



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

Appeal Reference: EA/2019/0063

Heard at Carlisle Combined Court

On 11 July 2019

Representation:

Appellant: in person

First Respondent: The Information Commissioner did not appear

Before

JUDGE BUCKLEY

JEAN NELSON

PAUL TAYLOR

Between

DAVID CLEMINSON

and

THE INFORMATION COMMISSIONER

Appellant

First Respondent

DECISION

1. The Tribunal dismisses the appeal for the reasons set out below.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50794134 of 12 February 2019 which held that the Ministry of Justice (MoJ) did not hold the requested information. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

2. Mr Cleminson has been party to a number of cases in Carlisle County Court including CA00212 which was discontinued in October 2001, CA403636 which concluded in March 1995 and CA00858 which was struck out in April 2008. Mr Cleminson is of the opinion that CA403636 is ongoing. We deal with this in our discussion and conclusions below.
3. All these claims arise out of an ongoing dispute about road humps between Mr Cleminson and the Council. We recognise that Mr Cleminson is frustrated and has been frustrated for many years about what he sees as the Council's failure to address this underlying issue. However, the merits and details of that dispute are not within our remit.
4. Civil restraint orders were issued against Mr Cleminson on 20 December 2012 (in relation to claim numbers CA002012/5CA00858), 16 March 2015 (in relation to the same claims) and 13 March 2017 in relation to CA002012. The restraint orders prevent Mr Cleminson from 'issuing claims or making applications in Carlisle County Court concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made' without first obtaining the permission of the specified Judge.
5. Whatever the case number specified in those orders, given that all Mr Cleminson's claims arise out of the same dispute with the Council they all concern a matter 'involving or relating to or touching upon or leading to the proceedings in which this order is made', including CA403636, even though that case number is not used in the civil restraint orders.

Request, Decision Notice and appeal

Request

6. On 24 July 2018 Mr Cleminson made a request for information to the MoJ, the material part of which reads:

[4] Please provide cost of making the series of extended civil restraint orders from 2005 in respect of case number CA002012 as payable at the public's expense, and this includes the present extended civil restraint order that cannot be based on the defendants evidence in support of the

compliance towards the England and Wales Road Hump Regulations, due to no supportive evidence has been served upon me the claimant to this date over the past 24 years and escalating at the public's expense.

7. The MoJ responded on 10 September 2018 stating that it did not hold any information within the scope of the request because the court files relating to CA002012 and CA403636 had been destroyed, there is no fee for a civil restraint order and no information was held regarding the cost of making extended civil restraint orders.
8. The MoJ conducted an internal review and upheld its decision by letter dated 11 October.
9. On 13 October 2018 Mr Cleminson amended his original request as follows:

Cleminson v Cumbria County Council Case Number CA00212

...

1. *The extended civil restraint order as made at the public's expense on the 13th March 2017 which is based upon reading the court file which must remain within the court file for a minimum of 3 years. (See attached copy) Please tell me the cost's involved within making this extended civil restraint order, this will include the length of time the judge spent when reading the court file if it existed at the time of imposing the extended civil restraint order.*
 2. *Your compliance to my F.O.I. request is vital due to the Ministry of Justice letter in a envelope post marked Carlisle & dated 11.10.18 claiming the court file under case number CA002012 has been destroyed. Hence to quantify the contents of the extended civil restraint order being genuine & not made via false pretences the court file must be held within the court files to validate the order.*
 3. *If the court has no such court file please submit to me an application for to apply for court orders to order the defendant to comply with the laws & regulations as made by Parliament, (ie) their duty as Highways Authority to assert & protect my rights as a disabled person to access all areas, & to comply with the England & Wales Road Hump Regulations & the Care Act as we are a disabled family without adult social care support from the defendant.*
10. It is this latter request which forms the subject of this appeal, although it must be read in the context of the earlier request.

Response

11. In its response dated 6 November 2018 the MoJ denied holding the requested information. In relation to point 1 the MoJ stated that civil restraint orders don't carry a fee and no record is kept of the amount of time the judge spent reading the file. In relation to 2 and 3 the MoJ stated that these were not requests for recorded information. It confirmed that the case files relating to CA002012 and CA403636 have been destroyed in line with the Record and Retention and Disposition Schedule and that the applications to extend the restraint order were made on the basis of papers/bundles served by Mr Cleminson on 27 February

2015 and 10 February 2017 which were preserved separately to the original court files.

