

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16th October 2007

Public Authority: Ministry of Justice
Address: Selborne House
54-60 Victoria Street
London
SW1E 6QW

Summary

The complainant, through his solicitors, asked the public authority for the audio record of his trial. The public authority withheld the information on the basis of sections 32 and 21 of the Freedom of Information Act 2000 ('the Act'). The Commissioner decided that neither section was engaged and that the public authority should therefore disclose the requested information to the complainant. He also decided that the public authority had delayed in providing the complainant with its refusal notice, in breach of section 17(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. The complainant had been convicted in a criminal trial. On 12 August 2005 solicitors acting for him requested from the court copies of the audio record of evidence from the trial, asking for the request to be put before the trial judge. The judge refused the application on 11 October 2005.
3. The solicitors approached the Information Commissioner, who informed them that it was necessary to make a request to the Department for Constitutional Affairs (DCA) (now the Ministry of Justice) in the first instance.
4. The solicitors sent their request to DCA's Access Rights Unit on 1 December 2005.

5. DCA replied with an undated letter which was received by the solicitors on 21 February 2006. It stated that the request had been refused by virtue of section 32 of the Act. It suggested that the solicitors consider making an application for the transcript under the relevant court rules. It also advised them of their right to request an internal review and to complain to the Commissioner.
6. On 23 February 2006 the solicitors requested an internal review. They explained that the tapes were relevant to their client's preparation of an application to the Criminal Cases Review Commission, and that identical information (ie a written transcript) could be obtained without leave from DCA at much more significant expense. They expressed their view that DCA was being '*defensive and obstructive*' in claiming section 32 in these circumstances.
7. DCA replied on 4 April 2006 upholding the original decision in relation to section 32. It added that, as a party to the proceedings, the solicitors' client was entitled to be supplied with a copy of the transcript, and that since the information was therefore reasonably accessible it was exempt by virtue of section 21(2) of the Act. It reminded the solicitors of the Commissioner's role.

The Investigation

Scope of the case

8. The solicitors contacted the Commissioner on 10 April 2006 to complain about DCA's decision. They stated that '*the abstract right to a transcript of trial proceedings is of no practical benefit to a prisoner who does not have the money to fund transcripts*', and expressed their view that DCA were '*adopting an unprincipled position which discriminates against those with limited funds*'.

Chronology

9. On 3 May 2006 the Commissioner asked the solicitors to provide copy documents relating to the complaint, which were sent on 8 May. He informed the solicitors on 3 November 2006 that the case had been given priority and that he would be contacting DCA to seek further clarification of its application of sections 32 and 21.
10. The Commissioner wrote to DCA on 9 November 2006 requesting comments on various points. He contacted DCA on a number of further occasions seeking its response.
11. DCA replied on 12 February 2007. It expressed its view that the Information Tribunal's decision in the case of '*Mitchell v. the Information Commissioner*' (EA/2005/0002) did not provide a sound basis for interpreting section 32(1)(c). It also indicated that, as a result of the complainant's application for a right to representation in an appeal against conviction, the Criminal Appeal Office held a written transcript of some of the trial proceedings.

Findings of fact

12. The requirements to record proceedings in a court case are set out in Criminal Procedure Rule 68.12:

'(1) Except as provided by this rule, the whole of any proceedings in respect of which an appeal lies (with or without leave) to the court shall be recorded by means of shorthand notes or, with the permission of the Lord Chancellor, by mechanical means.'

In practice all proceedings are now recorded by mechanical means, ie onto audio media. This Decision Notice refers to such information as the 'audio records'.

13. Written transcripts may be produced of audio records. Rights of access to written transcripts are set out in Criminal Procedure Rule 68.13:

'(1) A transcript of the record of any proceedings or part thereof in respect of which an appeal lies, with or without leave, to the court and which are recorded in accordance with the provisions of rule 68.12 –...

...(b) shall, on request, be supplied to any other person [than the Registrar] on payment of such charge as may be fixed for the time being by the Treasury, unless the court otherwise directs.

(2) Without prejudice to the provisions of paragraph (1) of this rule, the Registrar may, on request, supply to any interested party a transcript of the record of any proceedings or part thereof which is in his possession for the purposes of the appeal or application in question and in such case may make charges...'

14. In summary, written transcripts 'shall' be supplied to any person on payment of the charge, 'unless the court otherwise directs'; and written transcripts 'may' be supplied to 'any interested party' with a discretion to apply a charge. The Criminal Procedure Rules appear to be silent on provision of the audio records from which the transcript is produced.

