

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 July 2014

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### Decision (including any steps ordered)

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1. The complainant has requested information such as letters and claim forms relating to a formal legal challenge made by Methods. The DWP withheld this information on the basis of section 32 of the FOIA. The Commissioner's decision is that the section 32 exemption is engaged and as this is an absolute exemption, provides a basis for withholding this information.

#### Request and response

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2. On 4 June 2013, the complainant wrote to the DWP and requested information in the following terms:
  - 1) *"Any initial letter from Methods that outlined their challenge (similar to the one you have already released from Steria).*
  - 2) *The Claim Form and Particulars of Claim in respect of the formal legal challenge made by Methods."*
3. The DWP responded on 1 July 2013. It confirmed that information within the scope of the request was held but would not be disclosed as it was exempt on the basis of section 32 of the FOIA. DWP advised the complainant his request should be made directly to the Technology and Construction Court by making a written application under Rule 5.4C of the Civil Procedure Rules.

4. The complainant wrote to the DWP on 2 July 2013 to request an internal review of this decision. The complainant considered that the letter requested in part 1) of this request would not be a court document so would not be covered by section 32 of the FOIA. For part 2) the complainant pointed the DWP to the Information Tribunal decision in *Mitchell v Information Commissioner*<sup>1</sup> in which it was found that not all documents related to court proceedings would be caught by the section 32 exemption.
5. Following an internal review the DWP wrote to the complainant on 22 July 2013. It stated that as all the information was contained in court documents it was exempt under section 32 and upheld its decision to withhold the information.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 12 August 2013 to complain about the way his request for information had been handled. In particular the complainant did not agree that all of the information would be contained within court documents, specifically if a letter from Methods informing the DWP of its intention to challenge prior to court proceedings was held.
7. The Commissioner considers the scope of his investigation to be to determine if the information within the scope of the request engages the section 32 exemption and is therefore exempt from disclosure.

### **Reasons for decision**

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8. Section 32(1) of the 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 case or matter,*

*(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*

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<sup>1</sup> EA/2005/002

*(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.”*

9. There are two main steps to considering whether information falls within these exemptions. First, it is necessary to consider whether the information is contained within a document filed with a court. The next step is to consider if this information is held by the relevant public authority only by virtue of being held in such a document.
10. DWP has confirmed that it holds three documents which are within the scope of the request. These are a letter to the DWP from solicitors, a claim form and the particulars of claim. The Commissioner has looked at the letter from Methods outlining their challenge and the claim form/particulars of claim separately.

*The claim form and particulars of claim*

11. The DWP has explained that these are documents which a claimant files with the court and serves on the defendant. In this case the relevant court is the Technology and Construction Court (TCC). DWP argues that this clearly falls within the definition of a court set out in section 32(4) of the FOIA.
12. DWP states that the claim form and particulars of claim are held only by virtue of being contained in a document as described in subsections (1)(a) or (1)(b) of section 32. As such DWP only holds the information by virtue of being a party to the proceedings. To support this view the DWP provided examples of previous decisions of both the Commissioner<sup>2</sup> and the Information Tribunal<sup>3</sup> in which similar issues had been considered. In the case of the earlier decision notice the request had been for the Particulars of Claim relating to a court case and the Commissioner concluded the section 32 exemption applied to this information.
13. From his examination of the withheld documents and the evidence from the DWP the Commissioner is satisfied the information is only held by virtue of being contained in a document filed with the court for the

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<sup>2</sup> ICO case reference FS50435211

<sup>3</sup> *Mitchell v Information Commissioner* (EA/2005/2002)

purposes of proceedings (subsection (1)(a)) and is only held by virtue of being contained in documents served upon the DWP for the purpose of proceedings. As such he is satisfied the section 32(1) exemption is engaged in relation the claim form and particulars of claim.

14. Section 32(1) is an absolute exemption so the Commissioner is not required to consider the balance of the public interest. The Commissioner has therefore determined that the DWP correctly withheld this information.

*The initial letter from Methods outlining their challenge*

15. With regard to the letter, DWP has explained that the information contained within it is exempt on the basis of section 32(1)(b) as it is held by the DWP only by virtue of being contained in a document served on the DWP for the purposes of proceedings in a cause or matter. The DWP has acknowledged that the document must be held for the purposes of proceedings and not held after proceedings have started. In the case of Civil Procedure Rules this means after the claim form has been issued by the court.
16. The DWP has stated that the letter was only held because it was contained in a document which was the letter before claim to the DWP. DWP has pointed to the Pre-Action Conduct Practice Direction<sup>4</sup> which states that "*before starting proceedings – the claimant should set out the details of the matter in writing by sending a letter before claim to the defendant. This letter of claim is not the start of proceedings;*"
17. It is the DWP's view that this letter satisfied paragraph 7.1 of the Pre-Action Conduct Practice Direction as it was part of the required steps before the claim form was issued. Therefore if this letter had not been sent and the case had progressed to trial, the failure to satisfy paragraph 7.1 would have breached the requirement to comply with the Practice Direction and there may have been cost implications.
18. The DWP asserts that the letter is therefore the first stage in the proceedings. It considers that documents which are served under section 31<sup>5</sup> of the Civil Procedure Rules after proceedings have started are generally regarded as engaging the section 32 FOIA exemption. It therefore contends that documents served before proceedings start

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<sup>4</sup> [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct)

<sup>5</sup> <http://www.legislation.gov.uk/ukxi/1998/3132/part/31/made>

should benefit from the same protection as those served after where the documents is required to be served to comply with the CPR.

