Rotherham Metropolitan Borough Council v Harron & The Information Commissioner's Office and Harron v Rotherham Metropolitan Borough Council & The Information Commissioner's Office
[2023] UKUT 191 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000404-GIRF
& UA-2022-000032-GIRF

DECISION ON AN APPLICATION BY A NON-PARTY TO BE PROVIDED WITH DOCUMENTS IN THESE PROCEEDINGS

UA-2021-000404-GIRF

Appellant:	**Rotherham Metropolitan Borough Council**
First Respondent:	**Liam Harron**
Second Respondent:	**The Information Commissioner**
On appeal from:	**First-tier Tribunal (General Regulatory Chamber): EA/2021/0009**

UA-2022-000032-GIRF

Applicant:	**Liam Harron**
First Respondent:	**Rotherham Metropolitan Borough Council**
Second Respondent:	**The Information Commissioner**
On certification by:	**First-tier Tribunal (General Regulatory Chamber): EA/2021/0090**

DECISION

UPON the application of Derek Moss dated 27 January 2023 for disclosure of the parties' written submissions, including the statements of case and skeleton arguments

1. The application is refused.

2. The Upper Tribunal shall send a copy of this decision to Mr Moss as well as to the parties in this case.

REASONS

1. On 23 January 2023, Mrs Justice Farbey, the former President of the Upper Tribunal (Administrative Appeals Chamber) handed down judgment in the above appeal and application: [2023] UKUT 22 (AAC). The detail is contained in her judgment. In brief, she allowed the appeal of Rotherham Metropolitan Borough Council ("RMBC") against the decision of 29 June 2021 by the First-tier Tribunal (General Regulatory Chamber) ("GRC") to certify an offence by RMBC under section 61 of the Freedom of Information Act 2000 ("FOIA"); and in the absence of a certification, the Upper Tribunal's jurisdiction to undertake an inquiry under section 61(5) did not arise.

2. By application dated 27 January 2023 Mr Derek Moss, who is not a party to these proceedings, requested that the Upper Tribunal provide him with copies of "the parties' written submissions, including the statements of case and skeleton arguments". He relied upon open justice considerations.

3. Mr Moss submitted that it was unnecessary for his application to be disclosed to the parties and that it was incumbent on the Upper Tribunal to grant his request in light of the principles and authorities he cited and in so far as a direction has not been made under rule 14(8) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules").

4. I decided that the parties should be afforded the opportunity to make representations, given that determining the application would involve considering the extent of the Upper Tribunal's powers and could entail evaluative assessments involving the rights of others protected by the European Convention on Human Rights ("ECHR"). This was communicated to Mr Moss who indicated that whilst he did not consent to his application being shared with the parties, he understood that this was the Upper Tribunal's position.

5. Accordingly, by directions issued on 15 March 2023 ("the March Directions") the parties were provided with Mr Moss's written application dated 27 January 2023 and given 28 days to provide any written submissions that they wished the Upper Tribunal to take into account when determining the application. The directions indicated that if submissions were provided they should address, in

particular: (i) the Upper Tribunal's powers; (ii) the extent to which an analogy should be drawn with the position under CPR 5.4C(1) and 5.4C(2) (relied upon by Mr Moss) and, in so far as an analogy is pertinent, what should be regard as a "statement of case" for these purposes; (iii) the significance of rule 14(8) in this context, generally and in relation to this specific case; and (iv) whether the request should be granted / refused and whether any distinction should be drawn between any of the documents sought for these purposes.

6. Written submissions were received from Mr Harron and from the Information Commissioner, both dated 11 April 2023. I am grateful for the assistance they have provided. No submissions were made by RMBC. The March Directions indicated that if submissions were not provided by the stipulated timescale the Tribunal would proceed to determine the application.

7. I indicated in the March Directions that, as matters stood, I considered the application could be determined on the basis of written submissions. None of the parties have suggested that an oral hearing is necessary and this remains my view.

