

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2018

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

Decision (including any steps ordered)

1. The complainant requested handwritten notes of the judge in his employment tribunal. The Ministry of Justice has neither confirmed nor denied whether it holds any information by virtue of section 32(3) (court records) of the FOIA.
2. The Commissioner's decision is that the Ministry of Justice has applied section 32(3) of the FOIA appropriately.
3. The Commissioner does not requires the Ministry of Justice to take any steps as a result of this decision notice.

Background

4. Initially when the complainant submitted his request of 24 October 2017 (as set out below) to the Ministry of Justice (MoJ), it explained that it considered that he was making a request for his own information. However, it did not explain which exemption it was applying. The complainant complained to the Commissioner.
5. The Commissioner issued a decision notice¹ finding that the MoJ had to issue a fresh response, confirming whether it holds the information or is

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258260/fs50708245.pdf>

neither confirming nor denying whether it holds it, the exemption it is relying on and why.

6. The MoJ provided a fresh response on 23 February 2018.

Request and response

7. On 24 October 2017, the complainant wrote to MoJ and requested information in the following terms:

"As the ICO decision detailed below confirms that that Tribunals [sic]/Judge's Handwritten Notes are on the case file of Tribunal Case No: [specific number] I would like to request a copy of all the said handwritten notes in accordance with the Freedom Of Information Act."

8. The MoJ responded on 23 February 2018. It neither confirmed nor denied holding the information by virtue of sections 32(3) and 40(5).
9. The complainant did not request an internal review. However, the MoJ confirmed that if an internal review had been carried out, it would have upheld its application of sections 32(3) and 40(5).

Scope of the case

10. The complainant contacted the Commissioner on 23 February 2018 to complain about the way his request for information had been handled. He explained that the tribunal's/judge's handwritten notes are a detailed reflection of the written court judgment and should be accessible in the same way as the written court judgment, in accordance with the FOIA, especially as the MoJ has previously confirmed that these notes are on the court file.
11. The Commissioner has considered the MoJ's application of section 32(3).

Section 32 - court records, etc.

12. Section 32(3) of the FOIA provides that if a public authority receives a request for information which, if held, would be exempt under section 32, it can rely on section 32(3) to neither confirm nor deny whether or not it holds the requested information.
13. Section 32(1) and (3) of the FOIA states:

“(1) 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) member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

(3) 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.”

14. Section 32 is an absolute exemption and is therefore not subject to any public interest considerations.
15. The Commissioner has produced guidance on section 32² (the guidance) which sets out her interpretation of this exemption:

“We believe that section 32 was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings.

In effect, section 32 ensures that FOIA can't be used to circumvent existing court access and discovery regimes. Also, public authorities won't be obligated to disclose any information in connection with court, inquiry or arbitration proceedings outside those proceedings.”

16. The MoJ explained that section 32 exempts information held by a public authority if it is held only by virtue of being contained in a court record. The FOIA defines the documents that this covers and in this case it is considered that data relating to all civil court proceedings would contain documents created by the court and the court staff.

² <https://ico.org.uk/media/for-organisations/documents/2014222/section-32-court-inquiry-arbitration-records.pdf>

17. Additionally, the MoJ pointed out that in this case, to disclose whether it did or did not hold the court records in question, would in itself disclose to the world at large that sensitive personal information of the requester was or was not held.

18. In her guidance, the Commissioner considers what is meant by 'created by the court' and explains that when interpreting this term, authorities should follow the definition provided by the Information Tribunal in *Mitchell v ICO* EA/2005/0002 (10 October 2005)³. It concluded that this phrase refers to documents created by the judge:

'Documents created by members of court staff are dealt with in s.32(1)(c)(ii) so that the creator for the purposes of subparagraph (i) must be somebody outside their ranks. In our opinion, this can only be the judge, for whom the term "court", or more often "the court", is a familiar synonym...We acknowledge that such a construction results in "a court" being given a different meaning in s.32(1)(c) from s.32(1)(a), where the reference is to the institution...We are nevertheless driven to the conclusion that s.32(1)(c)(i) must refer to judicially created documents...'

19. The Commissioner is therefore satisfied that the requested information, if held, would have been created by a court, for the purposes of section 32(1)(c)(i).

20. The Commissioner considers that the MOJ was entitled to rely on section 32(3) to neither confirm nor deny whether it held information within the scope of the request.

21. As the Commissioner considers that the section 32(3) exemption is engaged she has not considered the MoJ's application of section 40(5).

³http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i47/mitchell_v_information_commissioner.pdf

Right of appeal

22. 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 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. 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.
24. 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

Deborah Clark
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