

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 April 2010

Public Authority: Her Majesty's Courts Service (an executive agency of The Ministry of Justice)
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested information, in the form of a list, relating to Crown Court sentences which have been reduced on appeal. The request was refused on the basis that the public authority does not hold lists of the type requested. The Commissioner does not accept that the information is not held. However, he accepts that the information that falls within the scope of the request is contained within court records and is therefore exempt by virtue of section 32(1)(a) and (c) of the Act. He also identified some procedural breaches of the Act. He requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. A defendant sentenced at the Crown Court can appeal against their sentence to the Court of Appeal Criminal Division. An appeal is made by filling in Form NG '*Notice and grounds of appeal or application for permission to appeal against conviction or sentence*'.

3. The application to appeal the conviction and/or the sentence is known as an application for 'Leave to Appeal'. The reasons why the sentence is thought either to be too long considering the offence and the circumstances, or wrong in principle, are known as the grounds of appeal.
4. The completed form NG, including the grounds of appeal, is sent to the Crown Court where the defendant was convicted or sentenced. The Crown Court will then copy all the documents used at the trial and send them, with Form NG, to the Criminal Appeal Office.
5. The work of the Criminal Appeal Office is to receive applications for leave to appeal and to prepare these for consideration by the Court of Appeal Criminal Division. When it receives a form NG, the Criminal Appeal Office puts the case details onto its database.

The Request

6. On 14 October 2008 the complainant wrote to HMCS requesting information in relation to Crown Court sentences which have been reduced on appeal:

'Please can you send the following information about cases where sentences imposed on offenders by a Crown Court have been reduced on appeal:

- a) any statistical analysis held of such cases*
- b) any list(s) held of such cases since 1 Oct 2005, even if only partial or limited to a selection or subset of such cases (this list to include ideally for each case the offence, the original sentence, the reduced sentence, the dates of both sentences, the courts at which they were imposed, and the names of the judges who imposed them).*

If you do not hold this information, please can you indicate what kind of information you do hold about cases where sentences imposed on offenders by a Crown Court have been reduced on appeal'.

7. HMCS wrote to the complainant on 28 October 2008 confirming that it held information in relation to part (a) of her request but that it was exempt in terms of section 21 (Information accessible to applicant by other means). In relation to part (b) of the request, HMCS confirmed that no such list(s) exist or are held by the Court of Appeal Criminal Division.

8. The complainant wrote to HMCS on 31 October 2008 expressing dissatisfaction in relation to part (b) of her request and asking for an explanation of its response.
9. HMCS responded on 14 November 2008, treating this correspondence as supplementary to its reply of 28 October 2008. In the course of responding, HMCS referred to section 32 of the Act, advising the complainant that:

'No report currently exists which would produce the information that you seek. You may also wish to consider that extracting the raw data will involve searching through individual court records in order to obtain the information that you are seeking, and would, in any event, be subject to an absolute exemption under section 32 of the Act'.
10. The complainant formally requested an internal review on 14 November 2008.
11. HMCS upheld its original decision in its internal review response which it provided to the complainant on 12 January 2009.

The Investigation

Scope of the case

12. On 12 January 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. Unfortunately, due to the volume of complaints made to the Commissioner under section 50 of the Act, the commencement of the investigation of this complaint was delayed.
13. The Commissioner has taken into account the fact that the complainant was provided with links to information relevant to part (a) of her request. Accordingly, the focus of his investigation has been to determine whether or not HMCS holds information in relation to part (b) of her request.
14. The Commissioner notes that under the Act Her Majesty's Courts Service (HMCS) is not a public authority itself. Instead it is an executive agency of the Ministry of Justice (MoJ), the public authority with responsibility for HMCS. Therefore, the public authority in this case is actually the MoJ not HMCS.
15. While the request was made to HMCS, for the purposes of his investigation of the complaint about HMCS' handling of the request, the

Commissioner dealt with the Ministry of Justice, who responded to the questions in his investigation on behalf of HMCS. Both HMCS and MoJ are referred to in this notice, but technically the public authority is MoJ.