The proceedings

8. I will refer briefly to aspects of the proceedings that have a bearing on the present application.

9. No order or direction has been made under Rule 14(1), (2) or (8) of the Upper Tribunal Rules.

10. Case management directions made by Upper Tribunal Judge Wikeley were issued on 12 April 2022. They included directions for the parties to provide written submissions in relation to both RMBC's appeal and the FTT's certification reference. Mr Harron provided written submissions dated 30 August 2022 and a skeleton argument dated 22 September 2022. RMBC provided written submissions and subsequently a skeleton argument dated 16 September 2022. The Information Commissioner provided written submissions dated 29 June 2022.

11. The hearing was held on 18 October 2022. Mrs Justice Farbey's reserved judgment was issued on 23 January 2023.

The application made by Mr Moss

12. Mr Moss made an earlier application for disclosure of the parties' submissions dated 31 July 2022. This was refused by Mrs Justice Farbey on 22 September 2022.

13. It is necessary to refer briefly to the subsequent history. By email sent on 21 November 2022, Mr Moss requested copies of "the parties' written submissions" from the Upper Tribunal. He argued that he had a right to these

documents, that the Upper Tribunal had a duty to provide them to him and that the parties should not be told of his request. In response, Mr Moss was informed that if he wished to pursue the request, Mrs Justice Farbey considered it appropriate for the parties to be made aware of it, to enable them to make submissions on the principles and on the case-law that he had cited. Mr Moss responded that he was seeking provision of the documents by way of the discharge of an administrative obligation on the Upper Tribunal, rather than a judicial decision. He relied in particular upon CPR 5.4C(1) by way of analogy and asked that the Upper Tribunal now comply with his request. Having considered the matter, I caused a further response to be sent to Mr Moss indicating that resolution of his request did involve a judicial decision and that it was open to him to reformulate his request as an application (and that if he did so, the parties would be given an opportunity to make written submissions in response).

14. Mr Moss then made the 27 January 2023 application. He was asked to clarify whether he was willing for this application to be shared with the parties. By email sent on 16 February 2023 Mr Moss indicated that there was no reason to give the parties the opportunity to object to his request, given that a Rule 14(8) direction had not been made. He said that he could not consent to his application being communicated to the parties as that would "compromise" his position, as set out in his application, but that he understood that his consent was irrelevant if the Upper Tribunal believed it appropriate to invite the parties to make representations.

15. As I indicated in the March Directions, I concluded that the parties should be given the opportunity to make representations. For the avoidance of doubt, I did not accept that the position of Mr Moss would be "compromised" if his application was shared with the parties.

16. The submissions that Mr Moss made in his 27 January 2023 application were as follows:

(1) Copies of the parties' written submissions were sought in reliance upon the open justice principle and Article 6 ECHR;

(2) *Aria Technology Ltd v HMRC* [2018] UKUT 111 (TCC) established that the Upper Tribunal has an inherent power and a common law duty to grant third party access to any documents relating to proceedings that are held in its records, unless a party had applied for a direction under Rule 14(8);

(3) *Moss v Information Commission* [2020] EWCA Civ 580 showed that any derogation from open justice must be "necessary" and that it was reasonable to regard the person who initiated proceedings as having accepted the normal incidence of the public nature of court proceedings. Further, that open justice applied with equal force in tribunals;

(4) As none of the parties in this case had (as far as he was aware), applied for a Rule 14(8) direction, they should be treated as having accepted that their written submissions would be made public;

(5) CPR 5.4C(1) provided helpful guidance, in specifying that a non-party could obtain a copy of a statement of case without needing to seek the court's permission. Reference was also made to CPR 5.4C(2);
(6) The request for the documents was for the Upper Tribunal to take an administrative step and the application should not be shared with the parties;
(7) Whilst skeleton arguments may not be "statements of case", the importance of allowing the public access to these documents was recognised in *Cape Intermediate Holdings Ltd Dring* [2019] UKSC 38 at paras 29 – 31; and
(8) In so far as his reason for requesting copies of the documents was relevant, he was "a campaigner and writer with a particular interest in information rights law and certification / contempt proceedings, and I need copies of the skeleton arguments to see what arguments were deployed in these cases, to enable me to write about them from an informed point of view".

