Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0083

Information Commissioner's Ref: FS50182912

Heard at Field House and Procession House **Decision Promulgated**

On 12, 13 and 23 March and 27 May 2009 **14th June 2009**

BEFORE

Chairman

JOHN ANGEL

and

Lay Members

JAQUELINE BLAKE AND MARION SAUNDERS

Between

DOMINIC KENNEDY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE CHARITY COMMISSION

Additional Party

Representation:

For the Appellant: Philip Coppel QC

For the Respondent: Clive Sheldon

For the Additional Party: Jason Beer

Subject matter

Statutory inquiry records s.32(2) FOIA

Cases cited

Mitchell v Information Commissioner EA/2005/0002

Ministry of Justice v Information Commissioner EA/2007/0120 & 0121

Szucs v Information Commissioner EA/2007/0075

Decision

The Tribunal upholds the Decision Notice dated 9th September 2008 to the extent that the s.32(2) exemption is engaged. For information not covered by this exemption and legal professional privilege (s.42 FOIA) the Tribunal provides the following substituted decision notice.

Information Tribunal **Appeal Number: EA/2008/0083**

SUBSTITUTED DECISION NOTICE

Dated: 14th June 2009

Public authority: Charity Commission

Address of Public authority: PO Box 1227, Liverpool, L693UG

Name of Complainant: Dominic Kennedy

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the Decision Notice dated 9th September 2008 is upheld except to the extent that the requested information is not exempt under s.32(2) FOIA unless exempt under s.42 FOIA..

Action Required

The Charity Commission to provide Mr Kennedy with the following information with the personal data of officials redacted within 21 days of this Notice:

Pages 71-75, 92, 95-96, 105-106, 110, 115 and 163 of the new refined disputed material bundle prepared for 27th May hearing and filed by the Charity Commission with the Tribunal on 30th April 2009,

Dated this 14th day of June 2009

Signed

John Angel

Chairman, Information Tribunal

Reasons for Decision

Background

1. Much of the background to this appeal was provided in evidence by the Appellant, Dominic Kennedy, and other witnesses to whom we refer to later in this decision.

2. George Galloway has been an MP since 1987. In the 1990s and early 2000s he mounted a campaign to overturn economic sanctions against Iraq. UN Security Council Resolution 661 (passed in 1990) had imposed these economic sanctions following Iraq's invasion of Kuwait in August 1990.

3. On 14 April 1995 UN Security Council Resolution 986 was issued, creating the Oil-for-Food Programme. The object of the Oil-for-Food Programme was to enable Iraq to sell its oil to the world market notwithstanding the sanctions. The programme ran from December 1996 to March 2003.

4. In 1998 Mr Galloway founded "The Mariam Appeal". Its objects as stated in its constitution were "to provide medicines, medical equipment and medical assistance to the people of Iraq; to highlight the causes and results of the cancer epidemic in Iraq and to arrange for the medical treatment of a number of Iraqi children outside Iraq". One of its core activities was to collect money so as to fund bringing Mariam Hamza, at the time four years old, living in Iraq and suffering from leukaemia, to the UK to receive treatment. The Appeal was surrounded with considerable publicity at the time.

5. From its creation in 1998 until it ceased operation in early 2003, the known total income of the Mariam Appeal was just under £1,468,000.

6. In Spring 2003 Mr Kennedy, a journalist with *The Times*, started to investigate the sources of funds for the Mariam Appeal and the manner in which those funds were used. Mr Kennedy discovered that the Mariam Appeal was not registered as a charity and that its activities, he believed, had spread beyond its stated objects. He set out his findings in an article published in *The Times* on 5 April 2003. He reported that Mr Galloway had used funds from the Mariam Appeal to pay for his visits to Iraq and other countries, to campaign against the economic sanctions then imposed upon Iraq and to denounce Israel. Further articles were written. At the heart of these articles were the questions

that surrounded the uses to which the funds collected by the Mariam Appeal had been put.

7. On 24 April 2003 the Charity Commission opened an evaluation into the use of the Mariam Appeal's funds for non-charitable purposes. The opening of the evaluation coincided with more widespread reporting of the Appeal's funds in the national press.

8. The Charity Commission's decision to open an evaluation was itself widely reported. The Charity Commission's evaluation established that the fund-raising literature for the Mariam Appeal expressed the purpose of the appeal in charitable form and that the funds raised in connection with the appeal were for charitable purposes. However, the Charity Commission was unable to satisfy itself that the concerns that had been expressed were unfounded.

9. Accordingly, on 27 June 2003 the Charity Commission instituted an inquiry under s. 8 of the *Charities Act 1993* ("the 1993 Act") to investigate how the monies raised for the Appeal between March 1998 and April 1999 had been spent. This was to be the first of three inquiries that the Charity Commission instituted, centring variously upon the sources and use of funds by the Mariam Appeal. At the same time, the Charity Commission continued to evaluate the use of funds in the later stages of the Mariam Appeal.

10. On 13 November 2003, the Charity Commission instituted under s.8 of the 1993 Act a 2nd Inquiry. Its remit was to investigate how monies raised throughout the lifetime of the Mariam Appeal had been expended. The two Inquiries were merged and managed jointly.

11. The results of both inquiries were published on 28 June 2004. In the Statement of the Results of the Inquiry ("SORI") at paragraph 21 it stated that the inquiries were closed on 17 May 2004. The SORI was a 2½-page document setting out the results of the two Inquiries. In it, the Charity Commission recorded its conclusions:

    (1) That the objects of the Mariam Appeal were charitable and that the Appeal should have been registered with the Charity Commission and placed on the Register of Charities.

    (2) That apart from public donations, the major funders of the Appeal were the United Arab Emirates, a donor from Saudi Arabia and a Jordanian businessman called Fawaz Zureikat.

    (3) That Dr Amineh Abu-Zayyad and Stuart Halford, two of the Appeal's original trustees, received unauthorised benefits in the form of salary payments from the Appeal's fund.

(4) That some of the activities of the Appeal were political in nature, in particular a campaign to end the sanctions against Iraq, but that these were ancillary in terms of expenditure to the purposes of the Appeal itself, and that the trustees could reasonably have formed the view that ending sanctions would have the impact of enabling treatment for sick children. In the words of the report the political activities "were capable of being viewed as ancillary to the purposes of the Appeal and in light of the fact that the Appeal was closed and in view of the difficulties in obtaining books and records of the Appeal, the Commission decided that it would not be proportionate to pursue its inquiries further".

(5) That while some of the payments made to Mr Galloway and the other trustees of the Mariam Appeal were made in breach of trust, because there was no bad faith, the Charity Commission would not be pursuing recovery of those sums.

