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

**Appeal Reference: EA/2018/0292**

**Decided without a hearing**
**On 6 June 2019**

**Before**

**JUDGE BUCKLEY**

**ANNE CHAFER AND JEAN NELSON**

**Between**

**GABRIEL WEBBER**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**MINISTRY OF JUSTICE**

Second Respondent

## DECISION

1. For the reasons set out below the appeal is dismissed.

## REASONS

**Introduction**

1. This is an appeal against the Commissioner's decision notice FS50768300 of 18 December 2018 which held that the Ministry of Justice ('the MoJ') was not entitled

to rely on s 41 Freedom of Information Act (FOIA) to withhold the information but that s 31(1)(c) was engaged, and that the public interest favoured withholding the information.

**Factual background to the appeal**

2. In 2014 as a result of reforms to legal aid, defendants with a disposable income of £37,500 or more were no longer eligible for legal aid in Crown Court proceedings. In October 2014 the Senior Presiding Judge ('SPJ')expressed an interest in understanding the scale and impact of unrepresented defendants in the Crown Court. The MoJ decided to conduct an internal research project because it was considered that there was a lack of data on the issue. The project was conducted by the MoJ's Criminal Justice and Analytical Services Team ('CJAS').

3. The research specification document sets out two objectives of the research: to explore the scale of unrepresented defendants in Magistrate's Courts and to understand the perceived effects of unrepresented defendants in the Crown Court.

4. The research involved interviewing members of the judiciary. There is formal guidance set out in a document entitled 'Judicial participation in research projects' ('the guidance'), which provides that approval for judicial participation has to be granted by the relevant judicial Head of Division. A formal application has to be submitted setting out, inter alia, how the research will benefit the judiciary or the courts and tribunals administration and improve or promote the administration of justice. The guidance states that approval will only be granted if, inter alia, in the view of the senior judiciary, the nature of the proposed research makes judicial participation necessary and 'judicial discretion and independence would not be impaired by participation in the research…'.

5. An application was made to the SPJ's office for permission to conduct judicial interviews in August 2015 and permission was granted on 27 October 2015.

6. Between 30 October 2015 and January 2016, the research team at CJAS emailed a number of Crown Court judges inviting them to take part in the project. The email states that the MoJ was conducting an 'internal piece of research' into unrepresented defendants with the support of the SPJ. The email enclosed a Research Information Sheet which stated:

> With your consent, we wish to record the interview using an encrypted Dictaphone and by using written notes. The recordings will then be transferred to a professional service who will write up anonymous transcripts of what's said to assist with analysis. The recordings will be wiped once successfully transcribed, and the transcriptions will be destroyed after three months…The main output will be a report designed for briefing policy/delivery colleagues on a specific information requirement that draws on research and analysis. The report will not be published, but may be subject to Freedom of Information Requests. Your name will not be used or recorded in the report and no information that could be used to identify you will be included in the supporting documentation. However, we will likely

mention the viewpoints of different roles and profession, for example 'the majority of judges interviewed believed that…

7. The email enclosed a consent form which included the following declarations:
    - I consent to being interviewed by Ministry of Justice Analytical Services regarding my experiences of unrepresented defendants.
    - 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…'
    - I agree that my interview can be recorded and that this anonymous recording can be transferred to a professional transcription service.

8. Interviews were held with 15 Crown Court Judges and were recorded and transcribed.

9. In February 2016 a 36-page draft report ('the draft report') was prepared including a number of anonymised quotes from judges. It was not intended for publication but was released to individual requestors in 2018 after a series of FOI requests and complaints to the Commissioner and the leaking of the draft report. There is no intention to formally publish the draft report which the MoJ asserts contains partial and inaccurate data and sections of which did not pass quality assurance checks.

10. In the draft report, the findings from the interviews were set out under five headings: features of unrepresented cases, effect upon other actors, outcomes and pleas, efficiency and solutions. The draft report includes 7 anonymised quotations from the interviews with judges ranging in length from about 12 words to about 65 words. The draft report makes a number of recommendations including creating guidance with the Judicial Office and/or HMCTS for Crown Court judges and unrepresented defendants and assessing the options for providing defendants with legal advice in the Crown Court.