Chronology

16. The Commissioner contacted the MoJ on 29 September 2009 asking it to provide him with further information in relation to its handling of the request.
17. The MoJ responded on 12 November 2009. The Commissioner wrote to the MoJ on 25 November 2009 asking for further clarification in relation to its claiming of the exemption at section 32. The MoJ provided a comprehensive response on 9 December 2009.

Analysis

Substantive Procedural Matters

Section 1 General right of access

18. Section 1(1) of the Act creates a general right of access to information held by public authorities. Section 1(1) of the Act states:

'Any person making a request for information to a public authority is entitled –

- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b) if that is the case, to have that information communicated to him'.*

19. In this case, HMCS told the complainant that it did not hold the information requested at part (b) of her request.
20. The focus of the Commissioner's investigation has therefore been on whether or not HMCS held the requested information at the time the request was made.

Is the information or any part of it held by Her Majesty's Courts Service (HMCS)?

21. In its refusal letter of 28 October 2008 HMCS provided the complainant with links to relevant judicial and court statistics.

22. In response to her query as to how it was possible to compile such information if the requested information was not held, HMCS explained to the complainant:

'the statistics which appear in tables 1.6 and 1.7 are compiled by a series of different reports which look directly at the codes in different "result fields" on our database; these fields exist independently of all other information we hold..... No report currently exists which would produce the information that you seek'.

23. HMCS also told the complainant:

'under the Freedom of Information Act there is no requirement for a public authority to analyse, process or generate new information in order to respond to requests'.

24. During the course of the Commissioner's investigation, the MoJ confirmed that it does not *'hold lists that would provide the information to answer her second question'*. It further advised that:

'In order to disclose the information [the complainant] has requested, we would have to run a special program to extract the information requested from the database.'

25. It told the Commissioner that:

'.. it would not exceed the £600 cost limit to program the computer system to extract this [the requested] information'.

However, the MoJ also confirmed its view that it is not *'obligated under the Act to create this information'*.

26. In support of its argument, the MoJ cited the Information Tribunal case of *The Department for Business Enterprise and Regulatory Reform v the Information Commissioner and Peninsula Business Service Ltd* (EA/2008/0087). In this case, the Information Tribunal said at paragraph 56:

'In order to disclose the requested information BERR would have to run a new ad hoc report (which we heard in evidence would be entirely possible). However we note that there is no requirement under FOIA for a public authority to create information'.

27. The Commissioner's view is that electronic databases, by their very nature, are designed to make use of information recorded in them. The Commissioner therefore considers that all information held in electronic

databases is held for the purposes of the Act. This is in line with the Information Tribunal's decision in Home Office v ICO EA/2008/0027, in which it said:

'It seems to the Tribunal that there is in reality no distinction between "information" held by a public authority and "raw data" held on a database which is itself held by a public authority... no new information needs to be collected in order to obtain information by running a new report'.

28. In response to the Commissioner's questions, the MoJ has confirmed that the requested information is available electronically and that there is no need to refer to manual files. The Commissioner understands the reference to manual files relates to 'NG forms' together with other documentation relevant to the case. The MoJ has advised that:

'When a form NG is received, this, together with other case documents and case correspondence is made up into an individual court file'.

29. With regard to the MoJ's argument that the Act does not require a public authority to create information, the Commissioner's view is that there is a difference between extracting or compiling existing information and creating new information. The Commissioner has issued guidance on this subject:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/information_from_original_sources_v1.pdf

30. In this, the Commissioner advises that a public authority is not creating new information where:

- it presents information it holds in the form of a list or schedule;
- compiling an answer to a request involves simple manual manipulation of information held in files; or
- it extracts information from an electronic database by searching it in the form of a query.

31. In light of this, the Commissioner does not accept that the requested information is not held. He has therefore gone on to consider the exemption at section 32 which the MoJ referred to in correspondence with the complainant and subsequently confirmed it was citing during the course of the Commissioner's investigation. In doing so, he has considered whether the requested information is held electronically and/or within paper files.

