

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 December 2023

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Decision (including any steps ordered)**

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1. The complainant requested lists of Upper Tribunal court hearings presided over by a named judge and deputy judge, together with other court hearings represented by named Home Office individuals. The Ministry of Justice (the 'MOJ') neither confirmed nor denied holding the requested information, citing sections 32(3) (court records etc) and 40(5) (personal information) of FOIA.
2. The Commissioner's decision is that the MOJ has was entitled to rely on section 32(3) of FOIA to neither confirm nor deny holding any information falling within the scope of the request. As he has found section 32(3) to be engaged, the Commissioner has not deemed it necessary to consider the MOJ's reliance on section 40(5B)(a)(i) of FOIA.
3. The Commissioner does not require the MOJ to take any steps as a result of this notice.

#### **Request and response**

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4. On 25 July 2023, the complainant wrote to the MOJ and requested information in the following terms:

“Following my recent inquiry at the Asylum and Immigration Tribunal, I would like to make an inquiry to disclose the following

information in accordance to The Freedom of Information Act 2000.

UI-2021-001410 - Date Of Hearing: 10.07.2023 – Upper Tribunal Judge [name redacted] and Deputy Upper Tribunal Judge [name redacted].

We would like to obtain a list of all court hearings presided by Upper Tribunal Judge [name redacted] between 03.07.2023 and 14.07.2023, at Asylum and Immigration Tribunal in London.

We would like to obtain a list of all court hearings presided by Deputy Upper Tribunal Judge [name redacted] between 03.07.2023 and 14.07.2023, at Asylum and Immigration Tribunal in London.

We would like to obtain a list of all court hearings represented by the Home Office [name and job title redacted] between 03.07.2023 and 14.07.2023, at Asylum and Immigration Tribunal in London.

We would like to obtain a list of all court hearings represented by the Home Office Secretary, [name and job title redacted] between 03.07.2023 and 14.07.2023, at Asylum and Immigration Tribunal in London.

We would like to obtain a list of all court hearings represented by the Home Office [name and job title redacted] between 03.07.2023 and 14.07.2023, at Asylum and Immigration Tribunal in London.”

5. The MOJ responded on 16 August 2023. It refused to confirm or deny that it held the requested information citing the following FOIA exemptions as its basis for doing so:
  - section 32(3), the ‘neither confirm nor deny provision’ for court records; and
  - section 40(5), the ‘neither confirm nor deny provision’ for personal information.

## Scope of the case

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6. The complainant contacted the Commissioner on 16 August 2023 to complain about the way his request for information had been handled.

His initial complaint was made prior to him having submitted an internal review request to the MOJ.

7. The Commissioner told the complainant to request an internal review from the MOJ, which he actioned on 16 August 2023.
8. Subsequently, the MOJ provided its internal review outcome to the complainant on 13 September 2023. The MOJ maintained that sections 32(3) and 40(5) of FOIA applied.
9. The complainant remained dissatisfied post internal review and complained again to the Commissioner. He argued that he is not seeking disclosure of "specific details" of the court hearings, stating:

"We do not request any sensitive data and our inquiry is the utmost very basic one, we would like to know whether the named persons in our inquiry list attended the court hearings at the Upper Tribunal - Immigration and Asylum in London within that specific time frame.

If the court hearings were public and were not conducted in a secret trial format, then we do not see any valid reason why those public court hearings and their basic information should be denied to disclose. In fact, we do not require specific details of what was discussed during the court hearing but rather a general description that should be publicly available anyway."

10. From subsequent correspondence, the Commissioner is aware that the complainant has made what he describes as other "inquiries" on this matter which he asked the Commissioner to consider. However, as explained to the complainant, the Commissioner is only able to determine those matters falling within his remit, namely those relating to FOIA in this case.
11. The Commissioner has, therefore, considered whether the MOJ was entitled to 'neither confirm nor deny' ('NCND') holding the requested information by virtue of sections 32(3) and 40(5) of FOIA.

