

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2017

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

Decision (including any steps ordered)

1. The complainant requested submissions and transcripts of pleadings relating to a number of cases before the European Court of Human Rights. The Ministry of Justice (MoJ) neither confirmed nor denied holding the requested information, citing section 32(3) of the FOIA (court records).
2. The Commissioner investigated the MoJ's application of section 32(3) and concluded that the MoJ was entitled to rely on that exemption to neither confirm nor deny holding the information.
3. She requires no steps to be taken as a result of this decision.

Background

4. Article 10 of the European Convention of Human Rights (ECHR) provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,

territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

5. The following cases have variously considered issues relating to section 32 of the FOIA and/or Article 10 ECHR:

- *Kennedy v Charity Commission* [2014] UKSC 20¹ (Kennedy). One of the issues before the Supreme Court in that case was whether, if section 32(2) of the FOIA contains an absolute exemption which continues after the end of an inquiry, that was compatible with Mr Kennedy's rights under Article 10 ECHR.
- *Magyar Helsinki Bizottsag v Hungary* (Application No. 18030/11)² (Magyar). That case concerned a request by the applicant, a non-governmental organisation (NGO), researching the quality of defence provided by public defenders in Hungary. The Court found that the domestic authorities had impaired the applicant NGO's exercise of its freedom to receive and impart information which amounted to an interference with a right protected by Article 10 of the Convention. In reaching its conclusion on the facts of this case the Court also found that Article 10(1) of the Convention could be interpreted as including a separate right of access to information in certain circumstances.
- *Moss v Information Commissioner* EA/2016/0250³ (Moss).

Request and response

6. On 25 November 2016, the complainant wrote to the MoJ and requested information in the following terms:

"Copies of all written submissions (Government, Applicant, and Third Party interventions) and transcripts of pleadings for the following cases before the European Court of Human Rights:

¹ https://www.supremecourt.uk/decided-cases/docs/uksc_2012_0122_judgment.pdf

² [http://hudoc.echr.coe.int/eng#{"itemid":\["001-167828"\]}](http://hudoc.echr.coe.int/eng#{)

³

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1976/Moss,%20Derek%20EA.2016.0250%20\(20.03.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1976/Moss,%20Derek%20EA.2016.0250%20(20.03.17).pdf)

- *Hurst (no 2) v United Kingdom [Application no. 74025/01]*
 - *Scoppola (no 3) v Italy; UK Government intervention [Application no. 126/05]*
 - *Greens and M.T. v United Kingdom [Applications nos. 60041/08 and 60054/08]*
 - *Chahal v United Kingdom [Application no. 22414/93]*
 - *Othman (Abu Qatada) v United Kingdom [Application no. 8139/09]*
 - *Babar Ahmad and others v United Kingdom [Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09]*
 - *A and others v United Kingdom [Application no. 3455/05]*
 - *Al-Skeini and others v United Kingdom [Application no. 55721/07]*
 - *Al-Jedda v United Kingdom [Application no. 27021/08]*
 - *Hassan v United Kingdom [Application no. 29750/09]*
 - *Jaloud v the Netherlands; UK Government intervention [Application no. 47708/08]*
 - *McCann and others v United Kingdom [Application no. 18984/91]*".
7. The MoJ responded on 21 December 2016. It refused to confirm or deny whether it held the requested information, citing section 32(3) of the FOIA (court records). It also advised that the information, if held, would be exempt from disclosure under section 21 of the FOIA (accessible to applicant by other means).
8. Following an internal review the MoJ wrote to the complainant on 7 February 2017. It revised its position, confirming its application of section 32(3) but advising that section 21 should not have been used.

Scope of the case

9. The complainant contacted the Commissioner on 15 February 2017 to complain about the way his request for information had been handled.
10. He disputed the MoJ's application of section 32 of the FOIA. He argued that the exemption granted to public authorities under section 32 no longer applies in the wake of the Grand Chamber of the European Court

of Human Rights' judgment in *Magyar Helsinki Bizottsag v Hungary* (Application No. 18030/11) (Magyar).

11. During the course of the Commissioner's investigation, the MoJ confirmed its application of section 32(3) in this case.
12. 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 FOIA.
13. The analysis below considers the MoJ's application of section 32(3) of the FOIA to the requested information.

Reasons for decision

14. Section 32 of the FOIA states:

"(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,

...

(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,".

15. The MoJ considers that section 32(3) applies in this case.

The complainant's view

16. With reference to the decision in Magyar, the complainant told the MoJ:

"The Grand Chamber affirmed that Article 10 of the Convention provides a "freedom to seek information".

