CO/7463/2009

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 19 January 2010

B e f o r e:

MR JUSTICE CALVERT SMITH

- - - - - - - - - - - - - -

Between:
DOMINIC KENNEDY

Appellant

v

THE INFORMATION COMMISSIONER

First Respondent

CHARITY COMMISSION

Second Respondent

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Mr Philip Coppel QC appeared on behalf of the Appellant
The First Respondent was not represented, did not attend
Mr Jason Beer appeared on behalf of the Second Respondent

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J U D G M E N T

MR JUSTICE CALVERT SMITH:

1. This is an appeal on a point of law from a decision of the Information Tribunal under Section 59 of the Freedom of Information Act 2000. The case was listed as The Times Newspapers v Information Commissioners but should have been listed as Dominic Kennedy v The Information Commissioner and the Charity Commission.

2. Since this appeal concerns the law and not the facts or the merits of the underlying application by the appellant for information, a brief summary is all that is needed.

3. Mr George Galloway, who has been an MP since 1987, founded in 1998 the "Mariam Appeal". Although the objects of the Mariam Appeal were stated to be charitable objects it was not registered as a charity. Its known income was nearly £1.5 million until its closure in 2003.

4. The appellant Dominic Kennedy is a journalist on The Times newspaper. In 2003 he began to investigate the Mariam Appeal. Following articles in The Times newspaper in which allegations were made in respect of the Mariam Appeal, the Charity Commission opened an evaluation, following which it instituted the first of three inquiries under Section 8 of the Charities Act 1993 into the Mariam Appeal. The result of the first two inquiries were published in June 2004 in a Statement of Results of the Inquiry (SORI).

5. Following further information from other sources and further pressure from the appellant himself, a third statutory inquiry was instituted by the Charity Commission in December 2005. This inquiry reported its conclusions on 8 June 2007. Later the same day the appellant made a request for information to the Charity Commission under Section 1 (1) of the Freedom of Information Act 2000. On 4 July 2007 the Charity Commission refused his request, citing, inter alia, the exemption from disclosure under Section 32 of the Freedom of Information Act.

6. On the same day and subsequently the appellant asked the Charity Commission to review that initial decision. By a decision dated 25 July 2007, the Charity Commission upheld its refusal, stating that in its opinion the absolute exemption contained in Section 32 (2) of the Freedom of Information Act applied to the information sought.

7. On 1 November 2007 the appellant complained to the Information Commissioner by letter. On 5 August 2008 the Information Commissioner informed Mr Kennedy that his complaint had been rejected on the basis of the exemptions in Section 32 (2) (a) and (b) of the Freedom of Information Act.

8. On 7 October 2008 the appellant appealed against that decision to the Information Tribunal. On 24 November 2008 the Charity Commissioner was joined to that appeal as an interested party. After a hearing, which was partly open and partly closed, during which witnesses gave evidence and were cross-examined, the tribunal ruled on 14 June 2009. It held that some of material held by the Charity Commission

fell outside the Section 32 (2) exemption but that the bulk of the material sought fell within it. In relation to the material falling within s.32(2), the Tribunal did not consider the other exemptions claimed by the Charity Commission.

9. The appellant appeals to this court against that finding, accepting of course that even if he is successful, it may be that some or all of the information falling within the terms of the request might be held exempt under other Freedom of Information Act exemptions relied upon by the Charity Commission. As just noted, the Tribunal did not rule upon the applicability of those exemptions in relation to the information held exempt under s.32(2).

10. All were agreed that the three inquiries were inquiries which fell into the category set out in Section 32 (2) of the Freedom of Information Act.

11. The Information Commissioner, who was represented at the tribunal and supported the submission of the Charity Commission at that hearing, has not appeared at this appeal but indicated that he is content for the Charity Commission (the second respondent) to present the arguments that it presented before the tribunal and which he supports.

12. The statutory framework under which the tribunal and this court are operating can be summarised as follows. Section 8 of the Charities Act 1993 ("the 1993 Act") is headed 'General Power to Institute Inquiries'. Section 8 (1):

> "(1) The [Commission] may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes, but no such inquiry shall extend to any exempt charity" -
>
> "(2) The [Commission] may either conduct such an inquiry [itself] or appoint a person to conduct it and make a report to [the Commission].
>
> (3) For the purposes of any such inquiry the [Commission], or a person appointed by [the Commission] to conduct it, may direct any person (subject to the provisions of this section) —
>
> (a) to furnish accounts and statements in writing with respect to any matter in question at the inquiry, being a matter on which he has or can reasonably obtain information, or to return answers in writing to any questions or inquiries addressed to him on any such matter, and to verify any such accounts, statements or answers by statutory declaration;
>
> (b) to furnish copies of documents in his custody or under his control which relate to any matter in question at the inquiry, and to verify any such copies by statutory declaration;
>
> (c) to attend at a specified time and place and give evidence or produce any such documents.

