

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 October 2007

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

### Summary

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The complainant asked the public authority for the audio record of a court hearing in which he had been a party. 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, and also in providing its internal review decision.

### The Commissioner's Role

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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

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2. On 24 August 2006 the complainant requested from the Courts Recording and Transcription Unit of the Royal Court of Justice the following information:

*'CD of the recordings of the hearing mentioned above which took place in open court 40 on 19/20/21/23 June 2006 before Mr Moylan';*

He also asked for *'the authorities'* on which DCA had based its refusal to provide this information in response to a previous telephone call which he had made.

3. The request was dealt with by the Department for Constitutional Affairs (DCA) (now the Ministry of Justice). On 26 October 2006 it replied that the requested information was exempt from disclosure under section 32 of the Act. It added that the information in the form of a court transcript was accessible to the complainant as a party to proceedings – by way of an application under the relevant court rule – and that the information which he had requested was therefore also exempt from disclosure under section 21 of the Act. DCA informed the complainant of his right to ask for an internal review, and to apply to the Information Commissioner's Office.
4. The complainant emailed DCA on 29 October 2006 requesting an internal review.
5. On 9 December 2006 he complained to the Commissioner that he had not received a satisfactory response from DCA.
6. The Commissioner contacted DCA, which indicated that the outcome of its review would be provided to the complainant within five working days. The Commissioner advised the complainant of this on 1 February 2007 and advised him to write again should he remain dissatisfied with DCA's decision.
7. DCA gave the complainant its internal review decision on 5 February 2007. It upheld the original decision, and provided web links to the statute sections to which had referred. It advised him of the Commissioner's role.

## The Investigation

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### Scope of the case

8. On 9 February 2007 the complainant contacted the Commissioner to complain about DCA's decision.

### Analysis

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### Procedural matters

9. 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 24 August 2006, and DCA issued its refusal notice on 26 October 2006. DCA therefore took 43 working days to respond to the request. Accordingly, the Commissioner finds that DCA failed to comply with the requirements of section 10(1), which constitutes a breach of section 17(1) of the Act.

## Exemption – section 32

10. The complainant requested a 'CD of the recordings' of a court hearing which occurred on 19-23 June 2006. DCA took the view that this audio record was exempt from disclosure by virtue of section 32 of the Act, since it was information:

*'held by Her Majesty's Court Service only by virtue of being contained in a document created by a court or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter.'*

11. Section 32(1)(c) 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.'*

12. In the Information Tribunal case of *'Mitchell v. the Information Commissioner'* (EA/2005/0002) the Tribunal identified a number of 'policy' considerations which justified 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.'*

13. 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'.

14. Having considered the Tribunal's decision in this case, the Commissioner has taken the view that court transcripts are not to be taken as documents created by a court or a member of the administrative staff of a court. He has gone on to consider whether the original 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.

15. In the light of the 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**

16. In addition to the section 32 exemption cited, the DCA also claimed that the audio record was accessible to the complainant as a party to the proceedings – by way of an application under the relevant court rule – and that the information which he had requested was therefore exempt from disclosure under section 21 of the Act.

17. Section 21(1) states:

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

The Commissioner has considered whether the right to apply to the court for an audio record of a hearing amounts to the information being '*reasonably accessible*'. His conclusion is that it does not. 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.

18. 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'* (emphasis added).

If the court has the power – for whatever reason – not to order disclosure of an audio record then the Commissioner considers that this avenue does not create an 'obligation' to disclose information 'on request'.

19. 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 transcript *'reasonably accessible'*, and that the section 21 exemption is accordingly not engaged in this case.

## The Decision

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20. 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

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21. 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 record of the hearing of 19-23 June 2006 which it claimed was exempt under sections 21 and 32 of the Act.

## Failure to comply

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22. 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

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23. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The complainant requested an internal review on 29 October 2006. After he had approached the Commissioner, and the Commissioner had contacted the public authority, DCA eventually provided the complainant with its internal review decision on 5 February 2007. DCA therefore took 67 working days to deal with the internal review. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. In this case the Commissioner does not consider that there were any reasons why DCA should not have completed the review within 20 working days, rather than the 67 working days which it actually took.

## Right of Appeal

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24. 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](mailto: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 16<sup>th</sup> day of October 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex

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**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 21(1)** provides that –

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

**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 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(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.