



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

Appeal Reference: EA/2019/0331

**Heard at Manchester
On 14 January 2020**

Before

**KAREN BOOTH
JUDGE**

**JEAN NELSON AND MALCOLM CLARKE
TRIBUNAL MEMBERS**

Between

PHILIP GRACE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

DECISION

(NB in this Decision: the Respondent is referred to as “the Commissioner”; the Ministry of Justice is referred to as “the MoJ”; the Freedom of Information Act 2000 is referred to as “FOIA”; and references to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

1. The decision notice issued by the Respondent on 20 August 2019 (reference: FS50826280) is in accordance with the law and the appeal is dismissed.
2. Within 14 days from the date of this decision, the Commissioner must provide Mr Grace with a further copy of the email dated 19/8/19 at the top of page 109 without the redactions in line 7 of that email (the redactions to the sender details should remain in place).

REASONS

Background to the appeal

3. The Department for Work and Pensions decided that there had been an overpayment of Employment and Support Allowance to Mr Grace. Mr Grace unsuccessfully appealed against that decision and ultimately had to repay the money. He subsequently brought a linked action for damages against Merseyside Police for failing to record and investigate what he considered to be a disability hate crime by employees of the DWP. There was a hearing on 1/5/18 at Liverpool County Court, where a District Judge struck out Mr Grace’s claim. He alleges that the Judge and the representative for the Police together perverted the course of justice at the hearing of that claim and he believes that the recording of the hearing will prove this.

The request for information

4. On 23/1/19, Mr Grace emailed the MoJ in the following terms (page 42):

‘I am requesting the unedited recording or transcript of Court Case ref: D83YM207.’
5. The MoJ responded on 31/1/19. They confirmed that MoJ held the information requested but was refusing to communicate it to him in reliance on section 21 (information accessible to applicant by other means). They explained the process for obtaining a transcript.
6. Mr Grace applied for a review of the MoJ’s decision (page 45). The review decision (page 46) was issued on 28/2/19. The MoJ upheld the original response but amended it to rely specifically on section 21(2)(b) (“(b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the*

information available for inspection) to members of the public on request, whether free of charge or on payment.”)

They cited the Civil Procedure Rules and paragraph 6.3. of Practice Direction 39A in support of that and also pointed to point 3 of the Direction that deals with access to audio recordings after a transcript has been obtained. A copy of the Direction is at page 48.

The complaint to the Information Commissioner

7. On 4/3/19 Mr Grace complained to the Commissioner (page 48).
8. The Commissioner investigated the complaint. Mr Grace submitted various supporting letters. The MoJ’s response to the Commissioner is at pages 87-90. The complaint led them to revisit their response to the information request and they concluded that their reliance on section 21 had been incorrect. They informed the Commissioner that they still considered the information to be exempt from disclosure but were now relying on sections 32 (court records, etc) (in particular, section 32(1)(a)) and section 44 (prohibitions on disclosure) (in particular, 44(1)(a)).
9. On 30/7/19 (page 91) the MoJ sent a revised response to Mr Grace citing sections 32(1)(a) and 44(1)(a) as the exemptions they were relying on to withhold the requested information.

The Information Commissioner’s decision

10. On 20/8/19, the Commissioner issued her decision (page 1). She decided that the MoJ was entitled to rely on section 32(1)(a) of FOIA to refuse the request for information. Having decided that section 32(1)(a) applied, it was unnecessary for her to consider section 44(1)(a).

The appeal to this Tribunal

Appeal grounds

11. Mr Grace appealed to this Tribunal. His grounds of appeal are set out on page 13. His desired outcome was as follows (page 14): “*The Tribunal orders the [MoJ] gives me an unedited copy of the audio recording of the hearing and recommends my case be heard by a jury.*”

Commissioner response to appeal

12. The Commissioner’s Response to the appeal is at pages 29-37.

Further responses

13. Mr Grace’s Reply to the Response is at 40-41.

The powers of the Tribunal

14. The task of the Tribunal is set out in section 58 of FOIA:

58 Determination of appeals

- (1) 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, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The issues we had to decide

15. The substantive issue we had to decide was whether the Commissioner had correctly decided that the MoJ was entitled to withhold the requested information in reliance on section 32(1)(a) of FOIA. If we were to decide that her conclusion was correct in that respect, we would not be obliged to consider the application of section 44 although it was open to us to do so. If we were to find that 32(1)(a) did not apply, we would be obliged to consider the application of section 44.¹

We could not consider the merits of Mr Grace's claim against the Police or his allegations about the conduct of the Judge and other participants in the hearing to which the audio recording relates. Those matters were outside our jurisdiction.

16. There were two preliminary issues that we had to decide at the hearing (which are dealt with in the Registrar's Case Management Directions dated 26/11/19 and the Ruling of Tribunal Judge Macmillan on 10/12/19 on her reconsideration of the Registrar's Directions – copies which are included, with copies of Mr Grace's correspondence on these issues, in the bundle of additional open documents that was prepared for the hearing).

(a) Mr Grace's assertion that we should obtain a copy of and listen to the audio recording.

(b) Mr Grace's assertion that we should see the unedited copy of page 109 of the hearing bundle, which had been provided to the Tribunal and the parties in redacted form.

The evidence and the type of hearing

17. The evidence before us consisted of: the paper evidence in the open hearing bundle that had been produced for the hearing; the paper evidence in the bundle of additional open documents referred to above; and Mr Grace's oral evidence.