The legal framework

17. There is no doubt that the open justice principle applies to the Upper Tribunal: *Moss* at para 46 and *Dring* at paras 36 and 41.

18. There is no express power in the Upper Tribunal Rules to provide non-parties with documents from cases that are before the Upper Tribunal.

19. I will return to Rule 14 of the Upper Tribunal Rules. It includes the following:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of –
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> (a) Specified documents or information relating to the proceedings;
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> .....
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> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if -
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> (a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
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> (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
>
> .....
>
> (8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons."

20. The Upper Tribunal, in common with all courts and tribunals exercising the judicial power of the state has "an inherent jurisdiction to determine what the [open justice] principle requires in terms of access to documents or other information placed before the court or tribunal in question": *Dring* at para 41 (see also para 34). Lady Hale (delivering the judgment of the court) went on to observe that the extent of any access permitted by the court's rules was not determinative (save to the extent that they contained a valid prohibition).

21. Lady Hale noted at para 44 in *Dring* that in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618 the Court of Appeal referred to the default position as being "that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing". She continued:

> "45. However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in [*Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at para 113, and *A v British Broadcasting Corpn* [2014] UKSC 25; [2015] AC 588 at para 41], the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose".
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> 46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality...
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> 47. Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day to day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting access. People who seek access after proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving material may be out of all proportion to benefits to the open justice principle, and the

> burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger and the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate." (Emphasis added.)

22. Earlier in her judgment, Lady Hale had identified the purpose of open justice as "to enable the public to understand and scrutinise the justice system of which the courts are the administrators" (para 37).

23. Accordingly, whilst the open justice principle is of fundamental importance, it is not the case, as Mr Moss submits, that the Upper Tribunal is under a *duty* to provide him with the documents that he has sought. Lady Hale's analysis at paras 41 – 47 of *Dring* applies to the inherent jurisdiction of "all courts and tribunals". As I have already noted, she emphasised that the extent of access permitted by the court's or tribunal's rules is not determinative (save to the extent that they contain a valid prohibition on non-party access). The provisions of Rule 14 of the Upper Tribunal Rules, which I have already set out, address certain situations in which disclosure or publication is to be prohibited generally or to specified persons; it does not follow that any non-party is *entitled* to any documents that are not the subject of a specific prohibition. As Lady Hale indicated, it is for the person seeking the documents to explain why they do so and how granting them access will advance the open justice principle, in addition to showing that there are no countervailing considerations, including that satisfaction of the request will not be disproportionate. I do, however, accept that the absence of a Rule 14 order or direction is one of the circumstances that falls to be considered.

24. In so far as Mr Moss relies upon *Aria*, the judgment of Judge Greg Sinfield was given prior to and without the benefit of the Supreme Court's decision in *Dring*. At para 20 the Judge said that the Upper Tribunal had an inherent power to grant a third party access to any documents relating to proceedings held in the Tribunal's records, and had "a duty under common law to do so in response to a request by an application unless the UT considers, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons". At para 25 he referred to there being "a strong presumption" that non-parties should be permitted access to such documents (and that the presumption was "particularly strong" where access was sought for a proper journalist purpose).

25. Mr Moss relied upon *Aria* in support of his original submission that provision of the documents was simply the fulfilment of an *administrative duty* on the part of the Upper Tribunal. However, it is plain that the reasoning in *Aria* does not support that proposition; the Judge specifically contemplated an

assessment being made by the Upper Tribunal and the possibility of the view being taken that the documents should not be disclosed, albeit the presumption was in favour of disclosure. Secondly, the analysis in *Aria* must now be read subject to the Supreme Court's decision in *Dring* and in particular the now established need for the non-party to identify why they seek the documents and how acceding to their request will advance the open justice principle.

26. For the avoidance of doubt, reliance upon Article 6 ECHR does not add anything to the common law open justice principle in the present circumstances.

