Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 June 2011

Public Authority: **Ministry of Justice**
Address: **102 Petty France**
London
SW1H 9AJ

Summary

The complainant requested information regarding a named person's Certificate of Conviction from Her Majesty's Court Service ('HMCS'). The public authority responded by neither confirming nor denying if the information was held relying on section 32(3) (court records) and section 40(5) personal information. The Commissioner finds that the public authority applied the exemption provided by section 32(3) correctly and he therefore did not go on to consider section 40(5).

The Commissioner's Role

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.

Background

2. The complainant explained to the Commissioner that the organisation he represents had for many years received information it requested from courts on convictions of its members or former members. He went on to explain that in seeking information on current and former members' activities the organisation is fulfilling its Royal Charter duty of protecting the public interest and operating its regulatory duties.

The Request

3. The Commissioner notes that under the Act Her Majesty's Courts Service is not a public authority itself, but is actually an executive agency of the Ministry of Justice which is responsible for Her Majesty's Courts Service. Therefore the public authority in this case is actually the Ministry of Justice not Her Majesty's Courts Service. However, for the sake of clarity, this decision notice refers to Her Majesty's Courts Service as if it were the public authority.

4. On 5 August 2010 the complainant wrote to HMCS with the following request:

   "[A named person] is a former member of this Institute. As such, he is entitled to apply for readmission at any time. I should therefore be grateful if you would supply me with a copy of the Certificate of Conviction relating to him…"

5. On 9 August 2010 HMCS responded citing sections 32(3) and 40(5) of the Act stating:

   "I can neither confirm nor deny that HMCS holds the information you are seeking."

6. On 20 August 2010 the complainant asked for further consideration to be given to his request. He included an article from the Sheffield Star newspaper regarding the matter to support his argument that relevant information was already in the public domain and the subject of public comment.

7. On 3 September 2010 HMCS responded, upholding its original decision to withhold the requested information under sections 32(3) and 40(5).

8. On 9 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled and to request his view of HMCS's response.

9. On 30 September 2010 the Commissioner wrote to the complainant with advice and assistance.

The Investigation

Scope of the case

10. On 1 November 2010 the complainant contacted the Commissioner again to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

    - The requested information was *'a record of decision, not documents prepared for the purposes of court proceedings'.*
    - The information requested is already in the public domain.

Chronology

11. The Commissioner contacted the MoJ on 10 February 2011 and requested further information in respect of this case.

12. The MoJ wrote to the Commissioner on 8 March 2011 with the requested information.

Analysis

Exemptions

Section 32

13. Section 32(1)(c)(i) and (ii) provides that information held by a public authority is exempt information if it is held only by virtue of being contained in any document created by a court for the purposes of proceedings in a particular cause or matter. Section 32(3) states that the duty to confirm or deny does not arise in relation to information which is (or would be, if it were held) exempt information by virtue of this section. In considering the HMCS's application of section 32(3) the Commissioner has first reflected on whether a 'Certificate of Conviction' is a document created by a court for the purposes of proceedings.

14. A court issues a Certificate of Conviction under section 113 of the Powers of Criminal Courts (Sentencing) Act 2000 and it is therefore clear that a certificate of conviction is a document created by a court. The complainant has stressed to the Commissioner that he is in agreement with this point.

15. The Commissioner then considered whether the certificate can be said to have been created for the purpose of proceedings in a particular cause

or matter. The Commissioner applied the 'dominant purpose' test to determine whether the dominant purpose of the certificate is to record a decision that is made in proceedings. The Commissioner concluded that because the certificate is a key part of the administration of a particular court case, it is created for the purposes of proceedings in a particular cause or matter.

16. During the Commissioner's attempt to informally resolve the case he explained his considerations to the complainant who subsequently responded and disagreed with the Commissioner's opinion. The complainant commented as follows:

"To our mind that phrase admits of only one interpretation, and that is that to fall within the definition of s32 the document must be created in order to further the proceedings in the cause or matter – i.e. it must be created during the course of the proceedings as part of the process which drives those proceedings forward. The Oxford English Dictionary definition of 'proceed' when linked with an action is 'be carried on or continued'. The Certificate of Conviction does not form part of the continuance or progression forward of any cause or action – it is the record of what occurred once the proceedings were concluded."

17. The Commissioner notes the legal definition of the noun 'proceeding' as '*a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws or regulations.'* The Commissioner's view is that the stage of the proceedings at which information is created is not significant, whether that is prior to, during, at the end of, or even post proceedings.

18. The Commissioner reviewed his guidance with reference to the Information Tribunal in the case of DBERR v ICO and Peninsula Business Services Ltd (EA/2008/0087) and also notes that section 32(1) can continue to apply if information originally obtained from a court record is later used for a different purpose.

19. The complainant argues that section 32(3) of the Act does not apply to records of decisions of the court in open session. However the Commissioner would point out that although cases in court in open session are deemed to be in the public domain, once the case is decided, and the file closed, the information regarding the case is no longer in the public domain.

20. The Commissioner has found that the information requested by the complainant if held by HMCS would be held in a relevant document created by the administrative staff of a court. He has also found that if the requested information is held it would have been created for the purposes of proceedings in a particular matter and would be held only by

virtue of being contained in a document created for the purposes of proceedings in a particular matter. The Commissioner's conclusion is that if the information is held it would be exempt by virtue of engaging section 32(1)(c)(ii). He therefore also concludes that section 32(3) is engaged in this case. As section 32 is an absolute exemption the Commissioner did not consider the public interest test.

21. For completeness, the Commissioner points out that the Act is applicant and purpose blind with regard to requests made under it. Therefore the complainant's motives cannot be taken into consideration when determining the application or otherwise of an exemption. Furthermore, when considering the application of section 32(3) an assessment as to what is already in the public domain need not be considered by a public authority.

22. In addition, although the Commissioner recognises that a Certificate of Conviction is likely to be used for other purposes, there is nothing in s32(1) that limits the way in which the information may be used or processed, as long as it was only acquired for the purposes of proceedings.

Section 40

23. As the Commissioner has found the information exempt by engaging section 32(3) it has not been necessary to also consider section 40(5).

The Decision

24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    Arnhem House,
    31, Waterloo Way,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@tribunals.gsi.gov.uk.
    Website: www.informationtribunal.gov.uk

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 22nd day of June 2011

Signed ……

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Court Records

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.

Personal information

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5) provides that –

"The duty to confirm or deny-

(a) 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 subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –

“In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.”