Exemptions

Section 32 Court records

32. Section 32 exempts information contained in certain litigation documents and court, tribunal and inquiry records and applies regardless of the content of the information.
33. Section 32 is a class based exemption. This means that, in order to demonstrate that it is engaged, it is simply necessary to show that the information in question conforms to the class specified in the relevant subsection of section 32. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption.
34. In this case, the MoJ advised the Commissioner that, in its view, the information is exempt by virtue of section 32(1) which states that:

'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'.*

35. In considering the extent to which the withheld information satisfies the above criteria laid down by the Act, the Commissioner has taken into account the observations on the nature and scope of the section 32 exemption contained in the case of *Mitchell v Information Commissioner* (EA/2005/0002).
36. In the case of *Mitchell v Information Commissioner*, section 32(1) is described as applying to three classes of court document. While paragraphs (a) and (b) relate to documents filed or served by the parties or by a third party pursuant to an order of the court, paragraph (c) refers to documents created by a court or a member of the administrative staff of a court.

37. Information can only be withheld under section 32 if it is solely held by the public authority by virtue of being in a court record and not elsewhere. In this case, therefore, the first question the Commissioner has addressed is whether HMCS only holds the information because it is contained in a document to which section 32 applies.

Is the information contained in a relevant document?

38. In the course of the Commissioner's investigation, the MoJ initially clarified that it is relying on section 32(1)(a), (b) and (c) of the Act. As a result of further correspondence with the Commissioner, the MoJ subsequently confirmed that '*section 32(1)(c) would apply*'. It further specified that it considers the requested information is exempt by virtue of section 32(1)(c)(i) and (ii).
39. Accordingly, the Commissioner has first addressed the issue of whether the requested information is held only by virtue of being contained in any document created by a court, or a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.
40. The MoJ has confirmed that the requested information is available electronically on a 'custom-made' database used to store detailed information about case progression and the outcome of each stage of the appeal process. Although the MoJ has told the Commissioner there is no need to reference manual files, in the Commissioner's view, it is appropriate to consider these files as he understands that relevant information may also be held in them.
41. The Information Tribunal in *Mitchell* held that the fact that section 32(1) referred to the information being held in a 'document' did not mean that that document had to be in paper form. It described the term 'document' as being '*broadly construed in an age offering so many recording media*'.
42. In this case, the MoJ has told the Commissioner that:
- 'the court does not collate the information [the complainant] has requested, they would have to create a program to extract the information from their database'*.
43. The Commissioner is satisfied that relevant information in this case is held on the Criminal Appeal Office (CAO) database. The Commissioner understands that the database is used by the Criminal Appeal Office in its work of providing administrative support to the Court of Appeal Criminal Division.

44. In accordance with the Information Tribunal, the Commissioner considers that the term 'document' is broadly defined. He therefore accepts, in this case, that records held on the database, as well as paper based records within the manual court files, are 'documents' for the purposes of the Act.

Was the document created by a court or a member of the administrative staff of a court?

45. As defined at section 32(4) of the exemption, the term 'court' includes '*any tribunal or body exercising the judicial power of the State*'. In this regard, the Tribunal has decided that 'court' in section 32(1)(a) means the court as an institution.
46. With respect to section 32(1)(c) however, when looking at the meaning of the phrase 'created by a court', the Information Tribunal in the case of *Mitchell* commented:

'Documents created by members of court staff are dealt with in s.32(1)(c)(ii) so that the creator for the purposes of subparagraph (i) must be somebody outside their ranks. In our opinion, this can only be the judge, for whom the term "court", or more often "the court", is a familiar synonym'.

47. Having considered the arguments put forward by the MoJ, and in accordance with the Information Tribunal's view that the term 'court' means the judge, the Commissioner is not persuaded in this case that the withheld information is created by the court. He does not therefore accept that section 32(1)(c)(i) applies in this case.
48. However, subsection (c) of the exemption also relates to the creation of documents by '*a member of the administrative staff of a court*'. The Commissioner considers that the term 'administrative staff' includes court clerks, ushers, listing officers, jury bailiffs and back-office staff such as those who prepare case files and court orders.
49. In this case, the MoJ has told the Commissioner that data is entered onto the CAO (Criminal Appeal Office) database by staff employed by the MoJ at the Criminal Appeal Office. The Commissioner considers that these members of staff constitute 'administrative staff' for the purposes of the Act. In this case, the Commissioner is satisfied both that the entry of information from the form NG onto the CAO database is the 'creation of a document', and also that Criminal Appeal Office staff are responsible for the creation of the manual court files.