11. During spring 2016 a decision was made to prepare a shorter focussed report for potential publication. A 7-page analytical summary, referred to as 'the final report', was prepared, peer reviewed and prepared for publication. It does not contain any quotes from the interviews. It has not been formally published by the MoJ, but was released as a result of the FOI requests and complaints to the Information Commissioner in 2018. The MoJ intend to formally publish the final report in due course.

**Request and Decision Notice**

12. The Appellant made the request which is the subject of this appeal on 2 June 2018:

> Paragraph 2.2 of the report states that interviews were conducted with 15 Crown Court Judges, and that these interviews were recorded and transcribed with the permission of the interviewee.
>
> Under the Freedom of Information Act 2000, please can you provide me with an electronic copy of the transcripts of all 15 interviews. You will obviously want to redact any sections that risk identifying the judge or any other natural person, however I note that the report contains many quotes from the interviews (e.g. on pages 8, 9, 12 and 13), identified by number (e.g. 'Judicial interviewee Five'), so the transcripts cannot be wholly confidential.

13. The MoJ replied to the request on 29 June 2018, confirming that it held the transcripts but refusing to provide the information relying on s 41(1)(b) FOIA (information provided in confidence).

14. The Appellant requested a review on 29 June 2018 and the decision was upheld on review on 20 July 2018. The Appellant complained to the Commissioner on 20 July 2018. On 30 August 2018 the MoJ informed the Appellant that it considered that the information was also exempt under s 31(1)(c) (prejudice to the administration of justice).

15. In a decision notice dated 18 December 2018 the Commissioner concluded under s 41(1) that the information was obtained by the public authority from another person but that disclosure would not constitute an actionable breach of confidence because the transcripts could be redacted so that no individual judge could be identifiable. The Commissioner concluded that s 31(1)(c) was engaged because disclosure could adversely affect the administration of justice.

16. Applying the public interest test the Commissioner accepted that there was a legitimate public interest in informing the public of the full picture of the research undertaken but that the key findings of the research were in the public domain so disclosure would not add anything further. Balanced against this was the need to allow the MoJ to conduct research into the effects of legislative change without disclosure to third parties. The Commissioner concluded that the public interest in withholding the information outweighed the public interest in disclosure.

**Grounds of Appeal**

17. The Grounds of Appeal in summary are:
    - 17.1. S 31(1)(c) is not engaged. The Commissioner has interpreted the notion of 'the administration of justice' too widely. Any prejudice would not be to the justice system but to the formulation of government policy. Any prejudice is speculative and artificial.
    - 17.2. Public interest does not favour maintaining the exemption. Judicial independence will not be affected any more by publishing views privately expressed. Judges are used to open justice and are unlikely to

be cowed. Judges will not be identifiable and therefore there will be no chilling effect.

**The Commissioner's response**

18. The Commissioner's response states:
    18.1. S 31(1)(c) is engaged. S 31 is not limited to certain types of information. Research of this type has the potential to affect the administration of justice. Disclosure has the potential to affect the administration of justice by deterring participants from full candour in future research of this type.
    18.2. On the balance of public interest, the Commissioner has not concluded that disclosure would violate the principle of judicial independence. Disclosure would be of limited value, whereas there is a strong public interest in enabling the efficient and effective administration of the justice system.

**The MoJ's response**

19. The MoJ's response states that the Decision Notice is in accordance with the law for the reasons set out in paragraphs 16-18 of the Commissioner's response. Further, the term 'administration of justice' is to be construed broadly and is not limited to law enforcement in the narrow sense.

20. There are two limbs of prejudice (i) contravention of the principles of institutional judicial independence and impartiality and (ii) reduced likelihood of judicial cooperation in future research. There is a real and significant risk of this prejudice occurring.