(4) For the purposes of any such inquiry evidence may be taken on oath, and the person conducting the inquiry may for that purpose administer oaths, or may instead of administering an oath require the person examined to make and subscribe a declaration of the truth of the matters about which he is examined.

(5) .....

(6) Where an inquiry has been held under this section, the [Commission] may either —

(a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as [the Commission] thinks fit, to be printed and published, or

(b) publish any such report or statement in some other way which is calculated in [the Commission's] opinion to bring it to the attention of persons who may wish to make representations to [the Commission] about the action to be taken."

13. Sub-sections (5) and (7) are irrelevant for these purposes.

14. Section 1 of the Freedom of Information Act 2000, so far as is relevant [reads]:

"(1) 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.

(2) Sub-section (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

15. Section 2 reads:

"(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either —

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that —

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption —

.....

(c) section 32,

..... "

16. The definition section - Section 84 - defines "information" (subject to sections 51 (8) and 75 (2)) as meaning "information recorded in any form". "Exempt information" is defined as "information which is exempt information by virtue of any provision of Part II".

17. Section 57 of the Act deals with appeals:

"(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

18. Section 58:

"(1) If on an appeal under section 57 the Tribunal considers —

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

19. Section 59 reads:

"Any party to an appeal to the Tribunal under section 57 may appeal from the decision of the Tribunal on a point of law to the appropriate court; and

that court shall be —

(a) the High Court of Justice in England if the address of the public authority is in England or Wales."

20. Returning to Part II and the exemptions contained in Sections 21 to 44 of the Act, it is agreed on both sides that not only does Section 32 create an absolute exemption, but also, importantly, that it is the only one of all the exemptions in the Act which does not concern itself with any of the three following matters: the content of the information, the consequences of the disclosure and the public interest in disclosure. All other exemptions involve at least one of those three matters.

21. In this appeal effectively four matters have been raised by the appellant who claims that the tribunal misdirected itself in law. I deal with these in chronological order rather than the order in which they appear in the grounds. First: Are documents which come into the custody of the Charity Commission for a purpose other than an inquiry and before any inquiry begins covered by the Section 32 exemption if they are then taken into the custody of the inquiry and held thereafter solely for the purpose of that inquiry? Second: When do inquiries under Section 8 of the 1993 Act conclude? If there is no clear legal answer to that question, when did the inquiries in this particular instance conclude? Third: Whenever that was, does the Section 32 (2) exemption apply to documents held by a public authority following the conclusion of that inquiry? Fourth: What is meant by the word "document" in Section 32? Is its meaning confined to what are nowadays called hard copy documents or does it include information recorded in an electronic medium?

22. It is therefore important to read the relevant parts of Section 32:

"(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) a member of the administrative staff of a court

for the purposes of proceedings in a particular cause or matter.

(2) 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.

(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.

(4) 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; ..... "

23. Sub-paragraph (d) is not in point.

24. There is no dispute in this case that this series of inquiries by the Charity Commission is included within the definition in sub-section (4) (c) I have just cited.

25. The first question: are documents containing information which come into the custody of the Charity Commission for a purpose other than the inquiry before the inquiry begins covered by the Section 32 exemption if they are then taken into the custody of the inquiry and then held only for the purpose of that inquiry? In its decision promulgated on 14 June 2009, the tribunal said this at paragraph 102:

"Having considered all these arguments, we find that once a public authority places documents it held prior to an inquiry into the custody of itself conducting a statutory inquiry then those documents would seem to us to be within the scope of Section 32 (2) where they are then only being held for the purpose of the inquiry. So, for example, where the original complaint leading to the inquiry and the subsequent evaluation documents are then placed in the custody of the person conducting the inquiry for the purposes of the inquiry and they are then no longer held for any other purpose then these documents would be 'held only by virtue of being contained in' such documents, and will be caught by Section 32 (2). If the documents are still held for another purpose, like the charity's annual return in the normal course of compliance, then in our view the documents would not benefit from the absolute exemption because they are not held ‘only by virtue’ of being contained in a document placed in the custody of a person conducting an inquiry for the purposes of the inquiry."