## **Reasons for decision**

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12. The Commissioner has first examined the MOJ's reliance on section 32(3) of FOIA.

## Section 32 court records etc

13. Section 32 covers information held 'only by virtue' of being contained in documents that are created or held for the purposes of court, inquiry or arbitration proceedings.
14. Courts and inquiries are not subject to FOIA, so the public authorities most likely to use this exemption are those whose functions involve regular interaction with the courts system, or who are party to court, inquiry or arbitration proceedings.
15. Section 32(3) of FOIA provides that if a public authority receives a request for information which, if held, would be exempt under section 32(1) or 32(2), it can rely on section 32(3) to neither confirm nor deny whether or not it holds the requested information.
16. In this case, the MOJ considered that, if held, the requested information would be exempt by virtue of section 32(1)(c) of FOIA.
17. Sections 32(1) and (3) of FOIA state:
  - "(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—  
...  
(c) any document created by-
    - (i) a court, or
    - (ii) member of the administrative staff 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."
18. Section 32 is an absolute exemption and is therefore not subject to any public interest considerations.
19. The Commissioner has published guidance on section 32<sup>1</sup> of FOIA which sets out the ICO interpretation of the section 32 exemption. As the Commissioner's guidance makes clear, the purpose of an NCND

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

response is to leave open the position about whether or not a public authority holds the requested information so that no inferences can be drawn from the authority's response.

20. In most cases, a public authority should be able to say whether or not it holds information relevant to the request. However, there are matters when confirming or denying if information is held can – in itself – disclose information which is exempt or which could prejudice the interest an exemption is there to safeguard. In these circumstances, the right under section 1(1)(a) FOIA (General right of public access to information) is disapplied and FOIA allows the authority to make an NCND response. This means that the authority can respond by refusing to inform the applicant whether or not they hold any information.
21. For section 32 of FOIA, the duty to confirm or deny relates to information that is exempt (or would be, if it were held). It is important for a public authority to use NCND responses consistently. Not doing so could undermine the effectiveness of the exclusion to confirm or deny whether information is held.
22. The Commissioner understands that section 32 FOIA 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 cannot be used to circumvent existing court access and discovery regimes. In addition, public authorities are not obliged to disclose any information in connection with court, inquiry or arbitration proceedings outside of those proceedings.
23. In its substantive response the MOJ told the complainant that:

“Under section 32(1)(c) information is exempt if it is a document created by a court (which includes any tribunal exercising the judicial power of the State) or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter.

The reason for section 32 is to preserve the courts control over court records. Even if a document may have been made public at the hearing it ceases to be a public record after the hearing and then becomes protected by virtue of section 32. Section 32 can apply even if that same information is later used for another purpose, (i.e. HMCTS [His Majesty's Courts and Tribunals Service] statistical purposes). The greater public interest was considered to lie in the preservation of the courts' own procedures for considering disclosure.”

24. At internal review, the MOJ explained that:

“In addition to 40(5) I also consider the information requested is exempt from disclosure because if held it may be contained in a court record. In respect to section 32(3) to confirm whether any court record is held would indirectly confirm that personal information is or is not held.”

25. The MOJ has told the Commissioner:

“In this matter, the requested information was for information about specified hearings, which, if it were held, would be held in a court file, for the purpose of conducting court business.”

26. FOIA is a public disclosure regime so that any information disclosed under FOIA, by definition, becomes available to the wider public. If any information were held, confirming this would reveal to the world at large that certain named individuals had been involved in the justice system at an identified court. If held, the requested information would be held in relation to court proceedings and there would be no other reason for MOJ to hold it other than for the purposes of those proceedings.

27. The Commissioner has therefore decided that MOJ was entitled to rely on the section 32(3) FOIA exemption in response to the complainant's request and was not obliged to confirm or deny whether MOJ held the information.

28. In the light of this decision, the Commissioner did not deem it necessary to consider the MOJ's reliance on section 40(5) of FOIA any further.

## Right of appeal

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29. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

30. 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.
31. 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 .....**

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**