IN THE UPPER TRIBUNAL **Case No:** GIA/1934/2015
ADMINISTRATIVE APPEALS CHAMBER

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) dated 5 May 2015 does not involve an error on a point of law. The appeal is therefore dismissed.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This appeal concerns the extent to which the class-based exemption for court records pursuant to section 32(1)(c) of the Freedom of Information Act 2000 [FOIA] applies to statistical data drawn from but not disclosing the content of documents created by a court or a member of court staff for the purposes of proceedings in a particular cause or matter.

2. I conclude that Section 32(1)(c) applies to such statistical information and so dismiss the requester's appeal.

3. It has not been necessary for me to receive submissions about the precise content of the requested information. These Reasons are complete in that they do not contain a closed annexe which cannot be read by the Appellant or the world at large.

Background

4. What follows is a summary pertinent to this appeal. The requester and Appellant is Mr Brown. The First and Second Respondents are respectively the Information Commissioner [IC] and the Ministry of Justice [MOJ]. The Ministry of Justice is the public authority responsible for Her Majesty's Courts and Tribunals Service [HMCTS] and it was joined as a party to the proceedings before the Upper Tribunal.

5. On 10 July 2014 Mr Brown made a request for information held by the MOJ. The request was in two parts of which the first part is set out as follows:

(a) How many applications did Leeds County Court receive in the year ending 31 December 2006 ex parte without notice for a non-molestation order (injunction) [Family Law Act 1996 s.45(3)]?
(b) How many of those applications were granted at the ex parte without notice hearing?
(c) How many injunctions in that year were made by Leeds County Court of its own motion for "relevant children" as defined in the FLA and how many were made for "children" over the age of 18?
(d) How many of such injunctions made a finding of physical violence and therefore contain a power of arrest (a penal notice)?
(e) How many of such applications were made by McCormicks (now Clarion) Solicitors then of 4 Oxford Row, Leeds?

Request (a) was not pursued on appeal to the First-tier Tribunal [the tribunal] as the information sought had previously been provided to Mr Brown by the MOJ. Mr Brown also asked for the same information with respect to occupation order applications made ex parte without notice pursuant to section 33 of the Family Law Reform Act 1996 [Part 2 of the Request] That part of his request was not pursued by him either in his complaint to the IC or in the subsequent tribunal proceedings.

6. On 29 July 2014 the MOJ refused to provide the information relating to requests (b) to (e), relying on the exemption for court records contained in section 32(1) of FOIA. Mr Brown complained to the IC on 12 September 2014. He told the IC that he knew how many injunctions of the type he was interested in had been granted as the MOJ had provided that figure to him. The scope of the IC's investigation was thus limited to whether the MOJ had correctly applied section 32(1) of FOIA to requests (b) to (e).

7. The MOJ confirmed that it relied on section 32(1)(c)(i) of FOIA and provided a copy of the Requested Information to the IC. It explained that this information was held on a database known as Familyman which was used to facilitate the case management of cases in the family courts. Court staff transferred information from hard copies of paperwork filed by parties in family proceedings onto Familyman as an event such as a hearing occurred. The MOJ confirmed that (a) the original paper documents from which the information had been extracted had been destroyed in accordance with the County Courts Records destruction and retention schedule and (b) the information was created and used only for the purposes of the proceedings to which it related.

8. On 25 November 2014 the IC issued his Decision Notice upholding the MOJ's reliance on section 32(1)(c). The Appellant appealed to the tribunal on 6 December 2014.

The Tribunal Decision

9. The First-tier Tribunal considered the appeal on the papers alone as had been agreed by Mr Brown and the IC. On 5 May 2015 it dismissed the appeal, agreeing with the IC that the requested information fell within the scope of section 32(1)(c)(ii) and, further, that the IC was entitled to rely on this subsection rather than on section 32(1)(c)(i) as the MOJ had done. By virtue of section 2(3)(c) of FOIA, information falling within the scope of section 32 is absolutely exempt from disclosure and is not subject to the public interest balancing request.

10. The tribunal found the following facts:

    (a) the relevant information in Familyman was obtained from hard copy materials provided by the parties to family litigation;
    (b) the hard copy files had been destroyed by the time of the Request and the electronic record in Familyman was the only source of the information requested;
    (c) the information in requests (b) to (d) was not derived from the parties but was recorded directly into Familyman by court staff as relevant events took place;
    (d) the requested information could only be obtained by interrogating the electronic record maintained by the court;
    (e) and the Familyman records formed part of a larger database which had general administrative purposes extending beyond the requirements of a particular case/matter.

    These findings of fact were not the subject of challenge in this appeal.

11. The tribunal held that the appeal was determined by the approach of the Upper Tribunal in Peninsula Business Services Ltd v Information Commissioner and Secretary of State for Justice [2014] UKUT 284 (AAC). The facts in Peninsula were very close to the facts in this appeal and that case constituted binding authority requiring the tribunal to decide that any relevant information in Familyman which was obtained from hard copy materials provided by the parties and not held elsewhere would fall within section 32(1)(c)(ii) of FOIA. That authority was sufficient to decide against Mr Brown with respect to request (a) [were that still being pursued] and request (e).

12. With respect to requests (b) to (d), the tribunal held that each element of the information requested was held at the relevant time in an electronic document that had been created by the court or a member of its administrative staff for the purpose of a particular cause or matter. It too was exempt from disclosure pursuant to section 32(1)(c)(ii).

13. Thus the tribunal held that the IC had been correct in ruling that the MOJ had been entitled to refuse the requests and the appeal was consequently dismissed.

The Appeal to the Upper Tribunal

14. The First-tier Tribunal granted permission to appeal on 1 June 2015. It did so on one issue namely, "*the extent to which the section 32 exemption applies to statistical data drawn from, but not disclosing the content of, materials submitted by the parties is a question on which there is scope for differing views and that an Upper Tribunal reconsideration of the issue, in the context of the facts arising in this case, may be beneficial".* It seemed to me that the underlined words "*materials submitted by the parties*" had been included in error. I defined the ground of appeal as "*the extent to which the section 32 exemption applies to statistical data drawn from, but not disclosing the content of, documents created by a court or a member of court staff for the purposes of proceedings in a particular cause*". None of the parties sought to argue that this clarification was inappropriate.

15. Prior to the hearing, I – together with Upper Tribunal Judge Wikeley - was required to deal with a number of ancillary matters arising from the inadvertent and erroneous disclosure of the requested material to Mr Brown by staff in the office of the Upper Tribunal. It is not necessary to record the detail here as it is addressed fully in a variety of case management rulings seen by all the parties. Nevertheless I record here my thanks to Mr Brown for his co-operation and compliance with the orders of the Upper Tribunal. Orders relating to that material remain in place to date and will do so without limit of time.

16. I held an oral hearing of this appeal on 10 May 2016. The Appellant appeared in person. Mr Peter Lockley of counsel represented the IC and Mr Christopher Knight of counsel represented the MOJ. I am very grateful to all the parties for their helpful written and oral submissions.

17. At the hearing before me, Mr Brown confirmed that he no longer wished to pursue a submission about the relevance of section 77 of FOIA to the issue in this appeal. I am grateful for that indication.

18. Following the hearing I received by email on 16 May 2016 an amended version of Mr Brown's skeleton argument. The changes to that document were mainly grammatical or matters of spelling. Paragraph 4 of the skeleton was reworded as follows:
"To the Appellant, the wording of S.32 FOIA is very clear. It is to stop members of the public obtaining copies of orders made by members of the judiciary in conjunction with Ministry of Justice court staff who actually prepare the orders (S.32(1)(C) FOIA) in litigation or similar proceedings to which they are not a party. This applies particularly to proceedings which are conducted in private, such as family proceedings."
The revised wording was little different from that contained in the skeleton argument sent to the other parties on 27 April 2016. Had the revision of this skeleton argument been of material importance, I would

have sought comment from the IC and the MOJ before writing these Reasons. It is not so I have not.