17. In support of his view that the requested information should be disclosed, the complainant referred to the four criteria for engaging an Article 10 right set out in Magyar, namely:

- the purpose of the information request;

- the nature of the information sought;
 - the role of the applicant; and
 - whether the information was "ready and available".
18. He also pointed out that the requested submissions can be freely consulted at the European Court's library in Strasbourg.
19. In correspondence with the MoJ, the complainant told the MoJ that, following the decision in Magyar:
- "... I believe that the exemption under s32 can no longer be read as denying me access to the legal submissions requested in light of my rights under Article 10 [of the European Convention on Human Rights]..."*
20. In support of his argument that the section 32 exemption no longer applies in the wake of the Grand Chamber of the European Court of Human Rights' judgment he referred the Commissioner to paragraphs 156, 158, 160, 161, 168, 169 and 180 of the Magyar decision.
21. He told the Commissioner:
- "Following this decision, and in line with the duties under sections 3 and 6 of the Human Rights Act to read legislation and act in conformity with Strasbourg jurisprudence, I believe that the FOIA can no longer be read as denying me access to the legal submissions requested in light of my rights under Article 10".*
22. With regard to the above criteria, in his submission to the Commissioner the complainant stated, albeit without further evidence in support of his view, that the information was requested for the purpose of academic research:
- "... and is of public interest in the sense of examining the UK's relationship with an important international institution".*
23. He further argued that the MoJ's view that the decision is not binding on the UK:
- "...misrepresents the nature of the Convention mechanism, in particular the importance of the Magyar Helsinki judgment as emanating from the Grand Chamber, which broadly seeks to harmonise and develop the case law of the Convention. In particular, the Grand Chamber's assessment that the ability to request such information strikes at "the very substance of...Article 10" [180] should be accorded significant weight in assessing the MoJ's human rights obligations".*

The MoJ's view

24. In correspondence with the complainant the MoJ told him:

"I note your point about the decision of the European Court of Human Rights in Magyar Helsinki Bizottsag v Hungary, but do not consider that it prevents reliance on the section 32 exemption; not least because that judgement is not binding on the United Kingdom".

25. During the course of the Commissioner's investigation, the MoJ maintained its view that, under section 32(3) of the FOIA, it was not obliged to confirm or deny whether it held information relating to court cases, including those before the European Court of Human Rights in Strasbourg.

26. The MoJ made no representations in relation to its view that the judgement in Magyar is not binding on the United Kingdom.

27. In its submission to the Commissioner, the MoJ clarified that it considered that the information, if held, would be exempt under section 32(1)(a) of the FOIA because it would be held only by virtue of being contained in documents filed with a court for the purposes of proceedings in a particular cause or matter, namely the European Court of Human Rights for the purposes of the proceedings listed in the request.

28. In support of its argument that documents filed with the European Court of Human Rights are documents exempt from disclosure under the FOIA, the MoJ referred to a case previously considered by the Commissioner⁴.

29. The Commissioner's decision in that case was that it was reasonable to consider the European Court of Human Rights to be a court for the purposes of section 32(1)(a) FOIA.

The Commissioner's view

30. The Commissioner has published guidance on section 32 of the FOIA⁵. That guidance states:

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/957710/fs_50516525.pdf

⁵ <https://ico.org.uk/media/for-organisations/documents/2014222/section-32-court-inquiry-arbitration-records.pdf>

"We believe that section 32 was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings.

In effect, section 32 ensures that FOIA can't be used to circumvent existing court access and discovery regimes. Also, public authorities won't be obligated to disclose any information in connection with court, inquiry or arbitration proceedings outside those proceedings".

31. In her guidance, the Commissioner also considers the scope of the various terms used in section 32 of the FOIA, including the term 'court'.

32. In that respect the Commissioner's guidance states:

"Furthermore, the presence of the word 'includes' in section 32(4)(a) clearly infers that the definition of 'court' isn't just confined to bodies which exercise the judicial power of the state. In our view, therefore, the term 'court' will also encompass international courts whose jurisdiction is recognised by the UK, such as The European Court of Justice and the European Court of Human Rights".

33. In reaching a decision in this case, the Commissioner has taken into account that The Grand Chamber of the European Court of Human Rights concluded in Magyar that, in certain circumstances, there may be a right of access to information pursuant to Article 10 ECHR.

34. The Commissioner recognises that the complainant considers that the decision in Magyar impacts the FOIA regime.

35. The Commissioner has been mindful of the decisions in Kennedy, Magyar and Moss in her consideration of the issues to be determined in this case.

36. With respect to the complainant's reliance on the decision in Magyar, the Commissioner considers that the decision of the Supreme Court in Kennedy is a complete answer. The Commissioner is mindful that the majority of the Supreme Court held that there was no Article 10 ECHR right of access to state-held information. She considers that that conclusion is binding on inferior courts and tribunals notwithstanding any subsequent decision from the European Court of Human Rights.

37. Furthermore, the Commissioner notes that, even were Kennedy not a complete answer for that reason, the majority of the Supreme Court further held that if there was an Article 10 ECHR right of access to state-held information, that right was not enforceable through the FOIA by virtue of the relevant exemption (section 32 in that case) read with section 78 of the FOIA. The majority found that the proper route of

challenge would be a judicial review to seek disclosure of the information in the ordinary courts.

38. In reaching a decision in this case, the Commissioner has taken into account that the above reasoning has recently been applied by the First-tier Tribunal in *Moss v IC EA/2016/0250*.
39. In light of the above, having considered the matter, the Commissioner is satisfied that, in the circumstances of this case, the Kennedy judgement should be followed.
40. The MoJ was therefore entitled to rely on section 32(3) to neither confirm nor deny whether it held information within the scope of the request.
41. Section 32 confers absolute exemption on information to which it applies, so no consideration of the public interest test is required.

Right of appeal

42. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

Jon Manners
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