Was the document created for the purposes of proceedings in a particular cause or matter?

50. In the Commissioner's view, when considering this element of the test as to whether or not the exemption is engaged, what matters is the purpose for which the information was created.

51. In his Awareness Guidance on the use of this exemption, the Commissioner notes that:

'It is important to remember that the proceedings for which the document covered by the exemption is held must actually have commenced. The exemption cannot be stretched to cover proceedings which are merely contemplated'.

52. The Commissioner understands that the work of the Criminal Appeal Office (CAO) is to receive applications to appeal a sentence imposed by a Crown Court. The Commissioner understands that the appeals are 'prepared for consideration' by the CAO. As described above, the CAO *'is supported in carrying out these functions by a custom-made database'.*

53. The MoJ has confirmed that an entry is not made on the CAO database until a Notice of Appeal has been lodged at the relevant Crown Court and sent to the CAO.

54. The MoJ has therefore argued that the information *'only exists because it was created for the purposes of proceedings concerning appeals against the length of sentences imposed by a court'*. It has also advised the Commissioner that:

'The lists [the complainant] has requested would have to be extracted from court records that were created for no other reason than considering whether prison sentences should be shortened on appeal'.

55. In this case, the Commissioner is satisfied that the withheld information was created for the purposes of particular appeal proceedings and that, given the nature of the requested information, proceedings have commenced.

Is the information held only by virtue of being contained in such a document?

56. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption. For instance, a public authority may have a set of financial records which are the subject of litigation. If those records are held only for the purposes of litigation and are contained in court records, then they are exempt. However, if it also held the records for another business purpose then they would not be exempt.

57. The MoJ has told the Commissioner that the requested information is '*available electronically but not used to provide any reports or lists*'. Having considered the nature of the information necessary to compile the list required to respond to the complainant's request, the Commissioner is satisfied that the information falling within the scope of this request is contained in the CAO database.
58. However, in order for the exemption at section 32 to be engaged, the test is that the information is held '*only by virtue of...*'. In this respect, the Commissioner understands that information relevant to the request that is held on the CAO database is also contained in the manual court files.
59. In respect of the information that falls within the scope of the request that is only held on the database, the Commissioner finds section 32(1)(c)(ii) engaged. In respect of the information which is found both in the manual court files and on the database, however, the Commissioner must consider whether it is held in the database only by virtue of having originally been a manual court record.

The manual court files

60. The MoJ has confirmed that '*the manual case records (including form NG) are retained for at least seven years*'. The Commissioner notes that the NG forms are initially lodged at the relevant Crown Court before being sent to the Criminal Appeal Office. He has therefore considered whether or not section 32(1)(a) applies to the relevant information within these forms.
61. Section 32(1)(a) is engaged where the information held by the public authority is held '*only by virtue of being contained in a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter*'.
62. In this respect, the MoJ has told the Commissioner that '*the initial information entered onto the Criminal Appeal Office's database comes mainly from the NG form*'.
63. In considering the fact that the information from NG forms originally filed with the Crown Courts is subsequently entered onto the CAO database, the Commissioner has taken into account the case of *The Department for Business Enterprise and Regulatory Reform v the Information Commissioner and Peninsula Business Service Ltd* (EA/2008/0087). In this case, which considered the application of the exemption at section 32, the Tribunal said:

'There is nothing in the section which limits the way in which that information may be used or processed by the public authority provided it is, in effect, only acquired by virtue of being in a 'court record' (i.e. a document falling within s.32(1)(a), (b) or (c)). Therefore if the information, once acquired, is used for management or policy matters, it is still covered by the exemption'.

64. Having considered the nature of the information falling within the scope of the request that is contained in the NG form, the Commissioner is satisfied, in this case, that the fact that it is subsequently used to populate the CAO database does not negate the fact that it is only held by virtue of being contained in a document filed with a court for the purposes of appeal proceedings. Therefore, in respect of the information on the NG form that falls within the scope of the request, he finds section 32(1)(a) engaged.
65. With respect to other information in the manual files and in scope of the request, the Commissioner understands that there is some duplication between the information used to populate the CAO database and that recorded in the manual court files as the appeal process progresses.
66. On this basis, and taking into account the Tribunal's comments in the DBERR case, the Commissioner is satisfied that whether the information is recorded firstly on the paper records and then used to populate the database, or vice versa, the information is only held by virtue of being in a court record. Accordingly, he finds section 32(1)(c)(ii) engaged.