12. The Charity Commission's SORI was the subject of press reporting, both nationally and internationally. In evidence before us Mr Kennedy expressed surprise at the superficiality of the SORI. As Mr Kennedy saw it, the combined SORI resulting from the 1st Inquiry and the 2nd Inquiry :

> "...had not really answered any of the key questions and the issues....It had simply identified some areas in which the Appeal should have acted differently. [It] did not carry any consequences for not doing so. The Charity Commission had clearly thought the matter of sufficient public importance to open an inquiry, and of sufficient public importance to conclude its First Statement with a statement on "*Wider Issues*". Yet the Charity Commission did not appear particularly concerned about what it had found, and the public were left in the dark on any details as to what had occurred, apparently this was because 'it would not be proportionate to pursue its inquiries further.' The First Statement did nothing to engender public confidence in the Charity Commission's supervision of organisations, such as the Appeal, that sought and received money from worthy causes: quite the opposite."

13. In October 2005 the Independent Inquiry Committee (IIC) appointed by the U.N. published a report into the Oil-for-Food Programme. It concluded that, amongst other things, certain allocations of contracts in the Programme had involved the payment of "illegal surcharges" to the then Iraqi Government. In the same month, the U.S. Senate Committee on Homeland Security and Government Affairs - Permanent Sub-committee on Investigations (PSI) produced a report reaching the

same conclusion. Both of these reports concluded that the Mariam Appeal had received donations from contracts made under the Oil-for-Food Programme. There was considerable press coverage of these findings.

14. On 9 December 2005, some 18 months after the Charity Commission's SORI following the conclusion of the 1st and 2nd Inquiries and notwithstanding its earlier formal decision that "it would not be proportionate to pursue its inquiries further" the Charity Commission instituted under s.8 of the 1993 Act a new (i.e. a third) inquiry into the Mariam Appeal. The stated purpose of the 3rd Inquiry was:

    — to ascertain whether any funds resulting from contracts made under the [Oil-for-Food] Programme were donated to the [Mariam] Appeal;

    — if so, to establish what was the legal status of those funds; and

    — to examine the extent to which the trustees of the Appeal properly discharged their duties and responsibilities in receiving those funds.

15. The institution of the 3rd Inquiry was also the subject of considerable reporting in the national press.

16. For the purposes of the 3rd Inquiry as stated in the SORI:

    — the Charity Commission "...sourc[ed] and independently examin[ed] a large volume of sensitive evidence obtained from international sources, in conjunction with the evidence previously gathered by the Commission..."

    — the Charity Commission "assessed and considered the information contained in the PSI and IIC Reports to satisfy ourselves as to the accuracy of their respective findings in so far as they related to the Appeal."

    — the Charity Commission "examined the various evidence and testimonies obtained by the PSI and IIC together with the responses to the Reports made under oath and in writing by Mr Galloway to the PSI and IIC and other public statements made by some of the charity trustees."

    — the Charity Commission "obtained further information to assist our analysis and review the information already held, together with the previous findings of our earlier section 8 inquiries

in respect of the Appeal."

— the Charity Commission "exchanged information with various agencies and regulators under the powers available to us under s.10 of the 1993 Act";

— the Charity Commission "using powers under section 8 of the 1993 Act, ...issued directions to the former charity trustees of the Appeal who were resident in the United Kingdom, George Galloway MP, Stuart Halford and Sabah Al-Mukhatar, to answer certain questions"; and

— "letters requesting information were also sent to the other former charity trustees of the Appeal, Mr Zureikat and Dr Abu-Zayyad".

17. The 3rd SORI was published on 8 June 2007. In the SORI it states that the inquiry was closed in April 2007. The 6-page SORI set out the results of the 3rd Inquiry. In it, the Charity Commission recorded its conclusions:

(1) That Mr Zureikat, the President of Middle East Advanced Semicondutor Inc, in the course of 11 payments, donated over £448,000 to the Mariam Appeal, with the largest single donation being the equivalent of £224,996.31 made on 4 August 2000.

(2) That this £224,996 donation was made from funds held by him substantially deriving from payments resulting from a contract made between Aredio Petroleum Ltd and the State Oil Marketing Organisation of Iraq (being the body charged with the sale of oil under the Oil-for-Food Programme) for the allocation of Iraqi oil under Phase VIII of the Programme.

(3) That between July 2001 and February 2002 Mr Zureikat made a further four donations (totalling £73,000) out of funds resulting substantially from contracts under the Oil-for-Food Programme.

(4) That as Mr Zureikat made his donations from commissions and other payments derived from the Oil-for-Food Programme that these donations came from improper sources.

(5) That the members of the Executive Committee of the Appeal should have been aware that they had created a trust, and the fact that they were unaware that they had created a charity did "not in law absolve them from their

duties and responsibilities as a trustee".

(6) That the charity trustees of the Mariam Appeal "did not make sufficient enquiries as to the source of the funding from Mr Zureikat to assess whether it was proper and in the interests of the Appeal to accept these funds"

(7) That had the charity trustees properly discharged their duty of care as trustees of the Appeal, they would almost certainly have discovered that there was a connection between the Appeal and the improper transactions conducted under the Oil-for-Food Programme.

(8) That Mr Zureikat had actual knowledge of the connection between the Oil-for-Food Programme and the Mariam Appeal.

(9) That Mr Galloway may also have known of the connection between the Oil-for-Food Programme and the Mariam Appeal.

18. It was reported in the press that Mr Galloway was critical of the Charity Commission's report, in particular because of what he termed its failure to interview him during the course of its 3rd Inquiry.

19. On 17 July 2007 the House of Commons Committee on Standards and Privileges published its Report into the conduct of Mr Galloway, complete with appendices, formal minutes, transcript of oral evidence, and written submissions from the Parliamentary Commissioner for Standards. Amongst other things, the Committee reported:

> "The Commissioner's inquiry has been one of the most complex ever undertaken, and has been of unparalleled duration." [§8]

The Committee noted that its:

> "...sole concern is whether Mr Galloway has complied with his obligations as a Member of the House under the Code of Conduct, and the related obligations arising from the requirements of the House regarding registration and declaration of interests, and connected matters, such as the extent to which interests may inhibit a Member's freedom of action in relation to proceedings in the House..." [§53]

The report recommended that Mr Galloway be suspended for 18 days.

20. The House of Commons Report provided a very detailed account of the complaint against Mr Galloway and a detailed analysis of the evidence relating to his complaint. The Report is a publicly available document. It covers very many matters that were similar to those investigated by

the Charity Commission in its 1st Inquiry, its 2nd Inquiry and its 3rd Inquiry.

21. In July 2007 Mr Galloway was suspended from the House of Commons for 18 days.

The request for information

22. By email dated 8 June 2007 Mr Kennedy made a request for information under s.1 FOIA to the Charity Commission in the following terms (the Request):

> *"Please would you let me know in writing if you hold information of the following description:*
>
> *Information concerning:*
>
> > *The inquiry into the Mariam Appeal which took place between December 2005 and April 2007, the results published on June 8, 2007.*
>
> *If any part of the information requested is covered by one or more of the absolute exemptions in the Act please treat this request as a request for that part of the information which is not covered by the absolute exemption.*
>
> *If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible.*
>
> *If you are of the view that there may be further information of the kind requested but it is held by another public authority please let me know as soon as possible. Please continue with this application as soon as possible.*
>
> *I believe that the information requested is required in the public interest for the following reasons:*
>
> 1. *To uphold public confidence that the Charity Commission conducts its inquiries in a spirit of fairness to all parties;*
> 2. *To provide assurance that the Charity Commission liaises fully with all relevant authorities so its inquiries are as thorough as possible;*
> 3. *To ensure that the Charity Commission spends money correctly when making inquiries into charities and their trustees."*

23. On 4 July 2007, the Charity Commission refused the Request (the Refusal Notice) in a letter that:

(1) Informed the Appellant that it held information concerning the Inquiry into the Mariam Appeal which took place between December 2005 and April 2007.

