

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 March 2016

**Public Authority:** Department for Work and Pensions  
**Address:** 6 -12 Tothill Street  
London  
SW1H 9NA

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of the written observations submitted by the UK government, in a particular matter, to the European Court of Justice.
2. The Commissioner's decision is that the Department for Work and Pensions ("DWP") correctly relied on section 32(1)(a) to withhold the requested information.

#### Request and response

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3. On 10 April 2015, the complainant requested information from DWP as follows;
  - "Please may I have a copy of the written observations submitted by the UK government in the European Court of Justice case C-67/14 "Jobcenter Berlin Neukoln v. Alimanovic", which deals with entitlement to benefits of out-of-work people from other Member States, as I can't find them published anywhere.
4. The DWP responded on 11 May 2015. It stated that whilst it held the requested information it was withholding it from the complainant by virtue of section 32.
5. Following an internal review the DWP wrote to the complainant on 19 June 2015. It stated that it upheld its original position.

## Scope of the case

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6. The complainant contacted the Commissioner 30 June 2015 to complain about the way his request for information had been handled.

## Reasons for decision

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7. Section 1(1) of FOIA provides that:

Any person making a request for information to a public authority is entitled:

“(a) to be informed in writing by the public authority whether it holds information of the description specified in the request,

and

(b) if that is the case, to have that information communicated to him.”

8. The DWP, in its letter to the complainant dated 11 May 2015, informed him it held the requested information.
9. Section 32(1)(a) states that information is exempt (from being communicated to the complainant) if it is 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.
10. Section 32(4) states that, “In this section- (a) “court” includes any tribunal or body exercising the judicial power of the State.”
11. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a document filed with a court in relation to a particular cause or matter? Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?
12. The complainant, in correspondence to the Commissioner dated 29 September 2015, made a number of submissions regarding the public authority’s reliance on section 32. A summary of his submissions are as follows;
  - Section 32(4) provides that a court includes any tribunal or body exercising the judicial power of the State. The ECJ might not fall within this definition as it does not exercise the judicial power of the State.

- It was for the national court to exercise the judicial power of the State in relation to the matters before it, but the UK written observations were not prepared for the purposes of proceedings before the national court and were neither filed with nor otherwise placed in the custody of this court.
  - The purpose of the legislation (i.e. section 32) has been spelled out in some detail during its passage through Parliament. This was that because there already existed mechanisms by which applications could be made to the courts for documents prepared for court proceedings, and that the courts' prerogative in dealing with such applications would be undermined by an alternative route under the FOIA. However, no such mechanism exists in relation to documents filed with the ECJ, and so the general intention of at least the possibility of disclosure that underpins the FOIA is not met.
  - There appears to have been at least one occasion on which the UK's written observations to the ECJ have been provided under the FOIA, as reported here<sup>1</sup>.
  - As far as I can establish, the rules governing the ECJ do not prohibit the publication by a member state of any written observations made to it by that member state. Indeed, as such observations are made entirely at the discretion of the member state in question, and have no evidential worth as they merely express the member state's views on the interpretation of the law, there would be no reason to do so.
13. The Commissioner notes The Court of Justice ("European Court of Justice") interprets European Union ("EU") law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.
14. The Commissioner takes the position that section 32(4)(a) does not provide a complete definition of 'court' because the word 'includes' suggests that it carries a broader meaning than 'any tribunal or body exercising the judicial power of the state'.
15. The Commissioner is therefore satisfied that section 32(4)(a) allows sufficient leeway for an authority to rely on the exemption in cases where the court in question (as is the case here) does not exercise the

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<sup>1</sup> [http://conflictoflaws.net/News/2009/11/UK-Written-Observations\\_P1.pdf](http://conflictoflaws.net/News/2009/11/UK-Written-Observations_P1.pdf)

judicial power of the state and yet is an international court whose jurisdiction the UK has recognised<sup>2</sup>.

16. The Commissioner therefore considers that the DWP has correctly applied section 32(1)(a) FOIA to the withheld information in this case. The Commissioner has no reason to doubt the assertion of the DWP that the requested information is held solely by virtue of it being in a document filed with the ECJ. Indeed the complainant's request is seeking a document filed with the ECJ. Section 32 confers absolute exemption on information to which it applies, so no consideration of the public interest test is required.
17. The Commissioner next turns to the complainant's submissions that have not been addressed above. Notwithstanding the primary purpose of section 32 (as identified by the complainant) the wording of section 32 is clear and relatively unambiguous and must be applied as such by the Commissioner. As to the decision of another public authority not to rely on section 32 (to withhold another UK submission), that was its decision that does not fetter the Commissioner or the DWP in this matter.

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<sup>2</sup> <http://www.bailii.org/uk/cases/UKHL/1990/7.html>

## Right of appeal

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18. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

19. 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.
20. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

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