18. Mr Grace had requested an oral hearing. The Commissioner had requested a paper determination.

¹ See paragraph 109 of the decision of the Upper Tribunal in IC v 1. Malnick and 2. ACOBA [2018] UKUT 72 (AAC).

Relevant law

19. Section 32 of FOIA provides as follows.

32 Court records, etc

- (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 investigation under [Part 1](#) of the Coroners and Justice Act 2009, any inquest under the Coroners Act (Northern Ireland) 1959 and any] 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.

20. Section 32 is an absolute exemption (section 2(3)(c) of FOIA), which means that it was unnecessary for the public authority to conduct a public interest balancing test when deciding whether to rely on that exemption.

The hearing

21. Mr Grace attended the hearing. He was not represented. The Commissioner did not attend and was not represented.
22. Mr Grace provided a helpful summary of the background to this appeal. He has not applied under the procedures to which MoJ refers for a transcript of the hearing. He believes that a transcript would be worthless as it would be unlikely to record the alleged quiet and private discussion between the District Judge and the representative of the police. He has not applied for a copy of the audio recording under the relevant procedure, because the application would need to be authorised by that Judge.

23. His reason for wanting us to listen to the audio recording was that this would prove a miscarriage/perversion of justice. As regards the redacted email, he was not interested in seeing the redacted contact details but wanted to see the remainder of the email without the redactions in line 7.
24. He was given an opportunity to make further submissions on the application or otherwise of section 32. His only submissions were as follows: he needed the audio recording in order to prosecute the District Judge who struck out his damages claim; section 32 could not be relied on to support a crime; the Commissioner's submissions on section 32 amounted to "legalese", "which protects a criminal and a kangaroo court". He also contended that open justice overrides the FOIA exemptions.

What we decided and why

25. For the same reasons that Tribunal Judge Macmillan gave in her Ruling dated 10/12/19, we decided that we did not need to listen to the audio recording before we decided whether section 32 applied to the withheld information.
26. In the interests of fairness and justice we did obtain a copy of the unedited email at page 109 of the bundle. We decided that there was no good reason to withhold the redacted part of line 7 from Mr Grace.
27. As regards section 32(1)(a), the specific question we had to address was whether the information in the audio recording and the transcript was held by the MoJ only by virtue of being contained in a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter. We were told (and accepted) that both are held by Liverpool Crown Court (which is part of HMCTS, an executive agency of the MoJ), and, therefore, part of the MoJ).
28. As regards the audio recording, it is clear from the decision of the Upper Tribunal in the case of *Edem v Information Commissioner and MoJ* [2015] UKUT 210 (AAC) that an audio recording of a hearing is a "document" for the purposes of section 32. That recording is in the custody of the court for the purposes of the proceedings initiated by Mr Grace. Those proceedings have ended, but the Commissioner has correctly asserted that a public authority can rely on section 32 after the relevant proceedings have concluded (paragraph 21 of the Response at page 34). The recording is clearly held by MoJ for that purpose. We were satisfied, therefore, that section 32(1)(a) applied to the audio recording.
29. In our view, however, section 32(1)(c) (a document created by a court) was the more obvious fit and we noted that that provision was relied on in the case of *Edem* (paragraph 11 of the decision). We were surprised that the MoJ did not cite that provision instead and that the Commissioner did not query this. However, as we were satisfied that section 32(1)(a) also applied to the audio recording, we considered that the Commissioner was entitled to reach the conclusion that she did.
30. The transcript is the written record of the hearing based on the audio recording. The reasoning at paragraph 28 applies equally to the transcript. We do not know who created this particular transcript, but it may not have been

created by the court or by a member of the administrative staff of the court. It may have been created for the court by an outside agency/organisation. This information did, therefore, fall more clearly within section 32(1)(a) rather than 32(1)(c).

31. Mr Grace did not make any relevant submission about the application or otherwise of section 32. We did not accept his assertion that open justice overrides section 32. He cited the Court of Appeal decisions in the cases of Regina (Guardian News and Media Ltd) v City of Westminster Magistrates' Court and another ([2012] EWCA Civ 420 and Cape Intermediate Holdings Ltd and Mr G Dring [2018] EWCA Civ 1795, but neither appears to be relevant.
32. In paragraph 72 of Toulson LJ's judgement in the Guardian News case, he made it clear that the exclusion of court documents from the rights conferred by FOIA (and the specific decision-making process that is conferred on the Commissioner and the tribunals in relation to FOIA decisions) is irrelevant to the courts' more general powers to determine whether disclosure of such information by them is required by the open justice principle. The Dring case concerned the principle of open justice in the context of the scheme and provisions of the CPR.
33. Information that falls within section 32 of FOIA is exempt from the rights conferred by section 1(1). Neither the Commissioner nor the Tribunal is empowered to override that provision if they are satisfied that section 32 applies.
34. None of Mr Grace's appeal grounds is relevant to the issue we had to decide. We have no powers to recommend that his case is heard by a jury.
35. There is a process outside FOIA for applying for transcripts and audio recordings of hearings, but Mr Grace has chosen not to go down that route.
36. Given our decision on section 32(1)(a) we were not required to consider section 44(1)(a). It was open to us to do so, but we considered that the case for section 32(1)(a) was sufficiently clear to make this unnecessary. In any event, there was insufficient information regarding section 44(1)(a) to enable us to consider that provision without having to adjourn for further submissions.

Conclusion

37. The Commissioner correctly decided that section 32(1)(a) applied to the withheld information and her decision notice is, therefore, in accordance with the law. The appeal is dismissed.

Signed: Karen Booth
Judge of the First-tier Tribunal

Date: 24 February 2020