The Upper Tribunal's Analysis

The Legislative Scheme and Summary of the Parties' Submissions

19. Section 32 of FOIA is an absolute class based exemption relating to court records. It reads as follows:

"(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."

20. Section 2(3)(c) of FOIA confirms that an absolute exemption is conferred on material falling within the auspices of section 32. Thus no issue of weighing the respective public interests arises when a request is made for information to which section 32 applies.

21. Mr Brown argued that section 32 had become overly complicated. Reference to a "*particular cause or matter*" in that section could not possibly include a request for purely statistical information. Statistical information would not identify the parties. The Peninsula case was not remotely similar to his request - in fact, none of the previously determined authorities had any relevance to his request for information. The essence of his case was that the nature of the requested information - that is, statistics - was different to the content of the court record as it would not identify the parties. That difference underlined why section 32(1)(c)(ii) should not apply to his request.

22. The IC and the MOJ submitted that this appeal should be determined by the approach in the Peninsula case which had also been applied and upheld by the Upper Tribunal in Edem v Information Commissioner and Ministry of Justice [2015] UKUT 210 (AAC). At the time when the information was created, it was contained in a document created by court staff for the purposes of proceedings in a particular cause or matter. Section 32(1)(c)(ii) thus applied to it. Statistical information was built from material which was exempt and thus section 32(1)(c)(ii) also applied to it. Merely because it was presented in a different form did not make exempt information into non-exempt information.

23. Having read and heard the parties' arguments, I accept the submissions by the ICO and the MOJ. My reasons for so doing are set out below.

The Underlying Purpose of Section 32(1) of FOIA

24. I can do little to improve on Upper Tribunal Judge Wikeley's analysis contained in paragraphs 22-25 of Edem [see above]. What follows draws on that analysis.

25. The purpose of section 32(1) is to ensure that courts and tribunals can rule on disclosure of their own records. This was affirmed by the Supreme Court in Kennedy v Charity Commission [2014] UKSC 20. Lord Toulson, considering the relationship between sections 32(1) and 32(2), concluded that:
"123. Just as Parliament by excluding courts and court records from the provisions of the Act did not intend that such records should be shrouded in secrecy but left it to the courts to rule on what should be disclosed, so in the case of a statutory enquiry Parliament decided to leave it to the public body to rule on what should be disclosed, balancing the public interest in its decision being open to proper public scrutiny against any countervailing factors, but the exercise of such power must be amenable to review by the court".
The heading to section 32 is "**Court Records etc**" which plainly covers not only written records but also audio recordings of court proceedings.

26. In Edem Judge Wikeley concluded in paragraph 24 that it would be very odd if courts and tribunals had an exclusive power to decide whether or not to order disclosure of written records (including transcripts of court hearings) whilst, at the same time, audio/video recordings of hearings were subject to a separate regime under FOIA. There was no rational basis for any such bifurcated system which would be wholly inconsistent with the principle recognised by the Supreme Court in Kennedy.

27. I find that the same analysis is equally applicable to numbers or figures drawn from written court records and presently contained in an electronic database operated by the family court. Mr Brown's reasoning - that the MOJ could extract information from court records and present it in a different numeric form and that this made it information which was not exempt at all - is fundamentally inconsistent with the principle enunciated in Kennedy.

28. It thus follows that I reject Mr Brown's argument about the purpose of section 32, namely that it is to stop members of the public obtaining copies of court orders in litigation to which they were not parties. That submission is inconsistent with the Supreme Court's affirmation that courts and tribunals are to be free to rule on what from their records should be disclosed. That purpose is far wider than the relatively narrow purpose espoused by Mr Brown and I can find no justification for limiting that which the Supreme Court has endorsed.