(2) Advised the Appellant that pursuant to its duty to assist applicants (s.16) it had re-cast his request for information into the following:

> "Please would you provide me with information about:
>
> The inquiry into the Mariam Appeal which took place between December 2005 and April 2007, its results published on June 8 2007.
>
> Your request appears to encompass all information that the Commission holds regarding the Inquiry."

(3) Advised the Appellant that it considered that s.31 of the FOIA was engaged "in respect of information relating to the Mariam Appeal."

(4) So far as the s.2(2)(b) public interest test and s.31(1) were concerned, advised that it considered that:

> "at this time, [the] balance of the public interest weighs more strongly with securing the Commission's ability to carry out its functions efficiently and therefore lies in withholding the information."

(5) Advised that it also considered that the Appellant's request:

> "engages the exemptions under s.27 (international relations), s.32 (information contained in court records and for the purposes of inquiries), section 40 (personal information), section 41 (information provided in confidence) and section 42 (legal professional privilege)."

24. By letters dated 4 and 16 July 2007 Mr Kennedy asked the Charity Commission to review the initial decision.

25. The Charity Commission made its decision on 25 July 2007 (communicated apparently in full to the Appellant on 25 October 2007)

that it upheld its Refusal Notice but that the absolute exemption from disclosure created by s.32(2) FOIA, concerning information which is held pursuant to an inquiry, applied.

The complaint to the Information Commission (IC)

26. Mr Kennedy complained to the IC by letter dated 1 November 2007.

27. During its investigation the IC accepted three suggestions of the Charity Commission, that the IC first reach a view on the applicability of s.32(2) of the FOIA, that the IC did not need to see the information that fell within the terms of the request, and that the Charity Commission give the IC a copy of the counsel's opinion it had obtained "in confidence" (i.e. without letting Mr Kennedy see what was in it). The IC also asked the Charity Commission to clarify two points. The Charity Commission supplied the IC with counsel's opinion and confirmed that for some of the material answering the terms of the Request it relied upon s.32(2)(a) and for the rest of the material it relied upon s.32(2)(b) of FOIA. In relation to the purpose for which the information was held, the Charity Commission wrote:

> "So far as your second query is concerned, I can confirm that my understanding is that all of the information held by us, which is subject to the request for information from Mr Kennedy, was held only by virtue of being contained in documents acquired or created for the purposes of the section 8 inquiry subject to the request. Just to put that into context, the Mariam Appeal came to our attention due to allegations that gave rise to three section 8 inquiries (the last of which is the relevant one for current purposes, although that inquiry drew on the previous two inquiries). We did not hold any other information about the charity..."

28. On 5 August 2008 the IC wrote to Mr Kennedy. It did not reveal that it had received a copy of counsel's opinion to the Charity Commission. Having recited that the Charity Commission believed that all of the information falling within the terms of the Request was exempt by virtue of sections 32(2)(a) and (b), the IC wrote:

> "Having considered the Charity Commission's arguments, and having discussed this issue with colleagues, I have reached the conclusion that the Charity Commission can correctly rely on sections 32(2)(a) and 32(2)(b) to withhold all of the information that falls within the scope of your request. My reasoning for reaching this conclusion is set out below...."

29. On 9 September 2008 the IC issued his Decision Notice. The IC rejected Mr Kennedy's complaint, stating:

> "The Commissioner has concluded that all of the requested information is exempt by virtue of the sections 32(2)(a) and 32(2)(b). However, in handling this request the Commissioner has also concluded that the public authority failed to provide a refusal notice compliant with sections 17(1)(b), 17(1)(c) and 17(3) of the Act."
>
> In the course of explaining the IC Decision, the IC:
>
> (1) Recorded that the Charity Commission had advised him that it held approximately 20 lever arch files of information that fell within the terms of the Request (§10).
>
> (2) Recorded that the Charity Commission had advised him that it was satisfied:
>
> > "that all of the information that it holds which is the subject of this request is only held by virtue of being contained in documents acquired or created for the purposes of this particular inquiry." (§16)
>
> (3) Recorded his belief:
>
> > "....that it is reasonable to conclude that this particular inquiry [i.e. the Mariam Inquiry] was one that was being conducted in line with the powers conferred on the public authority by section 8(1) of the Charities Act 1993." (§19)
>
> (4) Recorded his satisfaction:
>
> > "...that the information held by the public authority in relation to the inquiry was either provided to it by a third party and therefore falls within the scope of section 32(2)(a), or was created by it for the purposes of the inquiry and therefore falls within the scope of section 32(2)(b). In the Commissioner's opinion the information held by the public authority could not fall outside the scope of either of these two sub-sections." (§20)
>
> (5) Recorded his satisfaction:
>
> > "...that the information falling within the scope of the request is only held by virtue of being contained in the inquiry documents. That is to say, the information is not held by the public authority for any other purpose." (§21)

(6) Concluded that he was therefore satisfied:

> "...that all of the information falling within the scope of the request is exempt on the basis of sections 32(2)(a) and 32(2)(b). As section 32 is an absolute exemption, there is no need for the Commissioner to consider the public interest test as set out at section 2 of the Act." (§24)

(7) On the basis of the conclusion at (6):

> "[did] not consider it necessary to reach a decision as to the applicability or otherwise of the other exemptions that the public authority also relied upon to withhold the requested information." (§25)

(8) Decided that the Charity Commission had failed in its duty under section 17 of the FOIA by not explaining why it considered ss.27, 32, 40, 41 and 42 of the FOIA also applied to information falling within the terms of the request and by not explaining why it considered that the public interest test favoured withholding the information (§26).

The appeal to the Tribunal

30. By Notice of Appeal dated 7 October 2008, the Appellant appealed under s.57 of FOIA to this Tribunal against the Decision Notice.

31. On 14 November 2008 the Charity Commission applied to be joined to the appeal as an Interested Party. On 24 November 2008 the Tribunal joined the Charity Commission as an Interested Party and made various directions.

32. On 17 December 2008 the Charity Commission served, pursuant to the direction made by the Tribunal a Schedule of the Information falling within the terms of the Request and various other matters including the exemptions apart from s.32 of FOIA being relied upon. This was the first time that the Charity Commission had revealed any description of the sorts of information that it held answering the terms of the Request to Mr Kennedy. The Charity Commission also served a set of public interest considerations.