Analysis

Procedural matters

15. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

In this case the complainant made his original request on 1 December 2005, and DCA issued an undated refusal notice which was received by the solicitors on 21 February 2006. While it is not clear on what date the refusal notice was issued by

DCA, it will have been at least 50 working days after the request. Accordingly, the Commissioner finds that DCA failed to comply with its duty to issue the refusal notice within the time limit set out in section 10(1), which constitutes a breach of section 17(1) of the Act.

Exemption – section 32

16. The complainant requested the audio record of evidence from his criminal trial. DCA accepted in its letter to the Commissioner dated 12 February 2007 that it, rather than the court, 'held' the audio records for the purposes of section 32. It also accepted that it held written transcripts of some of the trial proceedings, being the trial judge's summing up of 18 October 2002 and a copy of the transcript of the judge's ruling of 14 October 2002 timed from 14:10 to 14:16.

17. However, DCA decided that the audio record was exempt from disclosure by virtue of section 32(1)(c) of the Act. Section 32(1) provides that:

'Information held by a public authority is exempt information if it is held only by virtue of being contained in—...

...(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.'

18. In the Information Tribunal case of *'Mitchell v. the Information Commissioner'* (EA/2005/0002) the Tribunal identified a number of considerations which justify making transcripts freely available.

'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 matter for control by the court itself.'

Transcripts of civil proceedings are...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.'

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.'

19. The Tribunal further expressed its view that, not only were there were no policy considerations which would justify restricting the dissemination of transcripts of public hearings, but a close analysis of the wording of paragraph (c) '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'.

20. In its letter to the Commissioner of 12 February 2007 DCA expressed its view that the Information Tribunal's decision in the *Mitchell* case did not provide a sound basis for interpreting section 32(1)(c), and that the section did in fact apply both to audio records and written transcripts held by the Criminal Appeal Office in this case. It made the following arguments.
21. First, it noted that in the *Mitchell* case the Information Tribunal had had '*no need to consider the unique role played by [DCA] in supporting the courts in the discharge of their judicial functions*', and noted that in paragraph 31 of its decision the Tribunal had stated that it was '*considering court records held by public authorities either as litigants, third parties subject to a court order or, as in the present case, interest [sic] parties*'.
22. Secondly, DCA claimed that the Tribunal had not considered '*in any detail whether transcripts may have been created by a member of the administrative staff of the court*', and that '*it is clear from the decision that the Tribunal did not have the benefit of full or accurate submissions on those issues*'.
23. Thirdly, DCA disagreed with what it characterised as the Tribunal's decision that transcripts were not records regarding which it was intended that access should be controlled by the court itself. According to DCA, it was clearly the intent of section 32 that '*access to court records should remain under the control of the courts in accordance with the court rules, including the Criminal Procedure Rules*'. DCA claimed that the Criminal Procedure Rule 68.13(1)(b) at the time of the Tribunal decision was '*a permissive provision which placed access by people other than interested parties in the discretion of the court*'.
24. Fourthly, DCA pointed out that, while the Tribunal had concluded that no legitimate issues of privacy or confidentiality arose concerning records of proceedings in public, in fact there remained cases where the law of confidence, the Data Protection Act and other statutory restrictions might prohibit the disclosure of information. Such information might include sexually explicit information or information relating to the identity of complainants, victims or young persons, and there were occasions when such material could be removed from disseminated transcripts.
25. Fifthly, it claimed that the Commissioner had accepted in previous cases that the '*repeated scrutiny of matters which have been tried in public may not be appropriate*'.
26. The Commissioner does not propose to address these arguments to the extent that they assert that the Tribunal's decision in *Mitchell* was flawed. Having considered that decision, the Commissioner takes the view that a clear conclusion was reached that written transcripts are not documents created by a court or a member of the administrative staff of a court. In the absence of clear evidence that the Tribunal's decision was perverse the Commissioner considers that it is right for him to adopt the ruling in *Mitchell*. If DCA wishes to attempt to

overturn the element of the *Mitchell* decision which it disputes then the appropriate course is an appeal to the Information Tribunal and/or the High Court.

27. To the extent that DCA's arguments may be seeking to distinguish this case from the facts in *Mitchell*, the Commissioner notes that there are two important differences between the cases:

- in *Mitchell* the requested information was not held by DCA, in its capacity as administrative support for the courts system, but by another public authority; and
- the requested information comprised a written transcript rather than the original audio record.

28. In relation to the first of those differences the Commissioner's view is that, whatever the nature of DCA's specialised role and the purposes for which it **holds** audio records and written transcripts, that has no bearing on the Tribunal's decision that such documents are not to be regarded as **created** by a court or a member of its administrative staff for the purposes of section 32(1)(c).

29. In relation to the second difference, the Commissioner has considered whether the original court record (in this case, the audio record) can be distinguished from the written transcript for the purposes of section 32(1)(c). He notes that in the *Mitchell* decision the Tribunal stated that:

'we are in no doubt that the tapes are themselves a "document" for the purpose of s.32(1)... 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.'