12. On 8 November 2018 Mr Cleminson made a separate request to access those papers/bundles, which is not the subject of this appeal.
13. By letter dated 29 November 2018 the MoJ upheld its decision on internal review.
14. Mr Cleminson referred the matter to the Information Commissioner on 1 December 2018. During the Information Commissioner's investigation, the MoJ informed the Commissioner that it did not regard parts 2 and 3 of the request as requests for recorded information.

Decision Notice

15. In a decision notice dated 12 February 2019 the Commissioner decided that on the balance of probabilities the MoJ did not hold any information within the scope of the request.
16. Taking into account Mr Cleminson's other correspondence the Commissioner interpreted the request as a request for information in the relevant file as well as information about the costs of making the Order. It agreed with the MoJ that parts 2 and 3 of the request were not requesting recorded information. It concluded on the balance of probabilities that the MoJ did not hold any information within the scope of part 1.

Grounds of Appeal

17. The Grounds of Appeal are in summary that the Commissioner was wrong to conclude that the information was not held on the balance of probabilities. In particular Mr Cleminson submits that the evidence shows that the court file has not been destroyed including a letter from Crutes solicitors dated 20 October 2000 and extended civil restraint orders dated 20 December 2012, 16 March 2015 and 13 March 2017 which all refer to reading 'the court file'.

The Commissioner's response

18. In summary the Commissioner contends that the Decision Notice was correct to conclude that, on the balance of probabilities, the MoJ did not hold information in the scope of the request. The Court has subsequently confirmed that the Crutes letter relates to a different court file.

The Appellant's response

19. Mr Cleminson's response is contained in a letter of 12 April 2019 and two letters of 14 April 2019.

20. In his letter of 12 April 2019 to the Commissioner Mr Cleminson makes a number of points which the Tribunal has taken account of where relevant. In particular he states that the Commissioner has failed to note that the Court requested a court fee in relation to case number CA403636 on 31 December 2014 which was paid on 5 January 2015, but no Court hearing has yet taken place.
21. Mr Cleminson's response of 14 April 2019 is wide-ranging. The Tribunal has read it and taken account of the relevant parts. The most relevant parts of it are that, in summary, the Commissioner failed to refer to a number of issues which Mr Cleminson considers relevant; the Commissioner has not noted that case number CA403632 is ongoing as a result of the agreement with Crutes solicitors on 16 April 1995. Mr Cleminson also questions, in a separate letter of the same date, how it can be claimed that the court file has been destroyed while the extended civil restraint order remains in force.

Legal framework

22. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities.
23. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

24. We have read and were referred to an open bundle of documents. Mr Cleminson made oral submissions and provided a number of further documents in the hearing and by email after the hearing, copies of which were provided to the Information Commissioner.

Issues

25. The issue we have to determine is whether, on the balance of probabilities, the MoJ held any information within the scope of the request.

Discussion and conclusions

The scope of the request

26. We agree with the Commissioner that parts 2 and 3 of the October request are not requests for information. In relation to the first part of that request, the MoJ and the Commissioner have interpreted it in the context of other correspondence from Mr Cleminson as a request for (i) information on the costs of making a civil

restraint order and (ii) any information on the court file relied on in making the civil restraint orders relating to, inter alia, CA002012.

Preliminary observations

27. Although the MoJ has not relied on the exemption in s 32, Mr Cleminson should be aware that even if the court files had not been destroyed, he has no right under FOIA to information which is held only because it is in a court file. There is an absolute exemption under s 32(1) for information 'held only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter'.
28. Secondly, we note that such information is likely also to be Mr Cleminson's personal information, which again is subject to an absolute exemption under s 40(1) FOIA.

On the balance of probabilities did the MoJ hold any information within the scope of the request?