33. Mr Kennedy with the benefit of Schedule of Information in his Witness Statement of 16 January 2009 identified more precisely the classes of documents within the terms of the Request to which he sought access, namely:

> "(a) Documents containing information that explains or evidences the Charity Commission's conclusion

that George Galloway may have known that Iraqi bodies were funding the Appeal.

(b) Documents from the Charity Commission to George Galloway inviting him to set out his position or speak to the Charity Commission and documents containing George Galloway's response to that/those invitation(s).

(c) Documents received by the Charity Commission from other public authorities (as defined in the FOIA) and documents sent by the Charity Commission to other public authorities.

(d) Documents that contain information describing or revealing the reason that (or otherwise explaining why) the Charity Commission decided to commence and continue the Second Inquiry."

He did not want the documents listed in the Charity Commission's 17 December 2008 Schedule which fell outside all four of the classes set out above but he made it clear that he was seeking documents in relation all three inquiries.

34. Mr Kennedy further narrowed the Request, taking out information to or from a foreign state or an international organisation. This included documents prepared by a foreign state, documents received from a foreign state, containing information received from a foreign state and addressed to a foreign state (including any institution, body or agency of that state). However he wished the Tribunal to be satisfied that the documents removed from the Schedule were the correct ones.

35. The second qualification referred to in §47 of his Witness Statement related to a claim for Parliamentary Privilege asserted by the House of Commons who applied to be joined as a party. The House of Commons has since re-visited its claim for privilege, indicating by e-mail to the Tribunal of 3 March 2008 that it no longer asserted the same. The House of Commons further advised that it would:

> "consider it inappropriate for the Tribunal to entertain argument or to reach conclusions on the application of s.34 ..... The Tribunal has been invited to do so by the Appellant, but we urge you to decline."

Since the body to which the privilege belongs is expressly disavowing its application, s.34 of FOIA no longer needs to be considered. This means that those documents which had previously been identified as being potentially subject to Parliamentary Privilege would now have to be considered under the other claimed exemptions.

36. We will call the reduced scope of the Request "the Refined Request".

37. The Tribunal decided that the case should be heard in two parts. Firstly as to whether s.32(2) was engaged in open session during the course of two days. If we decided that s.32(2) was not engaged or only engaged for some of the disputed information then we would sit for a further two days in closed session to consider the disputed material and the other exemptions to which a claim had been made except s.27 (International Relations) because of the narrowing of scope of the Request by the Appellant and the position of the House of Commons. The case was set down for an open hearing on 12 and 13 March and then a closed hearing on 23 and 24 March 2009.

38. In order to undertake this exercise the Charity Commission provided a list of documents in a spreadsheet format and colour coded to indicate what information was being withheld within each category of the Refined Request. In relation to this Mr Coppel, on behalf of Mr Kennedy, asked us to sample the removed information which originally formed part of the disputed information so as to satisfy ourselves that the Charity Commission and IC had undertaken the reduction exercise properly. In order to help us with the exercise Mr Coppel provided us with a suggested list of documents we should examine and also asked us to undertake further random sampling.

39. The Tribunal took a preliminary view without promulgating a decision that s.32(2) was not engaged in this case. The Tribunal permitted Mr Coppel to make final written submissions on behalf of the Appellant in relation to the further exemptions because he and his client would not be able to take part in the closed session. A closed hearing then commenced to consider the disputed material. In between the open and closed hearings the Tribunal undertook the sampling exercise. At the end of the first day of the closed hearing the Tribunal adjourned its proceedings to hear further submissions on the basis of Further Directions dated 25th March 2009.

40. The Tribunal then took the opportunity to review its preliminary decision, not based on any evidence or submissions made at the closed session on 23 March but only on the evidence and submissions on the first two open days, and decided that the s.32(2) exemption was engaged and that the case should proceed differently. The reasons for this finding follow.

The questions for the Tribunal

41. The first question the Tribunal has to decide is whether the Charity Commission and the IC are correct in contending that s.32(2) FOIA applies to defeat Mr Kennedy's right of access to all the information falling within the terms of the Refined Request. This is an absolute exemption so that if the Tribunal finds that it is engaged in relation to all the information subject to the Refined Request then the appeal can be

dismissed.

42. If the Tribunal finds that the exemption is not engaged or only engaged in relation to some of the information requested then the Tribunal needs to consider whether one or more of the exemptions under ss.21, 31, 40, 41 and 42 FOIA variously apply to some of the information that falls within the terms of the Refined Request.

43. If some of these exemptions are engaged then the Tribunal may need to take further steps to consider the public interest test, principally under the provisions of s.2(2)(b) FOIA.

44. The powers of the Tribunal are set out under s.58 FOIA. The Tribunal may consider whether a decision notice is wrong in law or that to the extent that a notice involved an exercise of discretion by the IC that he ought to have exercised it differently. In order to do this the Tribunal may undertake a merits review (s.58(2)) and can allow the appeal and/or substitute a new decision notice and in any other case dismiss the appeal.

<u>The s.32 exemption</u>

45. S. 32 FOIA provides, so far as relevant:

"**32 Court records, etc**

(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) ...

(c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and

(d) ..."

46. The two sub-sections in s.32 create absolute exemptions: they are thus not qualified by the public interest test in s.2(2).

47. S. 32 creates two classes of exemptions:

— S.32(1) creates a class of exemptions in respect of what might very loosely be called "court-documents"; and

— S.32(2) creates a class of exemptions in respect of what might very loosely be called "inquiry and arbitration documents."

48. In this case we are concerned with s.32(2) although the fact that the two classes are contained in the same exemption is significant as we explain later in this decision.

What is a "document"?

49. Mr Coppel contends that among the exemptions under Part II of FOIA, the requirement of s.32 that information be "contained in any document" is unique. All other exemptions simply look to the qualities of the "information" itself. It is inconceivable, he says, that the draftsman idly introduced into s.32(2) the phrase "contained in any document." These words must be given some work to do. In particular, the distinction that has been created between "document" and "information" must be acknowledged.

50. "Document" is not defined in FOIA. But the preceding words ("are contained in"), Mr Coppel says, are illuminating. The only non-obsolete meaning of the noun "document" is:

> "something written, inscribed, engraved etc. which provides evidence or information or serves as a record..."[1]

The word is, he says however, also employed metaphorically in everyday speech to cover more-or-less any form of information. The most common instance of this is a "document" held on a computer. Just as it is wholly circular and pointless to speak of "information contained in any information", so it is wholly circular and pointless to speak of "information contained in any document" unless "document" is given a narrower meaning than "information."

51. The narrower meaning, he argues, is simply yielded by giving the word "document" its dictionary meaning. It means something written, inscribed, engraved etc. It thus embraces what is handwritten, typed, printed, photocopied, or conveyed in any other physical, visible form. The ordinary meaning of the word "document" does not extend to magnetic charges on the platter of a computer's hard disk, nor to the electrical charges on a memory stick, and so forth.