26. The appellant's submissions were these. Section 32 (2) is concerned with the purpose for which the information is held at the time of the request for disclosure under the Freedom of Information Act. The word "only" in the section qualifies the word "held" and not the words "for the purposes of the inquiry". He submits that there is a tension at least, if not a contradiction, between the words just cited at paragraph 102 and the words at paragraph 87 under the heading "Tribunal's Conclusions, the Scope of the Exemption:

> "Our primary reason for this [preferring the Charity Commission's argument supported by the Information Commissioner] is because of the wording of Section 32 (2) of the Freedom of Information Act. In our view the adverbial phrase 'for the purposes of the inquiry or arbitration' qualifies the word 'placed' in Section 32 (2) (a) and not the word 'held' in the preceding general words to Section 32 (2). Subsequent events cannot alter the purpose for which a document was placed in somebody's custody. The words 'held only by virtue of being contained in' simply provide a causal connection between the presence of the document in the public authority's records and the placement with the person conducting the inquiry. However we find it does limit the exemption. If that information was also received independently from some other source it may not be exempt."

27. He submitted that if a document was placed into the custody of the Charity Commission, for instance as set out in paragraph 102, for the purpose of carrying out an investigation, it cannot be said thereafter that it is held by the inquiry only for the purposes of the inquiry.

28. In reply, the Charity Commission submitted that the tribunal's interpretation was correct. It was clear and simple to understand. The unusual statutory status of the Charity Commission as a body which holds documents in respect of charities as part of its normal duties and as the body which carries out statutory inquiries which are covered by the terms of Section 32 means that it will often hold documents for more than one purpose, as set out in the finding at paragraph 102.

29. So if a request was made, for instance, for information before an inquiry is in being but after an investigation which may in due course generate an inquiry, it would not be protected by the Section 32 exemption. If a request was made for information at any stage of an investigation or inquiry which is also being held for another purpose then it too would not be protected by the Section 32 exemption. But information in the custody of the Charity Commission when it was carrying out its function as the conductor of an inquiry is exempt, providing it is only held for that purpose.

30. On this point I accept the respondent's submission and adopt, with respect, the tribunal's reasoning and the correctness of it at paragraph 102 of the decision.

31. When do inquiries conclude? And in particular when did these inquiries conclude? This was a topic which occupied a good deal of the time of the tribunal and of this hearing. The tribunal's decision is at paragraph 69:

"Having considered all the evidence and submissions, we find that - despite the insertion of a closure date in the two inquiry reports before us - we accept that the actual closure date of the inquiries was the publication date of the SORIs. We are helped to come to this conclusion by the wording of Section 8 (6) of the 1993 Act which states that -

'Where an inquiry has been held … a statement of the results of the inquiry … may be published.'

This suggests that a SORI can form the conclusion of an inquiry and that a Section 8 inquiry closes at the date of the SORI publication. Also we heard evidence that a draft SORI is sent to the trustees to give them the opportunity to point out any factual errors before a final version is published. This is what happened with the third inquiry and helps us to come to the conclusion that an inquiry only ends with publication of the SORI."

32. The appellant submitted (1) in its SORI following the first and second inquiries the Charity Commission stated that "the inquiries were closed on 17 May 2004"; (2) in its SORI following the third inquiry the Charity Commission stated that "the inquiry was closed in April 2007"; (3) on 17 May 2004 the Charity Commission wrote to the Parliamentary Ombudsman and the original complainant stating that the inquiries were closed on that date; (4) as the result of (1) to (3), the Charity Commission's own assessment of the time of when the inquiries closed should be determinative of the matter; (5) in addition it was submitted that guidance published by the Charity Commission supports the appellant's contention.

33. Guidance headed "Operational Guidance: How the Commission deals with Regulatory Compliance Work handling Inquiry Cases" at paragraph 5 states:

"We will usually close the inquiry once we are satisfied that:

- any protective orders that need to be discharged have been (vesting orders, freezing orders and those appointing an interim manager may in exceptional circumstances need to stay in place but under review even though the inquiry is closed); and

- the trustees are able and willing to continue with regulatory action in line with an action plan agreed with us and will require monitoring by us; or

- the trustees are able and willing to continue with regulatory action in line with an action plan agreed with us but without further direct involvement from us; or

- all the issues have been remedied and the charity is operating on a proper footing; or

- no further action is required because evidence confirms that complaints made were unfounded.

Closure of the inquiry will require a statement of results of inquiry to be prepared which we will aim to publish within three months from closure."

34. Section 8 (6) of the Act, already cited, makes it clear that a SORI is not an inevitable consequence of an inquiry.

35. Mr Coppel QC submitted that if Mr Beer's submission were right the result might be that an inquiry which did not give birth to a SORI might never be closed. In addition, it was submitted that a table contained in Schedule 1C of the Act, containing a list in columns of decisions which may be the subject of appeal to the tribunal, the persons concerned and the powers of the tribunal, also indicates, because of the power in certain circumstances to direct the Commission to end the inquiry, that the closure of an inquiry can or possibly does occur before the publication of the SORI and certainly lends support to the general contention that in this case, at the very least, the Charity Commission's own assessment of when the inquiry had closed was correct.