27. I do not consider that *Moss v Information Commissioner* alters the position I have just set out. The appeal related to the different context of whether Mr Moss, a party to those proceedings, was entitled to an anonymity order. The Court of Appeal was not concerned with non-party applications for court documents. References to derogations from open justice being "necessary" (cited by Mr Moss in his current application) were made in that context, whereby an anonymity order is a well-recognised derogation from the principle of open justice (para 24). The court rejected the submission made by Mr Moss that Article 10 ECHR is not engaged when a court or tribunal decides whether to publish certain information, concluding that he was seeking to obstruct the release of normally public information held by a tribunal and that this derogation from open justice had not been shown to be "necessary" in the circumstances (paras 32 and 42 – 46).

28. In his written submissions, Mr Harron suggests that a distinction of principle should be drawn between documents provided to the Tribunal by a litigant in person and those provided by a represented party; and that documents provided by an unrepresented party should only be shared with a non-party where the litigant expressly consented to this. I do not accept that this is the correct position. I can see no reason why the principles that I have set out above should only apply to represented parties. There is no suggestion of such a distinction being drawn in *Dring* or in any of the earlier authorities that I am aware of and such a distinction would be unprincipled and inconsistent with the open justice rationale. The correct approach is the fact-sensitive inquiry identified by Lady Hale. That said, I can see that in some circumstances, particularly in relation to questions of proportionality, the absence of legal representation might be a relevant factor.

29. The Civil Procedure Rules make provision for the supply of documents to non-parties from court records. CPR 5.4C(1) provides:

> "The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
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> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;

> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).

CPR 5.4C(2) provides:

> "A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

30. CPR 2.3(1) defines a "statement of case" for the purposes of the CPR as "a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence" and "any further information given in relation to them voluntarily or by court order under rule 18.1". Accordingly, those are the only documents that are to be provided pursuant to CPR 5.4C(1)(a). This is apparent from the wording of the rules and confirmed by *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 397 (Ch); [2012] 1 WLR 2545, at para 57.

31. Mr Moss suggested that a position analogous to CPR 5.4C(1) should apply in the Upper Tribunal. This was the other main supporting plank of his argument that the Tribunal was under a *duty* to provide the documents to him and that it was unnecessary for him to identify a reason why he wanted them. I do not accept his contention. As I have just explained, a "statement of case" has a particular meaning under the CPR; there is no equivalent concept or definition in the Upper Tribunal Rules and thus an equivalent approach is not easily applicable to the present situation. Nor is there any need for an equivalent rule to apply. Furthermore, even if an analogy could and should be drawn with CPR 5.4C(1) for the purposes of the Upper Tribunal, it would not assist Mr Moss in this instance. It is clear from the terms of his application (read as a whole) and his earlier correspondence that he seeks the parties' written submissions and skeleton arguments. These documents would not meet the definition of "statements of case" even if these were proceedings under the CPR. I note that Mr Moss does not explain what he says constitutes a "statement of case" for the purposes of the Upper Tribunal, although he acknowledges that a skeleton argument may not do so.

32. CPR 5.4C(2) only applies in relation to documents that are part of "the records of the court". This concept was narrowly construed in *Dring* to refer to "those documents and records which the court itself keeps for its own purpose" (para 23). The extent of the court's power to grant disclosure to non-parties under its inherent jurisdiction arose in *Dring* because the application by the non-party did not come within CPR 5.4C(2). The difficulties and uncertainty presented by the concept of "the records of the court" was subsequently discussed by Nicklin J in *Hayden v Associated Newspapers Ltd* [2022] EWHC 2693 (KB) at paras 23 – 29 and 33. In light of this uncertainty, I see no benefit in trying to draw and apply an analogy with CPR 5.4C(2); all the more so as the position under the Upper Tribunal's inherent jurisdiction is in any event clear from *Dring*, as I have set out above and it allows for a fact-sensitive evaluation of the material circumstances. (I mention for completeness that under CPR

5.4C(2) the reason why the document is sought is a relevant factor to be considered: *Hayden* at para 65.)