52. This meaning, Mr Coppel further argues, is reinforced by the succeeding words in s.32(2)(a) – "placed in the custody of a person." Whilst most words in the English language enjoy a certain amount of elasticity of meaning, the words "placed in the custody of a person" cannot be stretched to cover information stored electronically. People do not normally think of themselves placing electrical or magnetic charges in the custody of another person.

53. Mr Beer on behalf of the Charity Commission does not agree with this suggestion and submits that the exemption set out in s32 applies to information contained in electronic media. This is because:

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[1] Definition 3 of "document" in the Shorter Oxford English Dictionary (1993 Edition)

(1) First, there is no good reason of principle or policy to restrict the definition of “document” in s32 to information contained in written form;

(2) Second, the law has generally approached the interpretation of the word “document” expansively and defined, or held, it to include reference to information held in media other than the written form;

(3) Third, were the word “document” to be restrictively defined, as the Mr Coppel submits that it should be, then odd and unintended consequences would result; and

(4) Fourth, the definition contended by Mr Coppel is inconsistent with previous decisions of this Tribunal.

54. In respect of his argument that the law has generally approached the definition of the word “document” by giving it an expansive meaning, Mr Beer brings to our attention a number of authorities, for example, *Lyell v. Kennedy (No. 3)* (1884) 50 L.T. where a moving cinematograph film was held to be a document, *Hill v The King* [1945] K.B. 329, *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652, where Vinelott J held that the database of a computer's on-line system, or which is recorded in backup files, was a document within the meaning of Order 24 of the RSC and *Alliance & Leicester Building Society v Ghahremani* (1992) *The Times*, 19th March per Hoffman J: For the purpose of an application to commit a solicitor for contempt for breach of a court order restraining him from destroying or altering any documents relating to a particular transaction, the word "document" was not restricted to visible writing on paper but included information stored in the hard disc of a computer. Mr Beer also points out that under Part 31.4 of the Civil Procedure Rules 1998, it provides “In this Part –‘document’ means anything in which information of any description is recorded...”

55. Mr Beer further submits that commentators and the Tribunal have suggested that the purpose behind the exemption in s.32 FOIA is to ensure that the existing rules regarding access to, or publication of information contained in, court records or held for the purposes of inquiries or arbitrations are not circumvented by applications under FOIA. Given this rationale, and the rules that exist to regulate access to and publication of documents contained in court records or created for the purposes of court and other proceedings (which rules define “document” expansively) it would be entirely inconsistent for s.32 of FOIA to have a very restricted application to only written documents. If that were the case, then an applicant under FOIA could secure access to, say, a video film, a memory stick or a computer hard drive that had been disclosed in the course of civil proceedings (because each of them was a “document”) when they could not secure access to a letter or a witness statement. Further, courts often now accept (or even

request) documents to be disclosed electronically. A very large proportion of court / inquiry etc. documents are now created electronically. If Mr Coppel is correct, and s.32 does not exempt from disclosure electronically held material, s.32 would be rendered largely nugatory.

56. Mr Beer brings to our attention that differently constituted Information Tribunals have considered the issue of the meaning of the word "document" in the context of s.32 on two previous occasions:

(1) In *Mitchell* [EA/2005/0002] the Tribunal held, at § 21:

> ...we are in no doubt that the tapes are themselves a "document" for the purposes of s.32(1), as the Respondent contends, since that term is broadly construed in an age offering so many recording media. It would be remarkable if an exemption depended on whether a tape was recorded or a stenographer produced a shorthand note...

(2) In *Ministry of Justice* [EA/2007/0120 and 0121] the Tribunal held, at §16:

> No distinction can be made for present purposes between a tape recording and a transcript. That was the view taken in *Mitchell;* it accords with commonsense and rule 10.15(7) of the Family Procedure Rules.

57. Mr Sheldon on behalf of the IC agrees with Mr Beer's submissions in relation to what the word "document" covers. Mr Coppel does not agree with their expansive interpretation of the phrase "contained in any document" and considers the Tribunal's decisions in *Mitchell* and *Ministry of Justice* were wrongly decided on this point.

Tribunal's conclusion as to what is a "document"

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 IC and already accepted by differently constituted Tribunals. This Tribunal does not consider that Parliament intended that the word "document" in the context of the s.32 exemption should be given the narrow meaning put to us by Mr Coppel. The Tribunal considers that it would not be commonsense to accept a narrower interpretation particularly in light of the definition of "information" under s.84 FOIA, 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 an

inquiry, and nothing to do with its contents. 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 to continually 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 s.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 documents 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 s.32 exemption.

When does an inquiry end?

61. We heard evidence from two witnesses for the Charity Commission in relation to inquiries held by the Charity Commission in particular the inquiries the subject of this appeal. They were Sharon Michelle Russell who is the Head of Compliance at the Charity Commission and Rachel Baxter who is a senior legal advisor for the Charity Commission.

62. In order to understand how an inquiry is instigated we need to turn to s.8 of the1993 Act. It confers upon the Charity Commission a general power to institute inquiries:

> "(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 except where this has been requested by its principal regulator.
>
> (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) The Commission may pay to any person the necessary expenses of his attendance to give evidence or produce documents for the purpose of an inquiry under this section, and a person shall not be required in obedience to a direction under paragraph (c) of subsection (3) above to go more than ten miles from his place of residence unless those expenses are paid or tendered to him.

(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.

(7) The council of a county or district, the Common Council of the City of London and the council of a London borough may contribute to the expenses of the Commission in connection with inquiries under this section into local charities in the council's area."

63. We note that under s.8(2) the Commission can undertake an inquiry

itself or appoint someone else to conduct the inquiry outside of the Commission. The usual process, although not completely clear from the evidence, was that someone within the Commission was given responsibility for conducting an inquiry but that person would have to seek authority from others in relation to certain aspects of the inquiry, for example seeking permission to exercise s.8(3) powers. Nearly all statutory inquiries are conducted internally by the Charity Commission. The Mariam Appeal inquiries were held by the Commission itself.

64. We also note that there is no requirement under s.8 to close an inquiry but that the Charity Tribunal has power to direct the Commission to end an inquiry under Schedule 1C to the 1993 Act. There appears to be no appeal to the Charity Tribunal in relation to the findings of an inquiry.

65. Ms Russell explained that when opening an inquiry under s.8 the Charity Commission writes a letter in fairly standard form to complainants and trustees. An inquiry will then typically have five phases (which at the time of the inquiries in question were contained in the Charity Commission's Operational Guidance No. 116, now 117), which is publicly available on its website and states, namely:

> 1. Evidence gathering. The Commission will gather evidence about the causes for concern and the charity's activities generally. This will normally involve seeking additional information and responses 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 cases for concern are substantiated we will advise the trustees of our conclusions. If the concerns are not substantiated we will 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 cases for 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 an 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. (emphasis added)

66. In the Guidance it expands on the SORI:

> **Issue of a Statement of Results of Inquiry:** The Charity Commission's policy is to report the outcome of formal inquiries by publishing a statement of results on our website. Trustees and individuals criticised in the statement will be given an opportunity to see it and to comment where they consider there to be factual inaccuracies before publication takes place. Our reports inform charities and the public about our role as regulator, about the inquiry

> process and about the action that we have taken in a particular inquiry. They also raise awareness about particular issues and we hope they widen the impact of our involvement in individual cases.