36. Mr Coppel submitted next that the tribunal should not have been swayed by the evidence of Miss Russell, the Head of Compliance at the Charity Commission. Her evidence was to the effect that what she conceded was, in retrospect, misleading information as to the date of closure contained in the SORIs and elsewhere was the result of the existence of key performance indicators (KPIs) within the Charity Commission which measured when the inquiry phase of an inquiry finished and then measured the interval between that stage and the publication of the SORI in a separate key performance indicator.

37. In support of his general submission on Miss Russell's evidence, he relied on evidence she had given in cross-examination by him. At what was page 162 of the transcript produced of the tribunal's hearing on 12 March 2009 Mr Coppel asked her:

"Q. The statement of the 2004 inquiries to begin with both of these SORIs by their nature are very important documents, are they not?

A. Absolutely.

Q. And the Charity Commission would have taken great care in their preparation - correct?

A. Correct.

Q. Would they have been overseen by lawyers at any stage?

A. Yes.

Q. Look, if you would, at paragraph 21. It states there that inquiries were closed on 17 May 2004. That is a true statement, is it not?

A. Yes.

Q. Then in relation to the third inquiry, starting at page 158, paragraph 16, the inquiry was closed in April 2007. That is a true statement too, is it not?

A. That is right, yes.

Q. The closing of an inquiry has important ramifications, does it not?

A. For the Commission, yes.

Q. Tell the Tribunal what those ramifications are.

A. In particular, as I said before, in relation to the key performance indicator that they are held accountable to Parliament so that is the date at which the time counter stops in relation to the nine-month target we have to meet. In relation to the charity it has significance under the charity trustees as an indication we will not without good reason open up again the inquiry that just shut. That is probably the two most significant elements that come from it."

38. A little later (at page 164) when questioned by a member of the tribunal, the following was said:

"Q. In relation to the two dates, are you saying that these two dates are the closure dates (something indistinct) as opposed to the closure dates - - - - - ?"

39. The witness interrupted and said:

"A. It is the same. The key performance indicator date is the date that it says at paragraph 21, page 156, 17 May 2004. I think what I tried to explain in my statement was we don't actually regard the whole process as finished until that inquiry report is published. So effectively the files are taken off the shelf if they are physical and put away or - if they are electronic as they are now - then it gets closed off. What happens on that date internally is on the computer the number changes from No. 3 to No. 8. So the function code changes. That happens between the assessment unit stage and the investigative process as well. So all that happens internally is a number changes on the computer.

MR COPPELL: You gave as the second important reason for identification of the date of the closing of an inquiry the charity and people involved in the charity are informed of this, and the significance for them is that the powers of compulsion that the Commission has, unless the inquiry is re-opened, are not going to be exercised against them thereafter unless it is re-opened. Is that right?

A. No. That is not quite right. This is the relevance of the technical point as to what the legislation says about using your powers. Section 9, which is the power to compel generally information, does not attach to whether or not an inquiry is open. So if it is shut and actually something came afterwards you could still use those powers in relation to the charity to do it."

40. Mr Coppel submitted next that the Charity Commission's submission that it is important that there should be clarity as to the date on which an inquiry closed was hard to accept when, if Mr Beer's submission is right, in this case the Charity Commission was giving misleading information to the world at large about the date on which the inquiry actually closed.

41. Mr Coppel further submitted that the Act permits the appointment by the Commission of an outsider to hold an inquiry. It is natural in those circumstances to state that the inquiry closes when that person stops performing his or her function which would ordinarily be before the publication of the SORI. He maintained the position finally as adumbrated in the passage of cross-examination to which I have just referred. The end of the inquiry stage of the process does bring to an end some - albeit not all - of the coercive powers of the Charity Commission and certainly those powers which are particular to the conduct of the inquiry such as, for instance, the ability to summon witnesses.

42. In reply, Mr Beer for the Charity Commission submitted, first, that as a matter of principle the finding by the tribunal of the date upon which the inquiries had closed was a finding of fact. Appeals under Section 59 are only permitted on questions of law. Only therefore if the finding was a finding which no reasonable tribunal could have reached can it be challenged as a matter of law. The court therefore was asked to apply Wednesbury principles to this question.

43. Secondly, he relied on a passage, relied on by the tribunal at paragraph 65 of its decision, from the Charity Commission's Operational Guidance, which was at the material time publicly available on its website. It states that an inquiry will typically have five stages:

"(1) Evidence Gathering

The Commission will gather evidence about the causes of concern and the charity's activities generally. This will normally involve seeking additional information and response from the trustees and elsewhere.

(2) Consideration of the Evidence

The Commission will come to a view as to what extent, if any, the causes for concern are substantiated.