21. The public interest favours maintaining the exemption for the reasons set out in the Decision Notice. Further the balance of interest's favours maintaining the exemption because the prejudice is to multiple aspects of the administration of justice, the severity of prejudice is significant and the report is already in the public domain.

**Appellant's reply**

22. The appellant's reply states that 'administration of justice' should be interpreted consistently with how it has been interpreted in other legislation. Having the potential to affect the administration of justice is insufficient. Prejudice to practical or policy changes is not prejudice to the administration of justice. The prejudice is too remote – there is a complicated chain of causation.

23. The fact that the report has already been published is a self-defeating argument.

24. If there is no explicit agreement that the transcripts would remain confidential it is difficult to see how there could have been an implicit understanding of

confidentiality. There is no evidence that the Judges understood that a transcript would not be put in the public domain.

25. If the judge's engagement with the research was proper, then disclosure would not harm the perception of independence, if it was not, then the public interest in disclosure is greater.

26. It is wildly speculative to suggest that individual judges might be identified.

27. The MoJ should already be giving the disclaimer that comments might in principle be disclosed under the FOIA.

28. There is no direct evidence that judges would be deterred from participating in future research.

**Legal framework**

29. S 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

*S 31 Law enforcement*

(1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
(a) the prevention and detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice,
(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
(e) The operation of the immigration controls,
(f) The maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
(g) The exercise by any public authority of its functions for any of the purposes specified in subsection (2),
(h) Any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
(i) Any inquiry held under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

…

30. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice.

*The Task of the Tribunal*

31. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

**Issues**

32. The issues we have to determine are:
    - 32.1. Whether disclosure would or would be likely to prejudice the administration of justice. This includes:
        - 32.1.1. Deciding how 'the administration of justice' should be construed.
        - 32.1.2. Identifying the applicable interest within the exemption.
        - 32.1.3. Considering the nature of the prejudice (identifying a causal relationship and that it passes a de minimise threshold)
        - 32.1.4. Determining the likelihood of prejudice (more probable than not or a real and significant risk of prejudice)
    - 32.2. In all the circumstances of the case, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This includes:
        - 32.2.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to or may cause, focussing on the public interests expressed in the particular exemption in issue.
        - 32.2.2. Identifying what actual benefits the proposed disclosure would or would be likely to or may cause.

**Evidence and submissions**

33. We have read an open and a closed bundle of documents, which we have taken account of where relevant. We have also read, on behalf of the Second Respondent, witness statements of Christina Pride, Head of Judicial Private Offices and Caroline Logue, Grade 7 (Band Ab) Principal Social Researcher at the MoJ.

34. Ms Pride gives evidence that if transcripts of research were disclosed it is highly likely that the judiciary would lose confidence in participating in future research and that there would be a negative impact on future judicial participation. She states that one of the current participants has now said that he would be 'very careful' in future when volunteering to help. Officials would not be able to advise the senior judiciary that the criteria around judicial discretion, independence and

anonymity would be met in future research. This is highly likely to result in refusals of permission for judicial participation. This could undermine and hamper the effective development of policy without the valuable views of the judiciary.

35. Ms Logue was the day to day analytical lead on the research project in issue. Her witness statement describes the process behind the research project. She describes how it is often difficult to get judges to participate in research projects. In this particular research project she states that there were significant difficulties in getting a sufficient number of judges to participate and provides example emails in support of this.

**Discussion and conclusions**

*The meaning of 'the administration of justice'*

36. The appellant argues that the phrase 'administration of justice' should be narrowly construed in the light of the rest of s 31. We disagree. S 31 protects a broad range of interests. It includes activities and purposes which 'go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings' (WS v Information Commissioner [2013] UKUT 181 at para 75). This interpretation is supported by the ICO Guidance on Law Enforcement (section 31) ('the ICO guidance') which states that the administration of justice is a broad term and applies to the justice system as a whole (para 25).

37. We do not accept that the fact that the phrase appears in the other statutes cited by the Appellant affects its meaning in the context of the FOIA. It is unsurprising that, for example, in a statute relating to criminal justice the phrase might be interpreted as referring to criminal trials.

