal in *Kennedy v Information Commissioner* [2011] EWCA Civ 367 (2011) EMLR 24, particularly at paragraphs 25 to 30 inclusive, per Ward LJ. At paragraph 29, Ward LJ said that:

    "I find it difficult to see why the exemption for court documents should subsist once the proceedings are on foot but die as soon as the proceedings have concluded. I find it surprising that court records, which may for example have attracted public interest immunity, but which are also records held by a public authority, should suddenly become liable to disclosure, subject, of course, to the other exemptions in Part II of FOIA narrowing the obligation to disclosure."

36. The conclusions of the Court of Appeal, it is said, reflect those of the particular Tribunal which dealt with the same case considered by the Court of Appeal: See *Kennedy v IC* (EA/2008/0087) in particular paragraph 71 to 95, especially at 92.

37. It therefore followed, according to the Commissioner, that since it has been found that section 32 provides on-going protection for court records, there can be little, if any, merit in an argument that contends that any court-created documents which can be characterised as a formal conclusion or a record of the proceedings is not covered by section 32.

38. The Tribunal respectfully agrees with that contention as well as the related contention made by the Commissioner to the effect that there is no logical reason as to why a document created by the court itself at the close of proceedings should be disclosable, whether in the form of a formal record of the proceedings or as part of notes jotted down by the judge after the handing down of judgment, while the rest of the file is exempt.

39. So, for example and by way of an illustration as provided by the Commissioner, if a letter is written by the court in reply to a party about some matter arising out of the case, the same would clearly be placed on the court's file. In the Commissioner's view, and also that of this Tribunal, such a document would clearly meet the test of having been created "for the purposes of proceedings". On any basis, this relates to the proceedings and forms part of the court's record.

40. The Tribunal pauses here to note one specific matter already touched on above. The Appellant had contended that the dictionary definition of "proceed" referred to or connoted an action being carried on or continued (see in particular Decision Notice at paragraph 16). The Commissioner reminded the Tribunal that the definition of the word "proceeding" from the Shorter Oxford Dictionary at least included:

"... the fact or matter of taking legal action; a legal action; <u>an act done by authority of a court of law</u>; a step taken by a party in a case." (emphasis supplied).

41. In the same vein, the Tribunal notes that the Commissioner referred in the Decision Notice to the fact that the legal definition of "proceeding"

includes a "particular step or series of steps in the enforcement, adjudication or administration of rights, remedies, laws or regulations."

42. In the Tribunal's judgment, the Appellant places too much significance on what could be said to be a very narrow and artificial construction of the word "proceedings" in the context of section 32(1). In this respect, it is important to bear in mind and to take into account the role and purpose of a Certificate of Conviction. The use of such certificates is of long standing. Such Certificates appear to have been recorded in the Evidence Act 1851 and certainly were dealt with and addressed by sections 18-19 of the Prevention of Crime Act 1871. The current modern provision which is critical and which records their use is section 73 of the Police and Criminal Evidence Act 1984. This provision provides that the Certificate constitutes proof of conviction where it is signed by an appropriate officer of the court. In the Crown Court, this will be the clerk of the court. In the Magistrates' Court, a Memorandum of Conviction will be signed by the designated officer. Reference has also been made above to other legislation providing for the specific consequences of the provision of such Certificate, e.g. section 113 of the Powers of Criminal Courts (Sentencing) Act 2000. See generally *R v Hacker* (1995) 1 Cr App Rep 332.

43. When the matter which is in issue is viewed in the above light, and in the Tribunal's firm view and judgment, there can be no doubt but that the Certificate falls squarely within section 32, and in particular, section 32(1)(c)(i) and/or (ii). The Tribunal is also of the view that for the purposes of this appeal it does not need to determine which of these two sub sections in fact applies in the present case.

44. Put shortly, the Tribunal finds it was entirely appropriate for the Commissioner to reach his conclusion to the effect the creation of the Certificate is a critical part of the criminal case process. The Tribunal can discern no error in law committed by the Commissioner when, as indicated above, he applied the so-called dominant purpose test which was stated to be applicable to section 32 cases in *DBERR v IC and*

Peninsula Business Services Ltd (EA/2008/0087), especially at para 55.

45. The next and second point which the Commissioner addresses is the contention that the Parliamentary intention in section 32 was to secure the privacy of court documents, but not to the exclusion of Certificates of Conviction, since the court case in question could be said to have been concluded.

46. In the *Kennedy* decision in the Court of Appeal supra, Ward LJ explained the rationale underlying the Parliamentary intention at paragraph 29 in the following way: it seemed to him that “the policy justification for this absolute exemption lies in the acknowledgement by the legislature (1) that decisions over court documents should be taken by the court and (2) that courts and inquiries should be treated in the same way.”

    He went on to say that FOIA “does not circumvent the power of the courts to determine their own disclosure policy and by the court’s own rules to decide if and when court records are to be disclosed.” See generally paragraph 30 in the *Kennedy* decision supra.

47. The Commissioner points out that the Tribunal has recognised the same rationale for example in *Ministry of Justice v Information Commissioner* (EA/2007/0120 and 0121) particularly at paras 30 and 31 where much the same rationale is set out. See also *DBERR v Information Commissioner and Peninsula Business Services supra* at para 47 and *Mitchell v Information Commissioner supra* at 34.

48. The Tribunal notes that in his further submissions the Appellant asserts that “for many years” Certificates “have been available to those with a legitimate interest in receiving them” and that courts “across the jurisdiction of England & Wales have been more than happy to provide Certificates and Memoranda of Conviction to ICAEW”. However, the Tribunal is particularly impressed by the fact that the relevant criminal procedure rules do not currently make specific provision for accessing

Certificates. In other words, the disclosure of Certificates of Convictions is a matter for the appropriate court and for the relevant rules which govern the business of that court. As the Commissioner rightly puts it, in the Tribunal's view, the rationale is particularly strong in respect of section 32(1)(c) cases: the treatment of a document created by the court should be a matter for that court alone.

49. That conclusion is fortified in the Tribunal's view by the fact that a Certificate of Conviction is not generally a publicly available document. It is simply not on all fours with public orders or judgments of the court despite the fact, as here seems to be the case, much the same information is available either through having been reported in the media or is otherwise available in the public domain.

50. The above conclusions are sufficient in the Tribunal's judgment to dispose of this appeal. The third contention put forward by the Appellant is to the effect that if the Commissioner is correct, a transcript of court proceedings should also be caught by section 32 and therefore be exempt. The Commissioner disagrees and this Tribunal respectfully agrees with the Commissioner. As has been seen above, the Appellant has cited the earlier decision of *Mitchell supra* but has failed, as the Commissioner correctly submits, to pay proper attention or consideration to this Tribunal's subsequent decision in *Ministry of Justice v Information Commissioner supra*. In that case, the requested information comprised audio recordings of court proceedings taken by transcribers. The Tribunal, in no uncertain terms, expressly overturned, and departed from *Mitchell* and held at paras 30-32 that such recordings were in effect the equivalent of a written transcript and were therefore exempt from disclosure under section 32(1).

51. The balance of the contentions made by the Appellant deal with what can be called public interest considerations. There is a short answer to this which has already been indicated. Section 32 is an absolute exemption and there is simply no room for traditional public interest considerations with regard to its application.

52. In view of its findings, the Tribunal does not propose to say anything further about the operation and/or scope with regard to this appeal of section 40(5) of FOIA.

Conclusion

53. For all the above reasons, the Tribunal respectfully dismisses this appeal.

David Marks QC
Tribunal Judge

Dated: 8 December 2011