67. In this case it has been accepted by all parties that all three inquiries were all closed. The only dispute is as to the date of closure. The reason this date is important is because any information coming into possession of the Charity Commission or created by it after an inquiry is closed may not be caught by the s.32 exemption.

68. Ms Russell gave evidence that the inquiry process is not completed until publication of the SORI. Mr Coppel says this cannot be correct because in the reports themselves they state the closure date is an earlier date than publication. Ms Russell explained to us that the closure date in the reports was when the investigation stage had been completed and the initial findings reached. This was because the Charity Commission has a Key Performance Indicator (KPI) to reach this stage of the process within an average of nine months from the start of an inquiry. The Commission then has another PKI to finalise and publish the report within the following three months. We understood the first PKI was reported to Parliament. Because the trustees and others are sent a draft copy of the SORI for comment prior to publication the draft may be changed and so the actual end date is the final version of the report and its publication date.

Tribunal's conclusion on when an inquiry ends

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 s.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 s.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 3rd Inquiry and helps us to come to the conclusion that an inquiry only ends with publication of the SORI.

70. We would observe that the Charity Commission's desire to achieve its KPIs may be causing it to state that an inquiry is closed before it in reality closes and that this may be misleading to both Parliament and others interested in its statutory reports.

The scope of s.32(2)

71. Mr Beer submits that the proper interpretation of s.32 of FOIA is that it is not limited in time to the period in which the inquiry is taking place (ongoing inquiry), but also applies to documents that continue to be held by the public authority after the inquiry has ceased (completed inquiry), if that is the only reason for which they are held.

72. This, Mr Beer submits, accords with the statutory language, and is consistent with (i) the analogous provisions relating to court records; (ii) the approach adopted by the Inquiries Act 2005 ("the 2005 Act"); and (iii) the meaning of s.63(1) of FOIA. The statutory language 'placed in the custody of a person conducting an inquiry' is capable of applying to an ongoing, as well as a completed, inquiry. That is linguistically it can cover documents that were so placed, and not merely those that are so placed.

73. In addition, Mr Beer argues, this is consistent with the language of s. 32(1): "*documents filed with, or otherwise placed in the custody of, a court for the purposes of proceedings*". S. 32(1) would readily be interpreted so as to cover documents held both during proceedings and after such proceedings had concluded, and there is no reason in principle why inquiry documents should be treated any differently.

74. This construction, he submits, also makes sense of relevant provisions in the 2005 Act which provides at:

> "18(3) Section 32(2) of the Freedom of Information Act 2000 (c. 36) (certain inquiry records etc exempt from obligations under that Act) does not apply in relation to information contained in documents that, in pursuance of rules under section 41(1)(b) below, have been passed to and are held by a public authority.
>
> 41(1) The appropriate authority may make rules dealing with –
>
> (b) the return or keeping, **after the end of an inquiry**, of documents given to or created by the inquiry" (emphasis added b y Mr Beer).

75. Mr Beer submits that the draftsman of the 2005 Act clearly took the view that, absent specific provisions such as s.18(3) and 41(1) of the 2005 Act, the exemption in s.32(2) of FOIA would continue to apply, even after the completion of an inquiry. That is, if all information contained in documents received or created by an inquiry becomes free of the s.32 exemption at an inquiry's conclusion, then there would be no need for these provisions: the exemption contained in s.32(2) would no longer apply. If this construction of s.32(2) is not correct, then s.63(1) (as it applies to s.32) FOIA would, for all practical purposes, be rendered otiose.

76. So far as is relevant, s.63(1) provides that "*information contained in a historical record cannot be exempt information by virtue of section [...] 32*". What constitutes a "historical record" for the purpose of s. 63(1) is provided for in s.62(1) FOIA as follows:

> "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"

77. Mr Beer argues that these provisions indicate that, after a period of 30 years, documents to which s. 32 of FOIA would otherwise apply cease to enjoy that exemption. If s.32 ceases to apply immediately following the conclusion of an inquiry, then s. 63(1) of FOIA would be restricted in application only to those court proceedings, inquiries, or arbitrations that had been ongoing for over 30 years. Realistically, he says, that cannot have been Parliament's intention.

78. These are arguments with which Mr Sheldon on behalf of the IC concurs.

79. The effect of these arguments is that all or most documents, in effect, used in a statutory inquiry would be exempt from disclosure for 30 years. Mr Coppel disagrees that all documents would be included and we deal with his arguments below. In terms of freedom of information this is an interesting construction as it would take away the possibility of disclosure for a very long time.

80. Mr Coppel argues that once an inquiry has concluded and the person conducting it hands over to a public authority the documents he created or received during that inquiry, the recipient public authority is not holding those documents only by virtue of what is stated in sub-sections (a) or (b) of s.32(2) FOIA. It is holding them by virtue of their having been transferred by the person conducting the inquiry and, quite probably, by virtue of its record-keeping functions.

81. Thus, he continues, in this case even where a person had placed a document in the custody of the Charity Commission for the purposes of one of its inquiries, all those inquiries having concluded at the time of the Request, no such document remained placed in the custody of the Charity Commission for the purpose of any of the inquiries. He argues that the above assertions of the Charity Commission and the IC do not accord with the wording of the section or its statutory purpose.

82. Mr Coppel further contends that the purpose of the s.32(2) exemption was not to prevent or restrict disclosure of documents. Rather, it was to maintain control over that process in the hands of the person

conducting an inquiry (or arbitration). Until the inquiry ends, the exemption provides a level of control which is necessary for the proper conduct of an inquiry. But that justification falls away at the end of the inquiry. S.32(2) does not then continue to provide a blanket exemption to disclosure.

83. As to the Charity Commission and IC's contention that their interpretation of s.32(1) lends support to their assertion that s.32(2) continues to apply after the conclusion of inquiries Mr Coppel argues the subsections are crucially different. A court or tribunal continues in existence after the conclusion of the individual case. A court or tribunal may therefore continue to exert control after the conclusion of the individual case according to its general rules on disclosure of documents: see *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch) at [28]. Also Courts have rules for such matters which can provide for the dealing with documents after proceedings have ended. It is for these reasons that s.32(1) continues to operate after the conclusion of the individual case. That justification does not exist in relation to s.32(2). This is why, after completion of the inquiry, disclosure falls to be determined under the general scheme of FOIA.

84. As to the Charity Commission's suggestion that the specific disapplication of s.32 in the context of the 2005 Act demonstrates that the s.32 exemption is not otherwise limited in time and the similar argument raised in relation to s.63(1) of FOIA, Mr Coppel contends all that these two specific examples achieve is a demonstration of the general rule, namely that the exemption under s.32(2) does not continue to apply after completion of an inquiry. Moreover, as already noted, the history of the provision strongly suggests, he says, that the s.63(1) "fall-away" was intended to be directed to court documents.