38. When considering whether or not there is prejudice to the administration of justice below, we adopt a broad approach to the meaning of that phrase. This would include some matters that fall within the remit of the executive, rather than the judiciary, and in particular some matters within the remit of the MoJ.

*The applicable interest within the exemption*

39. The applicable interest in this case, put simply, is the administration of justice. There are a group of provisions under the FOIA that exempt information so as not to undermine the enforcement of the law and the administration of justice. We agree with Coppel (Information Rights: Law and Practice) that the interests behind these exemptions are reflected in the quote from the White Paper which led to the introduction of the FOIA at 20-002, i.e. that freedom of information should not undermine the investigation, prosecution, or prevention of crime, or the bringing of civil or criminal proceedings by public bodies and that the investigation and prosecution of crime entails the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence

of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt.

40. These interests lie behind this group of exemptions in general, and, relevantly, behind the broadly expressed provision in issue in this case. Thus, it covers prejudice to a particular case and to the system of justice as a whole. We accept that the ICO guidance is correct to state, at para 26 that this exemption can protect a wide range of judicial bodies from disclosures that would in any way interfere with their efficiency and effectiveness, or their ability to conduct proceedings fairly. As the ICO guidance states at para 88, there is a strong public interest in protecting the ability of public authorities to enforce the law.

*The nature and likelihood of the prejudice*

41. Whilst we accept that the MoJ has an evidential burden to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is 'real, actual or of substance', we find it easier to consider this element at the same time as the likelihood of the prejudice.

42. The MoJ identifies two elements of prejudice. The first is that disclosure of the transcripts would contravene or risk contravening the principles of judicial independence and impartiality. The second is that the disclosure would lead to a reduced likelihood of judicial cooperation in future research.

43. In relation to the principle of judicial independence, we accept that publishing the verbatim opinions and experiences of judges in relation to unrepresented defendants may well undermine the perception of independence. We find that the perception of an independent judiciary is a fundamental part of the administration of justice.

44. The appellant submits that it is not the *publishing* of these opinions and experiences that undermines this principle: either it was proper that they should have expressed these opinions and described these experiences or it was not. We reject this argument.

45. It is clear from the Guide to Judicial Conduct that there are specific restrictions on *public* comment and on contribution to *public* debate by long standing convention. These were not public comments. Whilst the information provided to the judicial participants was not as clear as it could have been, it was never intimated to the participants that the transcripts of the interviews would be made public. The description of the extent to which their views would appear in an internal report was limited to mentioning the viewpoints of different professions, for example, 'the majority of the judges interviewed believed that…'. The judges were told that the transcripts and tapes would be destroyed after three months.

46. In the light of this information, and in the light of the views expressed about defendants and the court processes in the transcripts, we infer that the judges gave these views on the implicit understanding that a transcribed record of those views would not be published. We accept that there is a real and significant risk that publishing those views will undermine the perception of independence of the judiciary as an institution, whether or not individual judges are identifiable.

47. We accept that there is some risk that the identity of some judges could be ascertained through 'jigsaw identification' if the transcripts were simply redacted to exclude the individual judge's names, but we find that it would be possible to redact all identifying details leaving a very minimal risk of identification. Therefore, we do not accept that there is a real and significant risk of undermining the principle of impartiality.

48. The second element of prejudice relied on by the MoJ is the reduced likelihood of judicial cooperation in future research. The MoJ argues that ordering disclosure of transcripts in this case would 'set a precedent' which would make it difficult to resist disclosure of transcripts and notes of judicial interviews in future projects. Whilst the tribunal's decision would not 'set a precedent' in the sense that it is not, for example, binding on public authorities, we accept that disclosure in this case is likely to lead to a perception within the MoJ and the judiciary that there is an increased risk of such transcripts being disclosed and a consequent effect on the difficulty of finding judicial participants for similar research.

