



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Appeal No. EA/2015/0259

BETWEEN:

TOM WALL

Appellant

-and-

INFORMATION COMMISSIONER

Respondent

Before

**Brian Kennedy QC
Narendra Makanji
Dave Sivers**

Richard Bailey - Solicitor

**Date of Hearing: 23 February 2016, Court 10, Residential Property Tribunal, Alfred
Place London.**

DECISION

This Tribunal dismisses the appeal and the respondent's Decision Notice is upheld.

REASONS

Introduction:

1. The decision concerns an appeal of a Decision of the first respondent dated 15 September 2015, reference: FS50573033 (“**the Decision Notice**”).
2. In the Decision Notice the respondent held that the Public Authority, in this case, the Ministry of Justice (“**the MoJ**”) had correctly withheld requested information from the appellant pursuant to s 32 of Freedom of Information Act 2000 (“**the FOIA**”).

Background concerning requested information:

3. The requested information, in brief, concerned a list of convicted corporations from the MoJ held on a specific database. The full details of the request are set out at paragraph 4 of the Decision Notice which goes on to found that sections 32(1)(c) and 32(2)(b) of the FOIA are engaged
4. The MoJ responded to the request on 12 November 2014 refusing to provide the requested information under section 40(2) of the FOIA. The Appellant requested an internal review on 24 November 2014. The MoJ responded on 30 January 2015 and had revised its position in that, in addition to maintaining its reliance on section 40(2), the MOJ also cited sections 32(1) and 32(2) and 43(2) to withhold the requested information.
5. The Appellant contacted the Respondent on 2 March 2015 to complain about the way his request for Information had been handled. He specifically challenged the exemptions cited by the MOJ., resulting in the Decision Notice, the subject matter of this appeal.

The Legislative Framework:

6. The relevant legislation is set out at paragraphs 9 – 11 of the Decision Notice at page 3 of the hearing bundle before us and paragraphs 6 -9 of the Commissioners' Response to the Grounds of Appeal at pages 16 – 15 of the hearing bundle before us and in particular the relevant exemption applicable in this appeal concerning section 32 of the FOIA which provides as follows:-

“(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in - ----(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.

7. Under s 1(1) of the FOIA a person who has made a request to a “*public authority*” for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested [s 1(1) (a)] and, (b), if it does, to have that information communicated to him [s 1(1) (b)].
8. Pursuant to section 2(3)(c) of the FOIA, section 32 is an absolute exemption and is therefore not subject to the public interest test under section 2(1)(b) of the FOIA.
9. The duty to provide the requested information under section 1(1) (b) will not arise where the information is itself exempted under provision contained in Part II of the Act. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Qualified exemptions are subject to a public interest test under s 2(2) of the FOIA. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Absolute exemptions are not subject to a public interest test.

10. *“Public authorities”* are defined for the purposes of FOIA by s 3. The second respondent (the Ministry of Justice) is a public authority as defined. Courts and tribunals are not public authorities as defined. HMCTS is an executive agency of the Ministry of Justice who are the public authority for the purpose of this request.
11. By virtue of s 3(2), information will only be held by an authority for the purposes of FOIA if it is (a) *“held by the authority, otherwise than on behalf of another person”* or (b) *“held by another person on behalf of the authority”*.
12. *“Information”* is defined for the purposes of the FOIA by s 84 as *“information recorded in any form”*.

Issues for this Tribunal to consider:

Main issue

13. The main concern in this appeal is whether the information was only acquired by virtue of being contained in a relevant court record – even if it is later transferred to other documents or held or used in other ways. It is the original source of the information, which is important, not the form in which it is held. As can be seen below we accept and adopt the Respondents reasoning on this issue.

Grounds of Appeal:

14. The Appellant argues that the Commissioner erred in concluding that section 32 was engaged on the following grounds:
 - (I) Section 32 only covers databases with a role in legal proceedings. The MoJ’s court proceedings database does not serve such a purpose and therefore the exemption does not apply.
 - (II) The ICO's own guidance suggests that section 32 only applies to court derived information that is held with legal proceedings in mind.

(III) There are important differences between the database in the DBERR case and the MOJ's court proceedings database. They serve different purposes: the ETHOS database primarily aids legal proceedings; MoJ's database primarily produces statistical reports.

(IV) Section 32 only covers live proceedings. The MoJ's court proceedings database does not include live proceedings and therefore the exemption does not apply.

15. The Commissioner relies on his reasoning in his Decision Notice and makes the following submissions in his Response to the Grounds of Appeal;

“In DBERR V Peninsula B.S. Ltd. (EA/2008/0087) the appellant had requested information from the Court and Tribunals Service (“HMCTS”) in a request for the names and addresses of all respondents to the Employment Tribunal claims for a period of time. The information was refused under section 32 of the FOIA.

The information requested was contained in the ET1s and ET3s filed by the parties in the Employment Tribunals. The information was entered onto a database called “ETHOS”. The question for that Tribunal was whether the requirement that the information be “held only by virtue of being contained in. . . .” meant that the information is only covered by the exemption whilst it is still contained in the (hard copy or electronic) document filed with the Employment Tribunals or whether it applied to that information wherever it may subsequently be transferred or copied.