(3) Confirmation of our Findings

If the Commission believes the causes for concern are substantiated we

will advise the trustees of our conclusions. If the concerns are not substantiated we would advise the trustees and close the inquiry at this point.

(4) Remedial Action

The Commission will consider what action is appropriate either for the trustees or the Commission to rectify the causes of concern insofar as this is possible.

(5) Preparation and Publication of an Inquiry Report

The Commission will apart from in exceptional cases publish a report providing a statement of the results of the inquiry (SORI). You will be given an opportunity to see the statement and comment where you believe there may be factual inaccuracies before publication takes place."

44. From that he asked the court to infer, and suggested the tribunal correctly inferred, that an inquiry continues over those five stages.

45. He submitted next that Miss Russell's evidence was clear when taken as a whole and the tribunal was entitled to accept it, and therefore to adopt it in its conclusions.

46. In addition to the passages already quoted from her evidence, at what was page 137 of her evidence of the 12 March 2009 she dealt with the Operational Guidance note from which I have just quoted and the five phases. She said, when asked by Mr Beer -

"Q. The five phases are set out.

A. That is right.

Q. Does that accurately reflect your understanding?

A. It does. That is how we describe it so that members of the public and others who are subject to an inquiry can understand typically what may happen.

Q. We have seen in the two SORIs in this case that a date of closure of the inquiry is given in the body of the report before the date on which the report was published. Can you explain that? Where does that closure date come from and why is it there?

A. I think I refer to it in my statement. Some of the magic to the opening and closing dates of the inquiry that we put in the report relate to our Key Performance Indicators ..... which the Treasury and others have set for us about how quickly we carry out inquiries. So there is a magic internally and also in terms of how we report through to the people that give us

money and in turn to Parliament, about the date of the opening of the inquiry and also the date that we close it. Equally there is a magic to the date the report is published, because equally we are given a KPI as to how timely we are about publishing the report. There is a magic attached to them that is significant for the Commission. So in layman's terms everything is over in terms of us turning away from what happened on the inquiry as soon as that publication of the report happens. That is of particular significance for us. I can explain the logistics of what happens, if that is useful in terms of opening and shutting of the inquiry?"

47. Later, on 13 March, Mr Beer returned in cross-examination to this topic, recapitulating on the evidence that she had given and the fact that 17 May was the date in the first SORI. He said (page 53 of the second transcript):

"Q. You explained that was for KPI purposes but you would regard the inquiry as still open.

A. Yes.

Q. I just want to understand this: the purpose of sending the draft report, the draft SORI to the trustees would be what?

A. It is explained on our public website about what the purpose is, and that purpose is to give them an opportunity to highlight matters of factual accuracy [that should no doubt read 'inaccuracy'] about the inquiry that has been reflected in the report so that they can give comments back if they choose to reply. Those comments are considered by the Commission. If necessary, findings, conclusions and anything in the report needs changing may be changed.

Q. How can the inquiry make changes to its SORI if it has been closed? If, as the appellant would have it, the inquiry has been closed, who is making these changes in relation to a closed inquiry or is the inquiry still open?

A. The Commission is making these changes. It is its decision to do so. That is because effectively what happens is we stop our pro-active investigative stage when the inquiry is shut. The conclusions and the findings and if we need to get further information can happen in that period until finally the inquiry report is published.

THE CHAIRMAN: So, in effect, in this particular case - let us deal with the third inquiry - when do you say the inquiry was closed, taking that into account?

A. The day it was actually published on the website.

Q. That is the date in June?

A. Yes.

MR BEER: 28 June."

48. Mr Beer submitted that the natural conclusion, leaving aside what was contained in any document, would be that a trial or an inquiry of any kind would only end when the final decision of that trial or inquiry was promulgated. He further submitted that although in this particular case - a Section 8 inquiry - there is no requirement for a verdict or final judgment, as the result of Section 8 (6) of the 1993 Act, first of all, there normally is a SORI in practice and, secondly, if there was not one, in order to deal with Mr Coppel's point about inquiries theoretically carrying on forever, the moment the inquiry closed would have to be the moment when a decision was made not to issue a SORI.

49. Applying the agreed standard to the resolution of this question, namely can it be said that the decision of tribunal was so unreasonable that no reasonable tribunal could have reached it, I reject the appellant's submission. Although for the reason which Mr Coppel has so well set out it would have been perfectly possible for the tribunal reasonably to have ruled the other way, I cannot say that the finding it eventually reached was perverse or based on a lack of evidence which it should not have taken into account.

50. The Charity Commission has since altered its guidance to reflect the absurdity of saying that an inquiry had closed before the results of it were known. As a postscript it can be said that this is one of only a number of examples of what can be the potentially distorting effect of key performance indicators albeit that they are always set for laudable reasons.

51. In fact although it has taken a good deal of time before the tribunal and before me and in this judgment, my decision on this aspect of the appeal is not essential in the end to its ultimate disposal.

52. The fundamental question before me concerns the current situation. Was the tribunal right to hold, now the inquiries are on any view concluded, that the information still held by the Charity Commission is subject to the blanket exemption provided by Section 32 (2) of the Act?

53. The appellant made a number of submissions. He submitted that the plain words of the section make it clear that the moment an inquiry has concluded the exemption ceases to be available to a public authority holding the information: if information is to be withheld it must be under one of the many other possible exemptions in the Act. Once an inquiry has concluded and the person who conducts it - who may be someone not part of the Charity Commission - hands to the Charity Commission the documents that he created or received during the inquiry, it is plain, he submits, that the Charity Commission is not then holding those documents only for the reason identified in Section 32(2). Asked to define for what function or in what capacity the Commission is then holding the documents, one such reason would be almost certainly as record-keeper.

54. He submitted that the purpose of the exemption is to enable the inquiry or court to control its proceedings without interference or subversion. The purpose cannot have been, as the respondent submits, to freeze all such information whatever its content, regardless of its harmlessness or of the public interest in its disclosure, for 30 years until, by the provisions of Sections 62 and 63 of the Act, the documents become historical records and the exemption falls away.

55. He submitted next that the original rationale of the section (which at that time made no mention of inquiries), as described in Parliament by the Parliamentary Secretary for the Lord Chancellor's Department, was to give the courts the right to decide on disclosure of information both during and after proceedings. Courts are not public authorities within the meaning of the term. In considering this question, he submitted that the tribunal should have tried or tried harder to carry out the purpose of the Act which is to reveal information rather than applying what he submits was an expansive interpretation to this exemption which runs counter to the fundamental purpose of the Act.

56. In making that submission he relied on paragraph 92 of the decision at which the tribunal stated:

> "The tribunal realises that our finding provides a very wide scope for the Section 32 exemption. In most of our other decisions the Information Tribunal has tended to interpret exemptions narrowly because of the underlying concept of the Freedom of Information Act of the right to know or assumption of disclosure rather than to withhold information. However as with courts, documents can and should be released by inquiries and arbitrators when the public interest requires it. In our view Section 32 recognises the autonomy of both."

57. He further relied, in making this point, on parts of the speech of Lord Hope in Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550. At paragraph 4 of his speech, Lord Hope said:

> "There is much force in Lord Marnoch's observation in the Inner House that, as the whole purpose of FOISA is the release of information, it should be construed in as liberal a manner as possible ..... But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with DPA 1998. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework."

58. He relied, in addition, on passages from the judgment of Mr Justice Stanley Burnton (as he then was) in Office of Government Commerce v Information

Commissioner and HM Attorney General on behalf of the Speaker of House of Commons [2010] QB 98, in which he said:

> "71. Thus I agree with the statement of the Tribunal in Secretary of State for Work and Pensions v The Information Commissioner Appeal no. EA/2006/0040:
>
> '29 It can be said, however, that there is an assumption built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered 'in all the circumstances of the case'.'"

59. The respondent in his reply pointed out that the decision of the tribunal, which Mr Justice Stanley Burnton then upheld, was a decision of the same tribunal with the same chairman as in this case.

60. The appellant next submitted that in deciding how to interpret the terms of Section 32 it was not permissible to aid the interpretation of the statute by a reference to subsequent statutes, and cited a number of cases in support of that general proposition: Ormond Investments Co v Betts [1928] AC 143, Camille and Henry Dreyfuss Foundation Inc v IRC [1954] 2 All ER 466, Kirkness (Inspector of Taxes) v John Hudson & Co Ltd [1955] AC 696, Finch v IRC [1985] 1 Ch 1, and Cadbury Schweppes plc and Another v Williams (Inspector of Taxes) [2006] EWCA (Civ) 651

61. Secondly, on that point, to the extent that it is permissible to look at other more recent Acts of Parliament, in particular in this case Section 18 of the Inquiries Act 2005 which sets out a regime for particular types of inquiry, he submitted that the appellant's contention actually gains some support from that Act, in particular from Section 14.

62. Lastly, he submitted that the reliance placed by the appellant - and the tribunal in its judgment - on Section 63 of the Freedom of Information Act itself is misplaced. He submitted that it is possible to envisage situations in which the Section could operate even if, in the vast majority of cases, the documents were to be released from the protection of Section 32 long before the expiration of 30 years. It is therefore necessary to look at the terms of Sections 62 and 63:

> "62 (1) For the purposes of this Part, a record becomes a 'historical record' at the end of the period of thirty years beginning with the year following that in which it was created.
>
> (2) Where records created at different dates are for administrative

purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of this Part as having been created when the latest of those records was created.

.....

63 (1) Information contained in a historical record cannot be exempt information by virtue of section ..... 32 [and many other sections as well]."

63. Other periods are set out for the exemption to fall away after periods of 60 and 100 years in other parts of that section.

64. The respondent submits, first, that there is no Pepper v Hart [1992] UKHL 3 justification for going behind the clear words of the statute to look at what was said in Parliament, in particular, about a Bill which contained a provision which was radically different from that eventually enacted. He submitted that the stance the appellant invited the court to take, and had invited the tribunal to take, would introduce inconsistencies, not justified either by the language of the statute or by principle, between the positions as they apply to courts on the one hand and inquiries on the other, it being accepted that HM Court Service can continue to hold documents under the exemption after the conclusion of proceedings in their courts.

65. He submitted next that the word "placing" refers to the time at which the information was placed in the custody of the Charity Commission and "only" relates to the time at which the request for information was made. What Mr Beer described as his key submission on interpretation of the section outside the terms of the section itself comes from Section 63 which I have just quoted. His submission is that Section 63 (1) of the Act would be otiose if in fact all documents held under the Section 32 (2) exemption failed to have that exemption from the moment that the inquiry for which they were held had concluded. He reminded the court that at the tribunal the appellant's submission had been that Section 63 only applied to courts and not to tribunals.

66. Likewise, on the assumption that the court may look at the terms of subsequent legislation, he submitted that Section 18 of the Inquiries Act 2005, which disapplies Section 32 (2) in respect of concluded inquiries, provides another complete answer to the appellant's submission. What, he asked rhetorically, would be the point of that section if the Section 32 exemption fell away in any event when an inquiry was closed.

67. He submitted next that there is no basis for suggesting that the tribunal applied an expansive interpretation of the Section 32 exemption or that it should somehow have strained its judgment in favour of the right of access. He submitted that, properly analysed, the passages from the speeches of Lord Hope, Lord Rodger and the judgment of Mr Justice Stanley Burnton indicate that what is needed is a clear interpretation of Section 1, on the one hand, and whichever the exemption the section is being decided upon, on the other, without, as it were, fear or favour. He submitted that the decision is not an expansive interpretation and the words quoted from the decision at paragraph 92

- "the tribunal appreciates that this gives a wide scope to the exemption" - is simply an expression of the effect of the section rather than any decision to interpret expansively or narrowly.

68. There are good arguments to be made for a regime which protects absolutely information during the course of proceedings and then changes to require particular exemptions to be made out in respect of that information and after the proceedings are over. The development of common law and then its replacement by statute in the context of disclosure in criminal proceedings shows a gradual whittling away of class-based exclusions in favour of a duty to consider all information on a prejudice basis.

69. In my judgment however Mr Beer's arguments and the decision of the tribunal on this issue cannot be impeached. The words are clear. There is no ground for interpreting Section 32 (1) differently from Section 32 (2). It being agreed on all sides that court documents keep the exemption, it must follow that inquiries do as well. Section 63 resolves any possible doubt over the clarity of the section. To the extent - and it is of course a limited extent - that Section 18 of the Inquiries Act 2005 may be considered, it too, in my judgment, supports the potential existence of the exemption after the inquiry has closed.

70. In short, I adopt the reasoning set out at paragraph 87 of the tribunal's decision.

71. However it is right to say that the exemption can be waived. This inquiry involves matters of acute public concern. The court was informed that the Charity Commission is formulating guidance about the disclosure of certain exempt documents. The tribunal in its decision encouraged that process. This court, with respect, repeats that encouragement. Although of course it would be simpler to close the file for 30 years under the cover of the Section 32 exemption, the principles of the Act and public respect for - in this case - the Charity Commission in a matter of this seriousness should mean that the process which, so the court is told, has begun and has been encouraged by the tribunal is an important one.