85. Finally Mr Coppel attempted to demonstrate to us that the interpretation of s.32(2) provided by Mr Beer was to change the meaning of the sub-section.

<u>Tribunal's conclusion as to the scope of the exemption</u>

86. Having heard all the submissions of the parties, and reconsidered our preliminary view, we prefer Mr.Beer's arguments supported by the IC.

87. Our primary reason for this is because of the wording of s.32(2) FOIA. In our view the adverbial phrase "for the purposes of the inquiry or arbitration" qualifies the word "placed" in s.32(2)(a) and not the word "held" in the preceding general words to s.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 provides 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.

88. From this we conclude that it matters not for the purposes of s.32(2) whether the Commission conducted the inquiry itself or appointed an outsider who handed over the inquiry documentation to the Commission at its conclusion.

89. We consider Mr Beer’s submissions on ss 18(3) and 41(1) of the 2005 Act (see §§ 75 and 76 above) are formidable. Whilst the view of Parliament or the draftsman as to the interpretation of an earlier provision as demonstrated by the enactment of a later provision is not definitive, we consider it gives substantial weight to the interpretation we are adopting in this case. In our view Mr Coppel’s counter arguments do not adequately overcome this hurdle.

90. Likewise, he is unable to provide us with a plausible answer to Mr Beer `s point on s.63(1) – see §§ 77 and 78 above. We note, incidentally, that the Government is currently considering the reduction of the 30 year rule to 20 years following the Dacre Report.

91. The distinction Mr Coppel makes between courts under s 32(1) and authorities under s.32(2) focuses unduly on the nature of the institution rather than the information and the reason it came into the authority `s possession in the first place. In our view an inquiry has the same need to regulate publication of material which has been produced to it or created by it as a court. If a person is required to provide a document to a statutory inquiry, why should his/her right to continuing confidentiality after its conclusion be governed by different exemptions from that which would apply if production had been to a court?

92. The Tribunal realises that our finding provides a very wide scope for the s.32 exemption. In most of our other decisions the Information Tribunal has tended to interpret exemptions narrowly because of the underlying concept of FOIA 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 s.32 recognises the autonomy of both.

93. Finally, it seems odd to us that Parliament should have created, within the same section and in relation to broadly similar institutions, sharply contrasting exemptions without saying so in very clear language.

94. We note that our findings are consistent with the findings of a differently constituted Tribunal in *Szucs v Information Commissioner* EA/2007/0075.

95. What are the implications of our findings:

a) If after a court decision or an inquiry closes then anyone can ask for the leave of the court or person conducting the inquiry for documents and the judge or authority can consider this but outside the realms of FOIA. Courts have rules for this and government inquiries also envisage similar rules. Therefore we would recommend that the Charity Commission considers adopting such rules.
b) If documents are provided by other public authorities then a person can always make an FOIA request to them and they would not be able to rely on s.32(2);
c) If documents are held by the Charity Commission for purposes other than the inquiries then they may not be caught by the s.32(2) exemption. Some documents pre-dating the 1st Inquiry may not be covered and in this case some documents dated between the 2nd and 3rd Inquiries may also not be covered.

96. In relation to this third implication Mr Coppel also argues that the s.32(2) scope is further restricted. He contends that even within the dates on which an inquiry is being conducted, a document will only have been placed in the custody of the Charity Commission for the purposes of its inquiry if the donor's purpose in giving it to the Charity Commission related to the particular object of the inquiry.

97. The stated purpose of the 1st Inquiry was "to investigate how the monies raised for the [Mariam] Appeal between March 1998 and April 1999 had been spent" (§5). Later that purpose was extended "to investigate how the monies raised throughout the lifetime of the Appeal had been expended" (§7) – 2nd Inquiry.

98. The stated purpose of the 3rd Inquiry was "to ascertain whether any funds resulting from contracts made under the [U.N. Oil-for-Food] Programme were donated to the Appeal; if so, to establish what was the legal status of those funds; and to examine the extent to which the trustees of the Appeal properly discharged their duties and responsibilities in receiving those funds" (§15).

99. Accordingly, Mr Coppel argues that s.32(2)(a) can only apply to such of

the information answering the terms of the Refined Request in respect of which the Charity Commission or IC has satisfied the Tribunal that it was for the purpose of a particular inquiry that the information in that document was "placed in the custody" of the Charity Commission.

100. The Charity Commission agrees that documents placed in the custody of the Charity Commission before the commencement or after the conclusion of its inquiries are not placed in the custody of the Charity Commission "for the purposes of the inquiry". However, in relation to those documents received before the commencement of the 1st Inquiry, the Charity Commission contends that the s.32(2)(a) exemption nonetheless applies because this material was "then placed in the custody of the Charity Commission" for the purposes of the subsequent inquiries. The Charity Commission uses the same argument in respect of the material it acknowledges was received between the conclusion of the first and second inquiries and the commencement of the third, which was then used in the 3rd Inquiry.

101. Mr Coppel does not consider that approach adheres to the words in s.32(2). What he argues is that the focus of the governing words in the opening line of s.32(2) is the basis upon which the public authority holds the information. In order for either paragraph (a) or paragraph (b) to be satisfied, the public authority must hold the information *only* by virtue of the information being contained in a document of the kind described in paragraph (a) or (b). If the public authority holds the information for any other (or additional) reason, s.32(2) will not apply.

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 s.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 s.32(2) . If the documents are still held for another purpose, like a 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.

103. Our conclusions on all the preliminary matters and the decision that s.32(2) is engaged are unanimous.

Further directions

104. The Tribunal then went on to provide further directions in order to decide what documents covered by the scope of the Refined Request are not covered by s.32(2) FOIA.

105. We directed that the parties, with the benefit of the reasons for the preliminary decision, identify information which is likely to be dated before the 1st Inquiry and between the 2nd and 3rd Inquiries and any documents being received or created between the time of the closure of the 3rd Inquiry and the time of the Request. Much of this exercise had already been done by the Charity Commission and provided to us and the other parties in schedules. Then the Charity Commission was asked to review whether it still wished to claim the exemptions already claimed for this information, bearing in mind the Tribunal's observations in §95(a). The Tribunal would then reconvene on 27 May 2009 to determine whether any of these documents should be disclosed in closed session.

106. The Tribunal became concerned at the closed hearing on 23 March that the Charity Commission seemed to have taken a narrow interpretation of the scope of the Refined Request. Therefore the Tribunal directed that the Charity Commission review the information that it held in the date and time ranges indicated in the previous paragraph to see whether any other information should have been incorporated in the schedules.

107. The Tribunal then made the following directions:

(1) The Further Directions dated 25 March would no longer apply.