49. We accept the Appellant's point that participating judges should already be aware and/or should be made aware that there is always *some* risk that disclosure would be ordered: this is not an absolute exemption. However, we find that ordering disclosure in this case would be likely to have the effect contended for by the Appellant. There are specified criteria to be applied by the SPJ when deciding whether or not to approve judicial participation, including whether or not judicial discretion and independence would be impaired by participation.

50. A perceived *increased* risk of publication, based on the fact that disclosure was ordered on these facts, directly impacts on this factor. Further we accept the MoJ's submission that even if permission were granted by the SPJ there is a real and significant risk of participants being (a) deterred from taking part at all, in the light of the evidence of the Second Respondent's witnesses on the difficulties of obtaining judicial interviewees for research projects, and (b) deterred from providing full and candid views because of the conventional restrictions on the judiciary engaging in public rather than private comment described above.

51. This is not a situation where the judiciary can simply be expected to be more robust in the light of adverse publicity: we do not make the finding on the basis of a judge's fear of adverse publicity as an individual, but because of a judge's awareness of the conventional restrictions on public comment.

52. If, on future projects similar to this one, it becomes more difficult for the MoJ to find judicial interviewees, and if the participants are less willing to express full and candid views, we accept that this would be more likely than not to prejudice the administration of justice. The types of research projects which benefit from the input of interviews with judges have a clear impact on the administration of justice in the broader sense set out above. If we look at the recommendations of the draft report in this particular instance purely as an example of the type of future research that might be carried out, we accept that the lack of supporting evidence from those most intimately involved in the day to day delivery of justice to inform such recommendations would lead to a real and significant risk of prejudice to the efficient and effective operation of the justice system which is a fundamental part of the administration of justice.

53. We accept the Appellant's point that there are a number of links in the chain of causation here, but it is not necessary for there to be only one causative link. The question for us is whether there is a real and significant risk that disclosure would prejudice the administration of justice. On the basis of the steps set out above, we find that there is.

*The public interest*

54. We accept that disclosure would be likely to improve transparency, accountability and public understanding. There is a public interest in hearing the individual views of judges on the impact of unrepresented defendants on the justice system. However, the draft report and the final report which are already available to the public contain a summary of the points of interest to the wider debate about unrepresented defendants. What is missing from the report is primarily the illustrative examples given by the judges of their own experiences. Whilst these might be of interest to the public, they are of limited assistance in informing the public understanding of this issue.

55. There is nothing in the transcripts which suggest that the judges' engagement with the research exercise was improper, or that anything that was said was improper in the context described above and that therefore we reject the Appellant's argument that this increases the public interest in disclosure. Overall for these reasons we find that there is some public interest in disclosure, but that it is limited because of the information already in the public domain.

56. The Appellant submits that the fact that the information contained in the transcripts is already in the public domain can be used to support an argument that the public interest in maintaining the exemption is reduced. The extent to which information is already in the public domain can be and often is argued on both sides of the public interest balance. In this case, the limited quotes from the transcripts that are contained in the draft paper do not have the effect that publishing the remainder of the transcripts risks having. It therefore does not diminish the public interest in maintaining the exemption.

57. The public interest in maintaining the exemption is in our view significant for a number of reasons. Firstly, we have found that disclosure would impact both on the principle of judicial independence and on the effective and efficient operation of the justice system. Secondly, we accept the MoJ's submission that these impacts are significant. The principle of judicial independence is an important constitutional principle. The ability to take account of the frankly expressed views of judge's on how the system operates in practice is an important part of effective research into the justice system. We also accept that there is a significant public interest in the administration of justice.

58. Taking all the factors above into account we find that the significant public interest in maintaining the exemption that we have set out above outweighs the more limited public interest in disclosing the information described above. This does not mean that transcripts of interviews with judges taking part in research projects will always be exempt from disclosure under this section. It is not an absolute exemption and if there was a significant public interest in disclosure of the particular information it might, in an individual case, outweigh the public interest in maintaining the exemption.

59. This appeal is dismissed. Our decision is unanimous.

Judge of the First-tier Tribunal

Date: 25 June 2019