72. Finally, what is the meaning of the word "document" in Section 32? This was a live issue before the tribunal. At paragraph 58, it ruled:

> "58 The tribunal has considered all the submissions of the parties and has concluded that we prefer the expansive interpretation provided by the Charity Commission and Information Commissioner and already accepted by differently constituted tribunals. This tribunal has not considered that Parliament intended that the word 'document' in the context of the Section 32 exemption should be given the narrow meaning put to us by Mr Coppel. The tribunal considers that it would not be common sense to accept a narrower interpretation, particularly in light of the definition of 'information' under Section 84 of the Freedom of Information Act, namely 'information recorded in any form'. Otherwise it would mean that certain information would not be caught by the exemption only

> because of the form in which the information was placed in the custody of the person conducting the inquiry and nothing to do with its content. So, following Mr Coppel's interpretation, if the document was in hard copy it would be likely to be included but if the same document was on a CD or DVD it would not. We do not believe this is what Parliament intended. Again if Mr Coppel's interpretation was correct, then judges and those conducting inquiries would have continually to have this in mind when deciding in what format they wished documents to be lodged with them. This would place an unnecessary and unwelcome burden on the operations of courts and inquiries, particularly at a time when courts and inquiries are increasingly using new technology to make proceedings more efficient.
>
> 59 Also we note that the definition of 'document' in Section 97 (2) of the 1993 Act uses an expansive interpretation, namely 'information recorded in any form'. In view of the fact that the inquiry in this case is an inquiry undertaken under the 1993 Act, we consider that this definition of 'document' can subscribe to the meaning to be used under FOIA in order to give efficacy to the inquiry in question.
>
> 60 In this case our finding means that all the disputed information in the Refined Request is potentially subject to the Section 32 exemption."

73. The appellant submits that if the tribunal is right then there would be no need for the word "document" to appear in the section at all. The Freedom of Information Act is concerned with information. Section 32 (1) could have read ‘information held by a public authority is exempt information if it is held only by virtue of being filed with or otherwise placed in the custody of a court’. Likewise, sub-section (2) could have read: ‘information held by a public authority is exempt information if it is held only by virtue of being placed in the custody of a person conducting an inquiry or arbitration’.

74. The use of the word "document" in Section 32 must mean that Parliament intended "document" to mean what documents used to mean, ie, what we now think of as hard copy documents.

75. In support of that submission he cites the dictionary definition from the Shorter Oxford Dictionary 1993 Edn, which effectively eliminates such things as electronic documents and the like. He submitted that it was wrong of the tribunal to look to the definition of "document" in the 1993 Act as a guide to what the word means in the Freedom of Information Act, in particular Section 32.

76. The respondent submitted that in 2009 when the tribunal made its decision it was much too late for any one to interpret the word "document" in its old sense of hard copy, in particular in legal proceedings. Authorities as old as Lyell v Kennedy (No 3) [1884] 50 L.T., Hill v The King [1945] KB 529, Grant v Southwestern and County Properties Ltd [1975] Ch 185 and Derby & Co v Weldon (No 9) [1991] 1 WLR 652 etc have constantly widened the definition of "document" to include, most recently, documents on the hard drive of a computer and the like.

77. Secondly he submitted that the consequences of such a surprising, as he puts it, finding would be extraordinary. As the tribunal indicated in its final decision, it would mean that material held in non-paper form would be disclosable, subject to any other exemption, even during the course of a trial or proceeding when the same material on paper would not.

78. Thirdly, he submitted that if by 2000, when the Freedom of Information Act was passed, the intention had been to exclude all information which was not effectively hard copy from the Section 32 exemption, the statute would say so in a definition section. By 2000 the use of the word "document" had extended in ordinary and legal parlance well beyond paper. Finally, he points out that a number of dictionaries, including the latest Concise Oxford Dictionary, have indeed extended the definition of "document" beyond that set out in the 1993 Shorter Oxford Dictionary.

79. On this point too I agree with the respondent. It seems that to find otherwise would make a nonsense of the definition of "information" in Section 84 of the Freedom of Information Act. It seems clear to me that for the Act to work at all - and in particular for Section 32 to work at all - the word "document" must now mean what everybody now thinks it means and includes both hard and electronic copies of documents.

80. This appeal is therefore dismissed. This case has now involved three hearings: the inquiry, the information tribunal and the court. All three have had the benefit of having the same advocate on each side to present the case. I am indebted to them, as no doubt my predecessors have been, for the clarity of both their written and oral submissions.

MR BEER: Before my friend rises, the order that we would ask the court to make is (1) appeal is dismissed, (2) I will not make submissions on this because it follows, the appellant shall pay the second respondent's costs of the appeal, such costs to be the subject of detailed assessment if not agreed. I suspect that the reporters will in due course write up the decision from the transcript. There were a couple of typos in the making.

MR JUSTICE CALVERT SMITH: Can I send them out to you?

MR BEER: Yes. That would be easier. It is inevitable in a read-out like this. I have nothing else to say.

MR COPPELL: In relation to the order, my Lord, we have nothing to say. That is entirely unexceptional. I agree with the suggestion made as to correcting any slip that may find its way into the draft.

MR JUSTICE CALVERT SMITH: Are there any other matters?

MR COPPELL: No. This is a second appeal so there is no question of permission.

MR JUSTICE CALVERT SMITH: I make the order in the terms set out by Mr Beer.