19. DWP therefore considers that the meaning of "served" under section 32(1)(b) should be construed widely enough to cover information contained in a document sent in order to comply with the Pre-Action Conduct Practice Direction.

20. The Commissioner accepts that paragraph 7.1 of the Practice Direction on Pre-Action Protocols requires the claimant to send a letter before claim. It is also not disputed that a claimant must comply with the Practice Direction. However, the Commissioner has further considered the issue of whether the letter before claim is "served" upon the public authority and, if so, whether that service is "for the purpose of proceedings in a particular cause or matter."

21. In considering this, the Commissioner has referred to the Interpretation Act 1978<sup>6</sup> which, when referring to service by post provides:

*"Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. (Interpretation Act 1978 s 7)"*

22. The Commissioner considers that this suggests the requirement to send a letter before claim could amount to a requirement to serve the letter. However, the requirement is contained in a Practice Direction which is issued in accordance with the Civil Procedure Act 1997, specifically section 1 and Schedule 1. Section 1 relates to the CPR and states:

*"(1) There are rules of court (to be called "Civil Procedure Rules") governing the practice and procedure to be followed in –*

*(a) the civil division of the Court of Appeal.*

*(b) the High Court, and*

*(c) county courts [the county court].*

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<sup>6</sup> <http://www.legislation.gov.uk/ukpga/1978/30/contents>

*(2) Schedule 1 (which makes further provision about the extent of the power to make Civil Procedure Rules) is to have effect."*

23. Schedule 1 relates to Practice Directions and states that:

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*Civil Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions."*

24. The Commissioner notes that the requirement to send the letter before claim is not contained in an Act for the purposes of the Interpretation Act 1978 but is in subordinate legislation. The Shorter Oxford English Dictionary definition of "served" is to '*deliver to a person in the legally required manner*'. Based on this definition and the fact that section 7 of the Interpretation Act 1978 suggest that a legal requirement to send a letter is a requirement to serve, the Commissioner would accept that the sending of a letter before conduct can come within section 32 in that it could be construed as a document served upon the DWP.
25. For section 32 to be engaged the document must have been served upon a public authority but also must have been done so for the purposes of proceedings in a particular cause or matter. Whilst the Commissioner accepts the letter is required to be sent, his view is that the intention of the letter is to avoid the complaint progressing to litigation and to resolve the complaint to the clients satisfaction. For this reason the Commissioner is not convinced that the main purpose of the letter is for the consideration of proceedings. He considers section 32(1)(b) is not generally applicable to pre-action letters as under the CPR proceedings are started after the claim form has been issued by the court and pre-action letters are written before the claim form has been issued.
26. That being said, the Commissioner has gone on to consider the particular context of this letter and the further arguments presented by the DWP before determining whether the letter within the scope of this request is covered by section 32(1)(b).
27. DWP considers that section 32(1)(b) can apply to pre-action letters as subsection (1)(b) of section 32 of the FOIA is not limited to documents served after a claim form has been issued and only states that the exemption applies to documents served for the purposes of proceedings in a particular cause or matter. DWP has stated that part 44.3 of the CPR concerns a court's discretion as to costs. Subsection 44.3(4)(a), when discussing costs, states that "*the court must have regard to all the circumstances including ... the conduct of parties.*" In subsection (5)(a) the conduct of parties includes "*conduct before, as well as during, the*

*proceedings, and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct)”.*

28. DWP clarified that in this case a letter before action was served which is a necessary preliminary step before a claim form could be issued which it subsequently was. Therefore, DWP maintains that the letter which was part of the pre-action procedure was served “for the purposes of proceedings” in this case.
29. The Commissioner still considers that as no proceedings were in existence at the time the letter was sent it is not clear whether the letter was sent for the purpose of proceedings in the context of section 32(1)(b). In establishing this, he has considered the judgement in *Bilkus v Stockler Brunton [2010] 1 WLR* which commented on “the purpose of proceedings” at [44]:

*In my judgement, one should construe the words “in or for the purpose of proceedings” as a composite whole ... Work “for the purposes of proceedings” may be carried out before the proceedings are begun (taking instructions, writing a letter before claim, obtaining evidence and so on) or during the proceedings ... The phrase “for the purposes of” requires the proceedings to be contemporaneous with the work in question or to be in the future.”*
30. The Commissioner notes that the context of this case was very different in that it related to whether work completed by a solicitor was contentious business. However, this judgement does make it clear that a letter before action can be for the purposes of proceedings but that these proceedings must subsequently begin before a court or arbitrator.
31. Taking all of this into account, the Commissioner still considers that section 32(1)(b) is not generally intended to cover pre-action letters where, at the time they are served, there are no proceedings. However, he does recognise that where there are subsequent proceedings at the time a request under the FOIA has been made this will bring pre-action letters within the scope of section 32(1)(b). Therefore, in this case, the Commissioner accepts that section 32(1)(b) does cover the letter before claim but stresses that the reason for this is that he considers that the subsequent proceedings which were underway at the time the request was made is the reason for this.
32. As section 32(1) is an absolute exemption the Commissioner is not required to consider the balance of the public interest. The Commissioner has therefore determined that the DWP correctly withheld the letter before claim.

## Right of appeal

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33. 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: [grc@hmcts.gsi.gov.uk](mailto:grc@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**