Conclusion

67. The complainant has argued that *'it is essential that the criminal justice system should be fully transparent'* and that *'these are important matters of public policy which the public should be fully informed about'*.
68. However, in the case of section 32 of the Act, where the exemption is engaged, it applies regardless of the content of the information.
69. The exemption will only apply if the public authority holds the information solely because it was contained in one of the specified documents. In this case, the Commissioner is satisfied that the exemption at section 32 is engaged.
70. The Commissioner's reason for reaching this conclusion is that the information required to satisfy the complainant's request is held only by virtue of being held in documents, namely NG forms, which were

filed at the relevant Crown Court prior to being sent to the Court of Appeal, thereby engaging the exemption at section 32(1)(a), or in records on the CAO database or manual court files that were generated by administrative staff of the Criminal Appeal Office, for the purposes of appeal proceedings, thereby engaging the exemption at section 32(1)(c)(ii).

71. As section 32 is an absolute exemption under section 2(3)(c), the Commissioner has not gone on to consider the public interest test.
72. As the Commissioner has found the exemption engaged, the MoJ is relieved of the duty in section 1(1)(b) of the Act to communicate the information requested to the complainant.

Procedural Requirements

Section 1 – General right of access

73. Section 1(1) states:

'Any person making a request for information to a public authority is entitled –

- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b) if that is the case, to have that information communicated to him'.*

74. As the Commissioner considers that HMCS holds information within the scope of the request, he finds HMCS in breach of section 1(1)(a) of the Act in that it failed to advise the complainant of this fact.

Section 10 - Time for compliance

75. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

76. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act.

Section 17 – Refusal of request

77. Section 17 states:

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- a) states that fact,*
- b) specifies the exemption in question, and*
- c) states (if that would not otherwise be apparent) why the exemption applies.'*

78. In this case, HMCS referred generally to this exemption in its correspondence with the complainant dated 14 November 2008:

'You may also wish to consider that extracting the raw data will involve searching through individual court records in order to obtain the information that you are seeking, and would, in any event, be subject to an absolute exemption under section 32 of the Act'.

79. The Commissioner's view is that the Act requires a public authority to refer to the specific part(s) of the relevant exemption(s). In this case, HMCS not only failed to specify which sub-section/paragraph/sub-paragraph was being applied but also failed to specify in sufficient detail why it considered the exemption applied.

80. The Commissioner therefore concluded that it breached section 17(1)(b) and (c) of the Act in failing to supply a notice compliant with the requirements of that section within 20 working days.

The Decision

81. The Commissioner's decision is that the public authority did not deal with the request for information wholly in accordance with the Act in that:

- It breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request;
- It breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request; and

- It breached section 17(1) by failing to issue the refusal notice within the statutory time limit and section 17(1)(b) and (c) by failing to specify the subsections of the exemptions claimed.

Steps Required

82. The Commissioner requires no steps to be taken.

Other matters

83. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

84. Paragraph 38 of the section 45 Code of Practice (the "Code") recommends that:

'Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint...These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision of the handling of the application.'

85. The Commissioner notes that, whilst the authority did process the complainant's formal request (submitted on 14 November 2008) for internal review, it failed to handle the complainant's initial expression of dissatisfaction (submitted on 31 October 2008) as a complaint. The Commissioner expects that the authority's future handling of complaints will conform to the recommendations of the Code.

Right of Appeal

86. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 29th day of April 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 32(1) provides that –

'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.'*

Section 32(2) provides that –

'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.'*

Section 32(3) provides that –

'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.'

Section 32(4) provides that –

'In this section-

- (a) 'court' includes any tribunal or body exercising the judicial power of the State,*

- (b) *'proceedings in a particular cause or matter' includes any inquest or post-mortem examination,*
- (c) *'inquiry' means any inquiry or hearing held under any provision contained in, or made under, an enactment, and*
- (d) *except in relation to Scotland, 'arbitration' means any arbitration to which Part I of the Arbitration Act 1996 applies.'*