The FTT concluded that it was sufficient if the information had been acquired only by virtue of being contained in a document filed with the Employment Tribunal and that “if information, once acquired is used for [other] matters, it is still covered by the exemption” and that “provided the public authority is only holding the information as a result of being contained in a court document, it does not matter if that information is subsequently copied or transcribed or where or how that information is stored”.

16. This decision, the Commissioner points out was appealed to the Upper Tribunal (“UT”) in Peninsula Business Services Ltd. V IC & MoJ [2014] UKUT 0284 (AAC). In dismissing the appeal, the UT Judge concluded that “*the fact that the court record in question is a local database rather than a form filled in [by] a claimant or respondent makes no difference to the application of section 32 if the recorded information is the same*”.
17. The UT concluded that, given on the evidence before the UT that the ET1 and ET3 forms were the only source of the information that is migrated to ETHOS, then it must follow that the information is also protected from disclosure by section 32(1)(c).
18. Finally, the Commissioner argues, the UT also agree with the view that Ward LJ in the Judgment of the Court of Appeal in Kennedy V Charity Commission [2011] EWCA Civ. 367 accepted that the reference in section 32(1) to information being held only by virtue of it being contained in documents filed for the purposes of court proceedings, refers to the reasons why such documents were originally acquired, rather than any purposes for which they may continue to be held – and that the subsequent Supreme Court decision in Kennedy V Charity Commission [2014] USC 20 endorsed this approach.
19. The Commissioner argues that in applying the facts of this particular case, the information was acquired by the Magistrates Courts and Crown Courts of England and Wales and then contained in documents (court records) created by those courts for the purposes of proceedings in matters in those courts. The same information was then transferred to the MoJ in order for that information to be held in the MoJ’s court proceedings database.
20. Accordingly, the Commissioner argues, given that the “court record” in question in this case is the MOJ’s court proceedings database rather than documents held by the

Magistrates Courts and Crown Courts makes no difference to the application of section 32 if the recorded information is the same. Information from the Magistrates' Courts and Crown Courts passed to the MOJ was the only source of the information that is migrated to the MOJ database then it must follow that the information is also protected from disclosure by section 32(1)(c).

21. We accept the above reasoning as argued by the Commissioner and adopt it pro rata. Further we regard the dominant purpose of the recording of the relevant information to be important. In the present case this Tribunal finds that the 'dominant purpose' of the requested information – concerns information which is held, as per s 32 of the FOIA "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". Thus the 'dominant purpose' of recording and filing this information was specifically for legal proceedings, and the subsequent storing of it was merely for administrative purposes – rather than any other subsequent use.
22. In addition to the 'dominant purpose' test, this Tribunal holds that in a case where there is mixed information – some details falling under the exemption, others not, it is relevant to consider a balance of advantages over disadvantages in disclosing such information. This Tribunal adopts the balance of views set out by the Government's 2003 Public Consultation in that the advantages were outweighed by its significant disadvantages.
23. We find in the present case, the information held is only on record as a direct result and consequence of involvement in Court Proceedings. Other than this, such information would not be stored on the relevant database. The sole reason that the requested information is on the MoJ's database is because legal proceedings had taken place.

24. Accordingly we accept the Commissioners Response to the first ground of appeal and agree it is not relevant that the same information is used for a different purpose by the MoJ by virtue of it being contained in the Court Proceedings database.
25. We agree with the Commissioners response to Ground 2 of the appeal in that his own guidelines are not binding on us and in any event are out-dated by the DBERR case.
26. We agree also that Ground 3 of this appeal must fail in that, as we have indicated above, and as the Commissioner argues in his Response, *“It is the original source of the information which is important, not the form in which it is held.”*
27. Again we accept the validity of the Commissioners’ rebuttal of Ground 4 of the appeal in that while it could be persuasive, Cobain is not binding on us and more importantly the Peninsula case secedes Cobain and is decisive on the question of the passage of a reasonable time limiting the restriction referred to.
28. As stated before the exemption relied upon in the Decision Notice is an absolute exemption and the Public Interest test is not therefore applied when it is engaged.
29. The Appellant argues in an undated response to the Commissioners’ response but in our view adds nothing of substance that leads us to regard the Commissioners’ has erred in his reasoning. The purpose of the appellants request is irrelevant as FOIA is motive blind. Similarly the purpose of the holding of the information is not a test that is relevant in the sense the appellant suggests. It is the dominant purpose of the holding of the data by the Courts at the time of recording that is the test that should be applied.
30. The appellant has not produced evidence or otherwise persuaded us that there are not other ways for the public to determine whether a corporation has been convicted but even if there were not this is effectively a public interest test and as we have

indicated the exemption relied upon in the Decision Notice is an absolute exemption.

31. The appellant argues that the MoJ database does not perform administrative processes on behalf of the courts and its purpose is, he argues, to inform the public and policy makers. We repeat our reasoning above on the dominant purpose at the time of recording the information, FOIA being motive blind and the purpose of section 32(1)(c). It is not about direct disclosure to the public. In fact the Appellant continues to argue in other parlance that this case is different, inter-alia, on the facts and that disclosure is in the public interest. However for the reasons given above he has failed to persuade us that the Commissioner erred in his reasoning in the Decision Notice under appeal.

Conclusion:

32. In light of all the above considerations and for the reasons given above, this Tribunal rejects the submissions made on behalf of the appellant and accordingly dismisses the appeal herein.

Brian Kennedy QC

4 March 2016.