Application of Peninsula and Edem to this Case

29. Both these cases are decisions by other Upper Tribunal Judges. Neither is binding on me as a matter of strict precedent. I am however satisfied that both were correctly decided and I follow their reasoning and conclusion when determining this appeal. I reject Mr Brown's argument that no previously determined case law had any relevance to his case – that much is obvious by the references I have already made to case law (some of which is binding on me such as Kennedy) in these Reasons.

30. Peninsula is authority for the proposition that a "*document*" could encompass an electronic record or database [see paragraph 44]. Further the word "*document*" in section 32 meant no more than the form or format in which the information was recorded [see paragraph 46].

31. Thus I agree with Judge Wikeley's analysis in Edem that "*the term "document" carries a wide meaning covering any form or format in which information is recorded in a form suitable for the conveying of that information*" [see paragraph 32].

32. Peninsula also held that the question of the purpose for which material was created was to be determined when the relevant information came to be filed with or placed with a court or tribunal [paragraph 35]. That approach to the interpretation of section 32(1) was dictated by the reasoning of the Supreme Court in Kennedy to which detailed reference was made in paragraphs 32-34 of Peninsula.

33. The Peninsula case concerned an application by Peninsula Business Services for the names and addresses of respondents to Employment Tribunal claims. This information was extracted from the claim and response forms submitted by the parties and fed into a local electronic management database known as ETHOS. ETHOS was operated locally by tribunal staff and was designed to assist the Employment Tribunal in its case management. The source of the information migrated to ETHOS by court staff was from documents filed with a court for the purposes of proceedings in a particular cause or matter. Section 32(1)(a) applied to those documents and thus, the information contained on ETHOS derived from that documentary material was also protected from disclosure by section 32(1)(c).

34. The facts in Peninsula are broadly applicable to the facts of this case if the word "Familyman" is substituted for the word "ETHOS". Parts (a) and (e) of Mr Brown's request sought specific information which was information contained in documents placed in the custody of the court for the purpose of a particular case and that information was migrated onto Familyman by court staff. Applying Peninsula, the information sought in those Parts of Mr Brown's request was exempt from disclosure.

35. What about information "drawn from" the documents on Familyman without being the same as or disclosing information recorded in those documents [Parts (b) to (d) of the Request]?

36. That information was inputted by court staff as the case progressed. Thus, whether an injunction was granted ex parte; whether an injunction was made of the court's own motion for relevant children; or whether it incorporated a finding of physical violence were all items of specific information relating to a specific case or cases. That information was recorded in a document created by a member of court staff for the purpose of proceedings in a particular cause or matter [section 32(1)(c)(ii)]. I note that the statutory language pays no regard to the type or content of the information – it is simply irrelevant.

37. As the tribunal found, the statistics requested could only be obtained by interrogating the individual records of proceedings. Those individual records were exempt because they constituted information contained in a document created by court staff for the purposes of proceedings. Thus, these requested statistics would be built from or drawn from exempt content and, in this context, I find they would take on the character of the information from which they were derived. That analysis is consistent both with the Supreme Court's interpretation in Kennedy of what constituted the "*purposes of proceedings*" in section 32(1) and with the underlying purpose of section 32(1) itself. Put simply, when court staff inputted information onto Familyman for the purposes of proceedings in a particular case, that information constituted exempt information without limit of time howsoever the Familyman database was interrogated.

38. Mr Brown sought to argue that statistics would not identify any of the participants in family proceedings and thus that this type of numerical information was somehow fundamentally different in nature from the written information normally contained in court records. Whilst this argument appears superficially attractive, it does not - for the reasons I have set out - withstand the close scrutiny compelled by the interpretation of section 32(1) in the decided case law.

Conclusion

39. For all the reasons set out above, I find that the decision of the tribunal was not in error of law and I dismiss the appeal.

Gwynneth Knowles QC
Judge of the Upper Tribunal
25 May 2016.

[signed on original as dated]