

## **JUDICIAL EXEMPTION TO PERSONAL DATA ACCESS: X v (1) TRANSCRIPTION AGENCY (2)** **MASTER JAMES**

### **Introduction**

1. In the case of *X v (1) The Transcription Agency (2) Master James* [2023] EWHC 1092, handed down on 9<sup>th</sup> May 2023, the High Court (Farbey J) has for the first time considered in detail the scope of the judicial exemption<sup>1</sup> to the right to access to personal data under the GDPR and DPA 2018.
2. The judgment is notable for:
  - a) its detailed consideration of the scope of the judicial exemption<sup>2</sup>. The tasks undertaken by D2 in relation to the production of transcripts of proceedings, and the data processed for the purposes of those tasks, are judicial tasks performed as part of a judge's judicial functions, they are covered by the exemption.
  - b) its careful analysis of a fair procedure to be adopted when a party wishes to withhold disclosure – although it is in the context of the judicial exemption, it is of relevance to many such disputes under the DPA 2018/GDPR.

### **Summary**

3. In summary, Farbey J held that:
  - a) the scope of the judicial exemption was very wide and was apt to encompass all judicial functions.
  - b) (i) the appropriate process for scrutiny entitled the court to conduct it in the absence of the applicant and his representatives and that (ii) the problems raised by their absence could be catered for by a carefully considered closed session.
  - c) (on the facts) the documents fell under the judicial exemption and none of them were disclosable.
  - d) D1 was a data processor in any event.

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<sup>1</sup> The judicial exemption excludes from the scope of data protection information processed by an individual acting in a judicial capacity or a court or tribunal acting in its judicial capacity.

<sup>2</sup> Reliance was placed on the recent EUECJ case of *X and Z v Autoriteit Persoonsgegevens* [2022] EUECJ C-245/20 (24 March 2022).

## **Factual Background**

4. C (anonymised) brought proceedings against D1 (provider of court transcription service) and D1 (Costs Judge) for disclosure of his personal data pursuant to Article 15 of the GDPR and DPA 2018.
5. He had previously made subject access requests for the supply of his personal data but the request was refused primarily on the ground that it was exempt from disclosure. C sought an order that Ds comply with their obligations under GDPR and DPA 2018 and declarations to that effect. D2 asserted a blanket judicial exemption. D1 asserted the same exemption but added that it was a data processor in any event.

## **Scope of the Relevant Exemption**

6. The relevant exemption under para 14 of Part 2 of Schedule 2 to the DPA 2018 applies to enable personal data to be withheld from an individual if it is processed by an individual or court acting in a judicial capacity or if its disclosure would be likely to prejudice judicial independence.
7. The primary issue for the court (given the absence of any previous High Court or appellate authority) was whether Ds were entitled to withhold some or the entirety of C's personal data on the basis of the judicial exemption (par 5 i). The subsequent issue was the procedure for consideration of whether the judicial exemption applies: does the court have power to consider the withheld material in closed session (i.e., in the absence of C and his legal representatives)?
8. Ds provided bundles of "closed" material (i.e., the documents which were sought to be withheld) to the court but not the other parties. D1 also provided to C *de bene esse* some material which it maintained was not disclosable as it did not contain personal data at all.

## **Key Legislation**

9. Under Article 15 of the UK GDPR, a data subject shall have the right to obtain from the controller (but not the processor: UK GDPR art 4(8); DPA 2018, S 32) confirmation as to whether or not personal data concerning him or her are being processed and where that is the case access to the personal data.
10. The judicial exemption disapplies Art 15 where processed by an individual acting in a judicial capacity or a court or tribunal acting in its judicial capacity: para 14, Schedule 2 of DPA 2018.
11. The burden is on the party seeking to rely upon the judicial exemption to do so with significant and weighty grounds and evidence.

## Decision

12. The Judge held that there was an intrinsic and enduring connection between the independence of the judiciary and its immunity from suit. Their immunity means that they are not the subject of partisan pressures and free to take decisions that may have significant adverse consequences for a party without the threat of civil litigation. The same reasoning and principles apply to ensuring the independence of the judiciary under par 14 whether in relation to the exemption for judges acting in a judicial capacity or to judicial independence in direct terms (par 72).
13. It was wrong to suggest that in the interests of rooting out wrongdoing, the judicial exemption should be narrowly construed and restricted to matters relating to the production of judgments or the making of decisions. There are alternatives such as an appeal or complaints of judicial misconduct to JICO and JACO (par 75).
14. The judicial exemption is limited to paragraph 14(1) and (2) and is not a “status-based” exemption (par 77). Ultimately, Parliament intended that all judicial functions should be covered by the exemption and that the tasks “undertaken by the second defendant in relation to the production of transcripts of proceedings, and the data processed for the purposes of those tasks, are judicial tasks performed as part of a judge’s judicial functions”. The personal data processed by a judge and a transcriber for the purpose of litigation and in the context of court proceedings are captured by either para 14(2) or alternatively para 14(3)(par 92 and 94).
15. Notably, she also held that the Judicial Guidance (on which C relied) was not a proper interpretative tool and not all its examples stand up to analytical scrutiny (par 80).

### **Procedure for Consideration of whether the Judicial Exemption Applies**

16. The Judge then went on to consider the correct method for consideration of exempt data in the closed bundles.
17. Under the DPA 1998, s 15(2) permitted the court to consider the data and determine whether an exemption applied in the absence of C and his legal representatives. However, the DPA 2018 contains no such provision – and the White Book says there is “no explained reason” for the omission.
18. She held that it would defeat the purpose of the legislation if a person challenging the application of an exemption were to be given sight of the material for the purpose of advancing his or her arguments<sup>3</sup> (par 106).

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<sup>3</sup> C did not suggest a special advocate or confidentiality ring.

19. In the interests of fairness and open justice, the following procedural safeguards were applied:

- a) the length of the closed sessions was kept to a necessary minimum.
- b) D1 did not attend the closed session of D2 and vice versa and then there was a third closed session attended by both defendants' lawyers in order to check that the proposed gist of the closed sessions for reading out in open court was accurate.
- c) counsel were members of the independent Bar with regulatory, professional and ethical duties to the court that arise when one party to the proceedings does not appear before the judge. The solicitors attended in order that a further lawyer with regulatory and professional obligations could observe the interactions between counsel and the court.
- d) the closed sessions were limited to discussion with counsel as an aid to the court's inspection of the data.
- e) C provided written lists of questions for the court to consider in reviewing the respective defendants' closed bundles. These were the subject of discussion with counsel in the closed sessions.
- f) J probed counsel on any HRA points and adopted "a more inquisitorial role than would have been appropriate in some other civil proceedings".
- g) J composed a gist of the closed sessions which she read out in open court.
- h) in addition to the gist of the closed sessions, both defendants were willing to provide the claimant with some insight into the substance of the withheld data on a purely voluntary basis.

20. The facts of the case disclosed no documentation which was not covered by the judicial exemption and no evidence to suggest that D2 had any reason to hold data about C that was not connected to her being the judge in his case.

21. On the basis of all the open and closed evidence, the Judge was satisfied that (a) D2 processed C's personal data acting in a judicial capacity and (b) D1 processed his data only as an adjunct to judicial processing. Both defendants could rely on the judicial exemption on the grounds that D2 was acting in a judicial capacity (par 142). D1 was a data processor for all material purposes in any event (par 153 – 158).

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**9<sup>th</sup> May 2023**

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.