The Tribunal therefore indicated its view that the original court record and the written transcript constituted the same information.

30. In the light of this clear view from the Tribunal, the Commissioner has decided that, like the written transcript, the audio record does not constitute information which is created by a court or a member of the administrative staff of a court. Accordingly, section 32(1)(c) is not engaged in relation to the information requested in this case.

Exemption – section 21

31. In addition to the section 32 exemption, DCA claimed that the complainant was entitled as a party to the proceedings to be supplied with a copy of the written transcript. Accordingly, since the information was reasonably accessible it was exempt by virtue of section 21(2) of the Act. Section 21(1) states:

'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

32. As paragraph 29 of this Decision Notice indicated, the information required by the complainant in this case is obtainable in two forms, a copy of the original audio record and a written transcript of that audio record. It might be argued that, in referring the complainant to his right to pay for a written transcript when the form in which he had requested the information was as an audio record, DCA failed to comply with its obligations under section 11 of the Act. Section 11(1) states:

'Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant...,

...the public authority shall so far as reasonably practicable give effect to that preference.'

However, it is clear that in fact the complainant's preferred form would have been a written transcript. The reason he had requested the audio record was because he was unable to afford the fee for a written transcript.

33. The Commissioner has considered whether in this case the right to obtain a written transcript upon payment of a fee amounts to the information being *'reasonably accessible'*. In seeking the audio record from the court the complainant's solicitors made it clear that they were doing so precisely because the complainant was unable to afford the fee of £4,465 which they had been quoted by the transcription service. While section 21(2)(a) makes it clear that *'information may be reasonably accessible to the applicant even though it is accessible only on payment'*, the Commissioner takes the view that the amount of the required payment is a relevant consideration when assessing whether information is reasonably accessible. In this case there is evidence that the complainant cannot afford the fee; furthermore, on any objective basis the sum of £4,465 is an amount which would be likely to prove prohibitive for many people of average means. In the circumstances, the Commissioner has concluded that the written transcript is not reasonably accessible in this case.

34. Although DCA did not make it, there is also an argument that the information was readily accessible because the audio record was available upon application to the court. However, the Commissioner does not accept that argument. First, he does not consider that information is *'reasonably'* accessible if an applicant is obliged to go to the trouble and expense of making an application to a court, which might also require the services of a legal representative.

35. Secondly, the Commissioner notes that such applications may be refused by the court, in which case the information would not be *'accessible'* at all. He is supported in this view by section 21(2)(b), which states:

'information is to be taken to be reasonably accessible if it is information which the public authority or any other person is obliged by or under any enactment to communicate...to members of the public on request, whether free of charge or on payment.'

If the court has a discretion not to order disclosure of an audio record then the Commissioner considers that this avenue does not create an 'obligation by or under an enactment'. Having taken these two factors into account, the Commissioner has concluded that the right to make an application to a court for an audio record of a court or tribunal case does not render the record '*reasonably accessible*', so that section 21 is not engaged.

Other information held

36. Finally, the Commissioner notes that in its letter of 12 February 2007 DCA indicated that, as a result of the complainant's application for a right to representation in an appeal against conviction, the Criminal Appeal Office held a written transcript of some elements of the trial, being the trial judge's summing up of 18 October 2002 and a copy of the transcript of the judge's ruling of 14 October 2002 from 14:10 to 14:16. However, since the freedom of information request in this case was for a copy of the audio record, the Commissioner has not made any direction in respect of this information.

The Decision

37. The Commissioner's decision is that DCA (now the Ministry of Justice) did not deal with the request for information in accordance with the Act, in that it incorrectly withheld the requested information by reference to sections 21 and 32. The Commissioner also finds that, in exceeding the statutory time limit for responding to the request, DCA (now the Ministry of Justice) failed to comply with the requirements of section 10(1) of the Act, which constitutes a breach of section 17(1).

Steps Required

38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The Ministry of Justice should provide the complainant with the audio transcript of the trial which it claimed was exempt under sections 21 and 32 of the Act.

Failure to comply

39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following related matters. First, he considers it to be unsatisfactory that the Criminal Procedure Rules appear to be silent regarding access to court records. Secondly, he notes that the practice which DCA is operating in the apparent absence of any rule is that written transcripts are available on request (subject to a charge and any contrary direction that a court might make), whereas identical information contained in court records can only be accessed by way of a formal application to the court. The Commissioner cannot see any justification for this differential approach to what are two forms of the same information.

Right of Appeal

41. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 16th day of October 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (b) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (d) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (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.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Section 32(1) provides that –

“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.”

Section 32(2) provides that –

“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.”

Section 32(3) provides that –

“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.”

Section 32(4) provides that –

“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.