29. Dealing firstly with the request for information on the 'cost' of making such an order, we accept the explanation that there is a specific fee associated with making such an order and that records are not kept of the time taken by the judge in making such an order because there is no business reason to hold such information. We accept that such information is not held on the balance of probabilities.
30. In relation to the request relating to information held on the various court files in the proceedings to which the civil restraint orders relate, we note first of all that the claimant's concern appears to be that the civil restraint orders stated that they were made on the basis of 'reading the file', whereas the MoJ has confirmed that the files have been destroyed. Firstly, we have no reason to doubt the evidence that the documents referred to as 'the file' taken into account were those papers delivered to the Court by the Claimant in 2015 and 2017.
31. Secondly, if the claimant was concerned that the civil restraint orders were made without any evidence to support them, and therefore were wrongly made, the proper course of action is set out in the order i.e. applying to have the order set aside no more than 7 days after it was served. The claimant also has the option of making an application to discharge the order and, if necessary, applying for permission to appeal a refusal of such an application.
32. Turning to the question of whether or not the information is held on the balance of probabilities, we have to consider whether we accept the MoJ's evidence that all the relevant case files have been destroyed. We endorse the Commissioner's disappointment in the MoJ for not having a record of the destruction of the files. Not only is this best practice, but it makes appeals such as this less likely.

33. The claimant's broad point is that it is not true that the files containing the relevant information have been destroyed.
34. Dealing firstly with the claimant's reliance on the letter dated 20 October 2000; an email from the MoJ dated 9 April 2019 (p29 of the bundle) contains a 'note from the court'. It reads:

The letter dated 20 October 2000 is on a file that was issued by Cumbria County Council against D Cleminson. This High Court writ (1998-C-20) was present in the documents that D Cleminson viewed on 28/1/19.

The writ was issued against Mr Cleminson as he had judgment entered against him on 20/6/1996 for the sum of £5070.30 on case number CA501758 (we do not have this file either) – so Mr Cleminson owed the money – This does not relate to CA0020012 at all

The writ folder was viewed by Mr Cleminson

Following the writ being issued a writ of fieri facas was then issued against Mr Cleminson to enforce return of the monies.

We have no original files that Mr Cleminson issued. The writ was issued by Cumbria County Council to obtain the monies that Mr Cleminson owed them

35. We accept that this note is an adequate explanation for the existence of that letter and it is not evidence that the other case files have not been destroyed.
36. Part of Mr Cleminson's argument rests on the basis that CA403636 is ongoing, and that therefore, in his view, the CA403636 file is likely to have been retained. We have seen a judgment dated 30 March 1995 in that claim. That appears to us to be a final judgment. The judgment allows an application to amend the claim to include a claim for hire of garage and loss of use of road tax. The judgment determines liability in Mr Cleminson's favour and orders the defendant to pay damages and the court fee and expenses. A normal reading of this judgment would be that the order for damages includes an amount for hire of garage and loss of use of road tax, however it is apparent from the letter to Crutes solicitor dated 16 April 1995 that Mr Cleminson understood the order to mean that he was entitled to claim those items on a continuing basis until some future date.
37. On 30 December 2014 Mr Cleminson appears to have made an application for 'costs' in case number CA40636. This appears to be an application for the ongoing claims for hire of garage and loss of use of road tax which he thought had been permitted by the judgment of 30 March 1995. He paid the court fee on 5 January 2015. At that stage the extended civil restraint order issued on 20 December 2012 was still in force. It appears likely that applying for those damages in relation CA403636 fell within the terms of the civil restraint order.

38. Further Mr Cleminson submitted an application to 're-open' case no CA403636 on 24 April 2019. This suggests an acknowledgement that the Court, at least, views the case as closed. Our view that the judgment dated 30 March 1995 was a final judgment is supported by the order of District Judge Dodd dated 19 April 2019 (striking out the claimant's application to re-open the case) and which states that: '*On 30 March 1995 the Claimant (then the Plaintiff) obtained final judgment against the Defendant in this claim*'. The claimant wrote to the court objecting to his application being struck out and a hearing has been listed for 26 July 2019 to consider whether the strike out order should be set aside, varied or discharged.
39. In our view, none of this activity in relation to CA403636 since March 1995 makes it any more likely that the Court would have retained the file any longer than usual after the original judgment in March 1995.
40. On this basis we do not accept that the evidence relied upon by the claimant means that it is unlikely that the files would have been destroyed. Given the passage of time in all the claims, we find that it is highly likely that the files would have been destroyed and we accept that this is the case on the balance of probabilities. We find on the balance of probabilities that the MoJ hold no information within the scope of the request.
41. This is a unanimous decision.

Sophie Buckley

(Judge of the First-tier Tribunal)

Date: 18 July 2019

Promulgated: 22 July 2019