(2) The Charity Commission would provide a revised schedule only including information potentially not caught by the s.32(2) exemption as indicated in §105 above but also including any other information covered by the Refined Request taking into account the Tribunal's concerns expressed in §106 above and serve it with copies of any new information on the Tribunal and IC by 12 noon on 30 April 2009. The revised schedule to indicate which exemptions if any are being claimed in relation to all information in the revised schedule.

(3) The Tribunal would then reconvene in closed session on 27 May 2009 to decide whether any of the information in the revised schedule should be disclosed.

(4) Leave was given to the parties to apply for further directions by 23 April 2009.

Resumed hearing

108. The Tribunal reconvened in closed session on 27 May 2009. Prior to this the Charity Commission prepared a schedule of documents in accordance with the above directions and re-introduced some 30 plus new documents. The index to the schedule was also served on the Appellant and on the morning of the hearing the Tribunal received an email from the Appellant's solicitors asking the Tribunal to take certain matters into account, which the Tribunal duly did so far as they were relevant. .

109. Mr Beer helpfully categorised the information in the schedule into the following categories:

(1) evaluation and fact finding in relation to the 1st and 2nd Inquiries;

(2) evaluation and fact finding in relation to the 3rd Inquiry;

(3) briefing communications between the Charity Commission and the Home Office following the first two inquiries;

(4) internal press communications within the Charity Commission; and

(5) documents after the 1st and 2nd Inquiries but before the commencement of the 3rd Inquiry.

110. The Tribunal considered the information using this structure and found that although most of the documents were still caught by the s.32(2) exemption that some were not. Of those that were not the Charity Commission agreed to disclose some, but redacted so as not to reveal names or other personal data of individual data subjects claiming the s.40 exemption. Mr Beer then argued that if the Tribunal was to find that s.32(2) was not engaged for other documents then at least s.31 or s.42 was engaged and that the public interest test favoured maintaining the exemption. The main public interests taken into account for maintaining the s.31 exemption were the ongoing investigations of other agencies such as the police and the Parliamentary Commissioner on Standards which the Charity Commission was assisting with at the time of the Request and the prejudice to trustees if such documents were publicly disclosed before trustees had the opportunity to have allegations/findings properly put to them by these other agencies. Also the possibility of trial by media before a trustee could have the opportunity to explain an allegation. Clearly these interests are time based.

111. The Tribunal considered the schedule of documents referred to in §108 in detail and decided as follows.

112. The documents in the first category (§109(1)) pages 1 – 68 in the schedule were all documents relating to fact finding and the evaluation

by the Charity Commission as to whether they should instigate a statutory inquiry. These documents were subsequently placed in the custody of the person conducting the 1st and 2nd Inquiries for the purposes of those Inquiries and no longer held by the Commission for any other purpose.

113. We find that for these documents the s.32(2) exemption is engaged. The fact they were originally held for another purpose, namely the evaluation as to whether to commence a statutory appeal, did not prevent the documents being held only by virtue of the circumstance in s.32(2)(a) once they were placed in the custody of the person conducting the inquiry. In our view in this case documents held to establish that an inquiry should be commenced and which form the basis of the inquiry investigation and for no other purpose after the inquiry starts are then only held for the purposes of that inquiry and therefore covered by the s.32(2) exemption.

114. The documents in the second category (§109(2)) pages 97-104, 130, 136, 156-162 and 164-225 were used to fact find and formed the basis of the evaluation resulting in the 3rd Inquiry. For the same reasons above we find that the s.32(2) exemption was engaged as soon as they were passed to the person conducting the 3rd Inquiry and help for no other purpose than that inquiry.

115. For the documents in third category (§109(3)) the Charity Commission accepts that these documents may be held for other purposes and is prepared to disclose pages 71-75, 92 and 163 subject to redactions of the names of officials and other personal data such as their telephone numbers and email addresses. The Tribunal is informed that this information is the personal data of minor officials and we find that their personal data is exempt under s.40(2) following a line of decisions of the Information Tribunal on this exemption and so allow the redactions..

116. For the following documents in the fourth category (§109(4)) the Charity Commission accepts they are also held by the press office, namely those at pages 95-96, 105-106, 110 and 115, and is prepared to disclose them. The Documents at pages 107-109 and 111-114 although held for another purpose provide internal legal advice and the Charity Commission claims s.42 (legal professional privilege) and that the public interest balance favours maintaining the exemption taking into account the public interests submitted with the original schedule of disputed information. The Tribunal has reviewed the documents and agrees that the public interests set out by the Charity Commission

represent strong public interest which in our view are stronger than any factors provided by Mr Coppel in favour of disclosure. In particular we find that the Inquiries had a high degree of legal complexity and that the non qualified case workers undertaking the investigations required confidential legal opinions in order to steer the investigations. Therefore we find that the public interest balance under s.2 FOIA favours maintaining the exemption for these documents and that they should not be disclosed.

117. The documents in the fifth category constitute communications between the Charity Commission and the Parliamentary Committee on Standards. We were informed that these documents were all placed in the hands of the person holding the 3rd Inquiry and were not held for any other purpose by the Charity Commission. We note that most of the information relates to providing answers to questions about background information in the 1st and 2nd Inquiries. In other words the documents only contained information which was contained in documents placed in the custody of the person conducting those inquiries for the purposes of those inquiries. We consider such information is exempt under s.32(2) FOIA.

118. The Request was made a few hours after the end of the 3rd Inquiry. We did not find that any information in the refined disputed bundle was obtained or created by the Charity Commission in those few hours which were largely out of working time. Clearly if the request had been made at a later date more documents may have come to light which may not have been caught by s.32(2).

Final conclusions and observations

119. The Tribunal upholds the IC's Decision Notice in large part but has substituted a decision notice in respect of the documents which the Charity Commission agrees that it should disclose to Mr Kennedy because they are not caught by the s.32 exemption, but with personal data of junior officials redacted.

120. Our decision on all our findings is unanimous.

121. We would make a number of observations in this case. Firstly we would recommend that the IC should only very rarely decide not to review at least a sample of the disputed information when considering a complaint. Otherwise, as in this case, the Tribunal may not have sufficient confidence that the complaint has been properly investigated

and have to resort to undertaking such an exercise itself. The Tribunal is not necessarily the best forum for such an exercise despite the Tribunal's power to undertake a merits review.

122. Secondly, as already mentioned we would recommend to the Charity Commission that it considers introducing rules in relation to the documents it holds in statutory inquiries in the same way as courts, tribunals and government statutory inquiries, so that interested parties are aware on what basis they may be disclosed despite the exemption under s.32(2). We are led to believe that the Charity Commission has already started to consider how such rules could be introduced.

123. Finally one of Mr Kennedy's main criticisms of the Charity Commission was the brevity of its SORIs which in this case were only a few pages long. The Tribunal tends to agree with this criticism and recommends that the Charity Commission considers providing more detailed reports possibly in two stages. Firstly a brief report at the close of the inquiry and secondly a more detailed report after other agencies have been given the opportunity to decide whether they will be taking any further action.

Signed

John Angel

Chairman, Information Tribunal Date 14th June 2009