33. The parties draw attention to the Chamber President's Guidance Note on Third-Party Applications for Copy Documents from the Tribunal's File which has applied in the GRC from 30 July 2019. This Guidance indicates that it is expected that third parties who are requesting documents will initially approach the party who created the documents directly with a request for copies of specified documents which they submitted to the GRC. If provision of the document/s is refused, then the third party can apply to the GRC requesting a formal determination of the dispute. The Guidance also refers to the tribunal's inherent jurisdiction, to the *Dring* test and to factors that the GRC will have regard to in conducting the fact-specific balancing exercise. In this instance Mr Moss has not engaged directly with the parties and, to the contrary, has taken the position (which I have rejected) that they should not be made aware of his application.

Conclusions in respect of the current application

34. I have exercised the Upper Tribunal's inherent jurisdiction, applying the approach identified in *Dring*. I refuse the application for the reasons set out below.

35. I do not consider that Mr Moss has shown a good reason why providing him with the parties' written submissions and skeleton arguments would *advance* the open justice principle. I have already quoted the reason he identifies. It is expressed in one sentence only, with no detail given. He says that he needs copies of the skeleton arguments "to see what arguments were deployed in these cases, to enable me to write about them from an informed point of view". I accept that skeleton arguments may be important documents in understanding the issues before the court: *Dring* at para 29 and *Hayden* at para 32. However, the parties' *relevant* written and oral submissions were identified in considerable detail by Mrs Justice Farbey at paras 58 – 67 of her public decision. Mr Moss does not engage with this and does not explain why this judgment is insufficient to provide him with an informed understanding of the arguments deployed by the parties. In so far as Mr Harron's 30 August 2022 submissions ranged more widely, covering considerable background material, I do not see how this would assist Mr Moss to understand the legal arguments that were advanced. I also note that his earlier July 2022 application for the parties' written submissions relied upon a different reason for seeking the material, namely an alleged advantage that the other parties would otherwise have over him in the High Court proceedings *Moss v Royal Borough of Kingston-upon-Thames*, then due to be heard in October 2022 (and since concluded) – a proposition which Mrs Justice Farbey rejected. In July 2022 Mr Moss did not suggest that he wished to have these documents in his capacity as a campaigner and writer.

36. I am also influenced by the stance that Mr Moss has taken in relation to this matter. Rather than approach the parties directly for the documents, he has: (a) tried to argue that the Upper Tribunal administration was under a duty to provide the written submissions to him despite the September 2022 rejection of his earlier application; and (b) contended that the parties should not be told of his application. At best, this affords no support for the proposition that he has a good reason for the documents and, at worst, it positively undermines it.

37. Whilst I am conscious of the underlying subject matter and events that gave rise to Mr Harron's FOIA requests to RMBC, I bear in mind that no party has positively asserted that provision of the documents in question to Mr Moss would cause a risk of harm. Mr Harron has opposed provision of the material to Mr Moss on the basis that it should only be given with his express consent. RMBC has not made submissions. The Information Commissioner's submissions address the legal principles and indicate that a neutral position is taken to the outcome of the application, albeit the need for Mr Moss to show a good reason that advances the open justice principle and the absence of such a reason is highlighted. As I indicated earlier, I bear in mind that no direction has been made under Rule 14(8).

38. I also take into account proportionality considerations. Mr Moss has not shown that granting his request will not be disproportionate for the Upper Tribunal. Mrs Justice Farbey refused his earlier 31 July 2022 request on grounds of disproportionality, but he has not addressed this aspect at all in his more recent submissions. Disproportionality is all the more likely in circumstances where: no good reason for the request has been shown; a clear understanding of the parties' arguments can in any event be obtained from Mrs Justice Farbey's public judgment; Mr Moss has chosen not to request the submissions from the parties themselves and he could still do so; and he has already made a request for the written submissions that was refused in September 2022.

Mrs Justice Heather Williams DBE

President of the Upper Tribunal Administrative Appeals Chamber

8 May 2023