

FOIA s32(2) – Absolute exemption: statutory inquiry records

## ***Dominic Kennedy –v- Information Commissioner and the Charity Commission***

***EA/2008/0083***

***14 June 2009***

### **Cases:**

Mitchell v Information Commissioner EA/2005/0002

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

Szucs v Information Commissioner EA/2007/0075

### **Facts**

This case concerned a request for information to the Charity Commission under the Freedom of Information Act 2000 (FOIA) regarding its inquiries into the Mariam Appeal (“the Appeal”). The Appeal was founded in 1998 by George Galloway. Its constitutional objectives 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.” Another of the Appeal’s core activities was to collect money to fund the bringing of Mariam Hamza, who was suffering from leukaemia at the time, to the UK for treatment.

In Spring 2003, Mr Kennedy, a journalist with the Times newspaper, commenced investigations into the sources of funds for the Appeal and the manner in which those funds were used. His findings were published in the Times on 5 April 2003. Mr Kennedy reported that the Appeal was not registered as a charity and that he believed its activities had spread beyond its stated objectives. The publication also reported that Mr Galloway had used funds from the Appeal to pay for his visits to Iraq and other countries, to campaign against the economic sanctions then imposed on Iraq, and to denounce Israel. Further articles were written which questioned the uses to which the funds collected by the Appeal had been put.

On 27 June 2003, the Charity Commission instituted an inquiry under s8 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. A second inquiry was instituted on 13 November 2003 to investigate how monies raised throughout the lifetime of the Appeal had been expended. The two inquiries were merged and managed jointly. The results of these inquiries were published on 28 June 2004. The Statement of the Results of the Inquiry (“SORI”) recorded the Charity Commission’s conclusions which included inter alia that:

- two of the Appeal’s original trustees received unauthorised benefits in the form of salary payments from the Appeal’s fund;
- some of the activities of the Appeal were political in nature – however, these were viewed as ancillary in terms of expenditure to the purposes of the Appeal itself; and
- although some of the payments made to Mr Galloway and the other trustees of the Appeal were made in breach of trust, there was no bad faith and accordingly the Charity Commission would not seek to recover those funds.

Mr Kennedy was unhappy with the report’s findings for a number of reasons, in particular the fact that the Charity Commission did not appear particularly concerned about what it had found, and that the public had been left in the dark on the details as to what had occurred.

Further reports were written in October 2005 by the Independent Inquiry Committee (IIC) into to the Oil-for-Food Programme, and by the US Senate Committee on Homeland Security and Government Affairs – Permanent Sub-committee on Investigations (PSI). Both reports

concluded that the Appeal had received donations from contracts made under the Oil-for-Foods programme. Following these reports, the Charity Commission instituted under s8 of the 1993 Act a third inquiry into the Appeal. The stated purpose of the third inquiry was:

- to ascertain whether any funds resulting from contracts made under the [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.

The results of the third inquiry were published on 8 June 2007.

On 8 June 2007, Mr Kennedy requested information from the Charity Commission relating to the three inquiries ("the Request"). Mr Kennedy specifically stated that if any information fell within any of the absolute exemptions under the FOIA then the Request was to be treated as a request for the information which did not fall within the absolute exemptions. The Charity Commission refused the Request on 4 July 2007, relying on a number of exemptions. Mr Kennedy asked the Charity Commission to review its initial decision. The original decision was upheld on 25 July 2007, with the Charity Commission applying the absolute exemption created by s32(2) FOIA. Mr Kennedy then complained to the Information Commissioner ("the IC") on 1 November 2007. The IC issued its decision notice on 9 September 2008, rejecting Mr Kennedy's complaint and concluding that all of the requested information was exempt by virtue of ss32(2)(a) and 32(2)(b) FOIA. Mr Kennedy appealed to the Tribunal on 7 October 2008. Following the Tribunal's directions, Mr Kennedy modified and narrowed the Request ("the Refined Request").

### **Findings**

The first question the Tribunal considered was whether s32(2) FOIA applied to defeat Mr Kennedy's right of access to all the information falling within the terms of the Refined Request. Section 32(2) FOIA provides that information held by a public authority is exempt from disclosure if it is held only by virtue of being contained in any document. After considering the parties' arguments as to what is a "document", the Tribunal concluded that it preferred the expansive interpretation provided by the Charity Commission and the IC – namely that "document" includes electronic documents and that therefore s32 FOIA applies to information contained in electronic media. In arriving at this conclusion, the Tribunal relied upon the definition of "information" under s84 FOIA, namely "information recorded in any form", and the definition of "document" under s97(2) Charity Act, namely "information recorded in any form". The Tribunal therefore found that all the disputed information was potentially subject to the s32 exemption.

The Tribunal also considered the question of when an inquiry comes to an end. This was an important issue as any information which came into the possession of the Charity Commission or which was created by it after the inquiry was closed may not have been caught under the s32 exemption. The Tribunal concluded that the actual closure date of the inquiries was the publication date of the SORIs, and not the closure date stated in the SORI (which is earlier than the date of publication), as argued by the Appellant. The Tribunal arrived at this conclusion relying on the wording of s8(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 s8 inquiry closes at the date of the SORI publication. In addition, the fact 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, as what happened with the third inquiry, helped the Tribunal arrive at this conclusion.

As to the scope of the s32(2) exemption, the Tribunal found that the proper interpretation of s32 FOIA is that it is not limited in time to the period in which the inquiry is taking place but also applies to documents that continue to be held by the public authority after the inquiry

has ceased, if that is the only reason for which they are held. In coming to this finding, the Tribunal considered the submissions of the parties and found that that the adverbial phrase "for the purposes of the inquiry or arbitration" in s32(2) FOIA qualifies the word "placed" in s32(2)(a) and not the word "held" in the preceding general words to s32(2). Subsequent events cannot alter the purpose for which a document was placed in somebody's custody. The words "held only by virtue of being contained in" simply provide a causal connection between the presence of the document in the public authority's records and the placement with the person conducting the inquiry. The Tribunal also found that it does limit the exemption in that if the information was received independently from another source, it may not be exempt. It therefore does not matter whether the inquiry was conducted by the Charity Commission itself or by an appointed outsider, who then handed over the inquiry documentation to the Charity Commission at its conclusion. The Tribunal summarised the implications of its findings on this point as follows:

1. After a court decision or the closure of an inquiry, anyone can ask for the leave of the court or of the person conducting the inquiry for documents, and the judge or authority can consider this request outside the realms of FOIA. Courts have rules for these requests, and government inquiries also envisage similar rules. The Tribunal recommended that the Charity Commission consider adopting such rules as well.
2. If documents are provided by other public authorities then a person can make an FOIA request to that authority. The public authority would not be able to rely upon the s32 exemption.
3. If documents are held by the Charity Commission for purposes other than the inquiries, they may not be caught by the s32(2) exemption. Some documents pre-dating the first inquiry may not have been covered and in this case some documents dated between the second and third inquiries may also not have been covered.

The Tribunal also found 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 are deemed to be within the scope of s32(2) where they are only being held for the purpose of the inquiry. If the documents are still held for another purpose, like a charity's annual return in the normal course of compliance, then 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.

### **Conclusion**

The Tribunal upheld the IC's Decision Notice in large part but substituted a decision notice in respect of the documents which the Charity Commission agreed that it should disclose to Mr Kennedy because they were not caught by the s32 exemption, but with personal data of junior officials redacted.

This case is currently being appealed to the High Court.