

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2012

Public Authority: Ministry of Justice
Address: 102 Petty France
London SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested from the Ministry of Justice the names and addresses of Respondents in Employment Tribunal cases for England, Wales and Scotland for a specified period in 2011. The Ministry of Justice refused to provide this citing section 32 (Court Records exemption) as its basis for doing so.
2. The Commissioner's decision is that the Ministry of Justice has correctly withheld the requested information on the basis of section 32.

Request and response

3. On 18 August 2011, the complainant (acting on behalf of their client) wrote to the Ministry of Justice ("MoJ") and requested information in the following terms:

" Will you please treat this letter as my client's formal request under FOIA for the release of the following information held by the Employment Tribunal Service:-

'The names and addresses of all employing organisations that are Respondents in receipt of Employment Tribunal claims, for England, Wales and Scotland, from 1st April 2011 to 1st August 2011'.

Specifically, my clients do not require the disclosure of the names and addresses of Claimants in respect of any such claims."

4. The MoJ responded on 16 September 2011. It stated that the information was exempt under section 32(1)(a) and section 32(1)(c). It explained that it was following the Information Tribunal's ruling on their earlier case and provided a link to that judgement.
5. Following an internal review the MoJ wrote to the complainant on 11 November 2011. It stated that it had upheld its original refusal.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. It should be noted by way of background that the complainant had previously made a very similar request to the Department of Business, Enterprise and Regulatory Reform ("DBERR"), the previous owners of the information in question. This request was refused and DBERR's handling of the request was ultimately considered at the Information Tribunal in *DBERR v ICO and Peninsula* (EA/2008/0087) (the "DBERR case").¹ The Tribunal upheld DBERR's use of section 32 as a basis for withholding the information.
8. The complainant argued that the legal position had now changed. It said that the MoJ had not taken into account comments made by Ward LJ in *Kennedy vs Information Commissioner* [2011] EWCA Civ 367 at paragraph 25 (the "Kennedy case").²

"The arguments over [FOIA] sections 32(1) and 32(2)

25. *I have already adverted to the difference in the punctuation of the two sub-sections but the language itself is to all intents and purposes identical. It should, therefore, be given the same meaning. The natural meaning of section 32(1) is that the conditions set for the exemption*

¹

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i305/BERR%20v%20IC%20&%20PBS%20\(EA-2008-0087\)%20Decision%2028-04-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i305/BERR%20v%20IC%20&%20PBS%20(EA-2008-0087)%20Decision%2028-04-09.pdf)

² <http://www.bailii.org/ew/cases/EWCA/Civ/2011/367.html>

to apply are that (1) the information is contained in a document filed with the court or served upon or by public authority or created by the court in each case for the purpose of the proceedings in the particular cause or matter and (2) that the information was held by the public authority at the time of the request for its disclosure only by virtue of being contained in such a document ..."

9. These remarks post-dated the Tribunal's judgement in the DBERR case. Further commentary on Ward LJ's remarks in the Kennedy case is set out later in this notice.
10. The MoJ sent the Commissioner a copy of the withheld information and its arguments as to why section 32(1)(a) and section 32(1)(c)(ii) applied.
11. The Commissioner's investigation focused therefore on the question of whether Ward LJ's comments are binding on his decisions and, where they are, whether this means that the requested information is not exempt under section 32(1)(a) and section 32(1)(c)(ii) of the Act.

Reasons for decision

12. Section 32(1) of FOIA 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,
- (a) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (b) 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."

13. The requested information in the *DBERR* case is described in paragraphs 1 – 8 of that judgement. The requested information in this case is almost identical except for the time period to which the request relates.

The complainant's arguments

14. The complainant argued that the Tribunal was wrong in the *DBERR* case as regards section 32(1)(a) because, whatever the original reason for gathering the withheld information, this information was now held on the MoJ's ETHOS system. This meant that the information was used for another purpose which did not fall within the exemption at section 32(1)(a). He argued that Ward LJ's comments supported this view and that these comments were binding upon the Commissioner. He also drew attention the fact that, in the *DBERR* case, the Commissioner had originally agreed with his client's position although the Tribunal had ruled in favour of *DBERR*. He also drew attention to elements of the Commissioner's own published Lines to Take (specifically LTT194), which in his view, supported his current position.³
15. The complainant also argued that section 32(1)(c) could not apply because the MoJ's ETHOS system was not a "document". Even if it could be considered to be a series of documents, the ETHOS system does not exist for the purpose of proceedings in a particular cause or matter.

The MoJ's arguments

16. The MoJ provided background information about the ETHOS system. It described it as a "case management system" and emphasised that the original reason the information was collected was for the purpose of proceedings in a court case. It explained that the database entries were created using paper records which were filed for the purpose of court proceedings. It added that section 32(1)(c)(ii) applied because the information would be created by a member of the administrative staff.
17. It also set out its detailed view as to why Ward LJ's comments were not binding.

³ <http://www.ico.gov.uk/foikb/FOIPolicySection32-gatewayline.htm>

The Commissioner's conclusions

18. The complainant drew attention to the fact that matters covered in the Kennedy case have now been considered at further stages in the court process and that this adds weight to his position that Ward LJ's remarks remain binding upon the Commissioner. The Commissioner agrees that these further developments mean that Ward LJ's remarks are binding upon him. This is because although the decision in the Kennedy case was originally stayed, pending reconsideration by the First Tier Tribunal of the impact of Article 10 of the European Convention on Human Rights (ECHR), the result of the restored Court of Appeal hearing was that Article 10(1) of the ECHR had no application in this case. This effectively gave Ward LJ's original remarks in the Kennedy case binding status.
19. The Commissioner does not however agree that Ward LJ's decision supports the complainant's case. Although the complainant quotes from paragraph 25 of the Kennedy case, Ward LJ's conclusion is provided at paragraph 43 of that case. In the Commissioner's view, in dismissing the appeal Ward LJ accepts that the reference in section 32(1) to information being held only by virtue of it being contained in documents filed for the purposes of court proceedings, refers to the reasons why such documents were originally acquired, rather than any purposes for which they may continue to be held by a public authority. Although Ward LJ's decision was made in relation to section 32(2) his conclusion was that section 32(2) should be interpreted in the same way as section 32(1).
20. In the Commissioner's view, the provisions of Section 32(1) can continue to apply if information originally obtained from a court record is later used for a different purpose as is the case here. He thinks that 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 section 32(1)(a), (b) or (c)). The Commissioner is satisfied that, the circumstances which the Tribunal considered in the *DBERR* case remain the same except that the withheld information is now held by MoJ rather than DBERR (or its successor department) and that relevant time period described in the request is more recent. The Commissioner does not think that either of these two points is materially significant.

21. The Commissioner therefore agrees with the MoJ that the requested information is exempt under section 32(1)(a) and section 32(1)(c)(ii) of the FOIA. In reaching this view he is following the Tribunal's decision in the *DBERR* case about information which is almost identical to the information which was considered in that case.

Right of appeal

22. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

23. 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.
24. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF