Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0087

Information Commissioner's Ref: FS50080369

Heard at Victory House, London **Decision Promulgated**

On 3 April 2009 **28 April 2009**

BEFORE

John Angel

Chairman

and

John Randall and Dave Sivers

Lay Members

Between

DEPARTMENT FOR BUSINESS, ENTERPRISE

AND REGULATORY REFORM

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

PENINSULA BUSINESS SERVICES LIMITED

Additional Party

Representation:

For the Appellant: Gerry Facenna

For the Respondent: Holly Stout

For the Additional Party: Ben Hooper

Decision

The Tribunal allows the appeal.

Reasons for Decision

Background

1. At the time of the request, the Employment Tribunal Service ("ETS") (whose function is to provide administrative support to the Employment Tribunals) was an executive agency of the Department for Business, Enterprise and Regulatory Reform ("BERR"). It has since been transferred to the Ministry of Justice ("MoJ") and now forms part of the combined Tribunals Service ("TS").

2. The information requested (the names and addresses of respondents) is information that must, under the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004* ("the 2004 Regulations"), be provided in both the claim form ("ET1")[1] and the response ("ET3")[2] in employment tribunal proceedings. The 2004 Regulations were introduced after extensive consultations.[3]

3. Copies of the claim form and the response are presented to the ETS (now the TS) in hard copy or on-line. The information as to the names and addresses of respondents is then used by the ETS (now the TS) so that it can fulfil its administrative functions in respect of proceedings.

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[1] Rule 1(4)(c) and (d) of Schedule 1 to the 2004 Regulations.
[2] Rule 4(3)(a) and (b) of Schedule 1 to the 2004 Regulations.
[3] Routes to resolution: improving dispute resolution in Britain July 2001; Government response to routes to resolution consultation October 2001; Moving Forward: the report of the Employment Tribunal System July 2002; Employment Tribunals: Consultation on draft revised regulations and rules 5 December 2003; Government Response to the Consultation on the revised regulations and rules 20 July 2004.

For example, the ETS is responsible for ensuring that information about hearings, orders and decisions are sent to the parties.

4. Some of the information contained in claim forms and responses was also used by BERR (and is now used by MoJ) to provide statistics for management and policy purposes.

5. From 1965 until 1st October 2004 a public register ("the Public Register") was maintained in respect of employment tribunal claims. It contained the name and town of the parties to all claims commenced in employment tribunals in England and Wales. Between 17th August 2000 and 1st October 2004 it also contained the addresses of the parties. The Public Register in this form was abolished in 2004. Instead, the 2004 Regulations made provision (by regulation 17) for a public register of employment tribunal judgments ("the Register of Judgments"). In most, but not all, cases the Register of Judgments will therefore include the names of the parties where a case has proceeded to a hearing.

6. Prior to the abolition of the Public Register, Peninsula Business Services Ltd ("Peninsula") had used the information contained in it for marketing purposes in order to identify potential clients for their employment litigation advisory services.

7. Since the 2004 Regulations have been introduced ETS (now the TS) on each Wednesday makes available a Press List of cases due for hearing for the week after the following week (e.g. on Wednesday 4th February 2009 a "Press List" of those cases for hearing during the week commencing 16 February 2009). The Press List contains the following details: venue; hearing date; case number; jurisdiction codes; the claimant's initials, surname and the town in which he/she lives; the respondent's name and the town in which the Respondent is based. The Press List is prepared and sent to *Courtserve,* where it may be accessed free of charge following on-line registration for the service. Peninsula is registered to access the service.

8. A Daily Cause List of cases set for hearing is also produced and displayed in the reception area of each Tribunal office. The Cause List contains, in addition to the information in the Press List, the actual location of the hearing (e.g. Room 1); the estimated length of the hearing; the name of the representatives(s); the name of the tribunal

clerk and (if allocated when the cause list is prepared) details of the Employment Judge and members. *Courtserve* also provides access to this information on the same day.

The request for information

9. On 17 January 2005 Peninsula requested from BERR then the Department of Trade and Industry ("the DTI") "names and addresses of all Employing Organisations that are Respondents in receipt of all Employment Tribunal claims for England, Wales and Scotland, from 1 October 2004 onwards" ("the Request"). This was refused (the "Refusal Notice") and Peninsula asked for an internal review.

10. The DTI upheld its original decision claiming: (i) that the information requested was only held by it on behalf of the Employment Tribunals and so by virtue of s 3(2)(a) of FOIA was not "held" by it for the purposes of s 1 of FOIA; and (ii) that in any event the information was exempt from disclosure under s 36(2)(c) (prejudice to the effective conduct of public affairs) (the "Outcome of the Internal Review").

The complaint to the Information Commissioner (IC)

11. By a Decision Notice dated 2nd October 2008 the Commissioner determined: (i) that the information requested was held by BERR for the purposes of s 1 of FOIA; and, (ii) that the exemption under s 36(2)(c) was properly engaged, but that the balance of public interest favoured disclosure of the material.

The appeal to the Tribunal

12. BERR appealed against that Decision Notice by Notice of Appeal dated 30th October 2008. In its Notice of Appeal, BERR relied for the first time on exemptions under s.32 FOIA (court records, etc) and s 40 (personal data), in addition to the exemption under s 36(2)(c). However, BERR no longer relied on s.3(2)(a).

13. The Tribunal joined Peninsula as a party to the appeal. The IC and Peninsula indicated that they did not object to the s.32(1) exemption being claimed for the first time before the Tribunal.

14. Following the exchange of witness statements in compliance with directions leading up to the hearing the IC indicated that he would be likely to accept that s.32(1) was engaged (even in relation to respondent's post codes which he had previously indicated he did not consider were covered). In effect by the time of the hearing the IC had accepted, subject to further evidence, that s.32(1) applied and that his Decision Notice dated 2nd October 2008 was wrong.

The questions for the Tribunal

15. The Tribunal decided that it would deal with the following questions by way of a preliminary hearing:

    (1) Whether the s.32(1) FOIA exemption could be claimed for the first time before the Tribunal?

    (2) If it could be claimed, whether the s.32(1) exemption is engaged?

    If the s.32(1) exemption is engaged then it was accepted by all parties that the appeal would succeed.

16. The powers of the Tribunal are set out under s.58 FOIA. The Tribunal may consider whether a decision notice is wrong in law or that to the extent that a notice involved an exercise of discretion by the IC that he ought to have exercised it differently. In order to do this the Tribunal may undertake a merits review (s.58(2)) and can allow the appeal and/or substitute a new decision notice and in any other case dismiss the appeal.

17. The Tribunal heard evidence from Mandy Shala Mayer CBE who has been the Director for Dispute Resolution in the Employment Relations Division of BERR since October 2007.

Whether a late exemption can be claimed?

18. The Tribunal has set down its approach to this issue in *Home Office and Ministry of Justice v Information Commissioner* (EA/2008/0062) at [72]-[73]:

> "72. The Tribunal has considerable jurisprudence on the claiming of late exemptions. This was summarised by the Tribunal in **Department of Business and Regulatory Reform v IC & CBI** EA/2007/0072 at paragraph 42:
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> > *The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss. 10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.*
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> 73. We endorse this finding even more so where exemptions are claimed for the first time before the Tribunal. We do not accept Mr Faccena's contention that we are obliged to accept the claiming of late exemptions under FOIA."

19. In that case, permission to rely on exemptions claimed late in the appeal proceedings was refused, with the exception of the late claim to rely on s.40 (because of the risk that not allowing reliance on that exemption would result in breaches of data subjects' rights under the Data Protection Act 1998 ("DPA")).

20. In other cases, the Tribunal has permitted late claiming of exemptions. Factors that the Tribunal has considered important when determining whether or not to exercise its discretion in this regard have included: the fact that the refusal notice was issued at an early stage of the implementation of FOIA when there was limited experience of the application of exemptions (*BERR v IC and CBI*, ibid, at [43]); whether the late claim arises because the public authority has mis-identified the correct exemption (*Bowbrick v IC and Nottingham City Council* EA/2005/0006 at [49]), or because the request was initially considered under the wrong jurisdiction (*Bowbrick,* [50]); when the information in respect of which the exemption is claimed was discovered (*Benford v IC and DEFRA* EA/2007/0009 at [39]); and at what point in either the Commissioner's investigation or the proceedings the exemption is claimed (*Home Office and MoJ v IC*, ibid, at [74] and *Benford*, ibid, at [39]).

21. In the present case, Ms Stout on behalf of the IC, submits that it is appropriate to permit BERR to rely on the exemption in s.32 for the following reasons:

    (1) The original refusal notice was issued at an early stage of the implementation of FOIA when public authorities had little experience of dealing with requests; and
    (2) Although the Commissioner's investigation took place some three years later, the Commissioner does not consider in the circumstances of this case that the failure to raise s.32 at that stage should preclude reliance on that particular exemption before the Tribunal. This is due to the nature of the information which the exemption at s.32 is seeking to protect. S.32 seeks to protect, amongst other information, information contained within court records, and ensure that FOIA does not impinge upon other access regimes (see in particular CPR Part 5.4A-5.4D).

22. BERR concurs with the points made by the IC and adds that in the IC's Reply, at para. 31, the IC notes that "BERR's arguments under section 32 have great similarities to the arguments considered by the Commissioner in relation to section 3(2)(a)". Mr Facenna on behalf of BERR argues that it is important that BERR is not raising new arguments which bear no relationship to points previously made. Having taken into account the Decision Notice and experience of FOIA gained in the four years since the information request, he submits

BERR has concluded that the information is exempt under s. 32 FOIA, not under s. 3(2)(a).

23. Mr Facenna also argues that disclosure contrary to s.32 FOIA would have an impact on the interests of a very large number of third parties who are not represented in these proceedings.

24. The Tribunal has considered all these arguments and the fact that Peninsula does not object to the exemption being claimed at this stage. The Tribunal also considered the origin of the information that would be caught by s.32, were that exemption to be engaged. If the information had been generated by the public authority, and was disclosed as a result of a failure to claim the s.32 exemption at an earlier stage, the public authority could be said to be the author of its own misfortune. However, the information in question is held as a result of BERR (MoJ) providing administrative services through the ETS (TS). Furthermore, the information had been provided by individuals and companies, who had a reasonable expectation that it would not be disclosed at an early stage in proceedings, especially given the abolition of the Public Register in 2004. The Tribunal should consider the interests of those who supplied the information to the public authority (and who are not represented in these proceedings), as well as the interests of the public authority itself. Those former interests are best protected by ensuring that if disclosure is to occur, that should be as a result of a decision of the Information Commissioner or of the Information Tribunal. Disclosure should not occur solely because of a failure of BERR to claim the s.32 exemption at an earlier stage.

25. We find that in the circumstances of this particular case there is reasonable justification for allowing the exemption late. The Tribunal now needs to consider whether the exemption is engaged.

Whether the s.32(1) exemption is engaged?

26. S.32 of FOIA provides so far as relevant as follows:

> "**Court records, etc.**

32. (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,

(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.

(4) In this section-

(a) "court" includes any tribunal or body exercising the judicial power of the State …"

27. The exemption under s. 32 is an absolute exemption under s. 2(3)(c). Accordingly, if the exemption applies BERR is relieved of the duty in s. 1(1)(b) of FOIA to communicate the information requested to Peninsula.

28. There is some previous jurisprudence of the Tribunal in respect of the exemption under s. 32 of FOIA including: *Szucs v IC* (EA/2007/0075), *Ministry of Justice v Information Commissioner* (EA/2007/0120 & EA/2007/0121) and *Mitchell v Information Commissioner* (EA/2005/0002). The latter (which concerned transcripts of court proceedings) contains some helpful observations on the nature and scope of the s 32 exemption:

> "31 We remind ourselves that a court is not itself a "public authority" within s.3(1) (see Schedule 1) so that we are considering court records held by public authorities either as litigants, third parties subject to a court order or, as in the present case, interested parties.

> 32 Section 32(1) applies to three classes of court document. Paragraphs (a) and (b) seem to relate to documents filed or served by the parties or by a third party pursuant to an order of a court, eg, a summons requiring production of a document, either in civil or criminal proceedings. Paragraph (c) refers to documents created by a court or a member of the administrative staff of a court.
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> 33 Documents to which paragraphs (a) and (b) relate will routinely include pleadings, witness statements and exhibits served as part of a litigant's (or in criminal proceedings most often the prosecution's) case as well as lists of documents, material served under an obligation to disclose and documents such as skeleton arguments prepared by the advocates. …
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> 34 A related but distinct rationale for exemption is that the courts alone should control access to documents produced or created by the parties and served on the court and other parties, so that existing statutory procedures and rules, such as the Civil and now the Criminal Procedure Rules and practice directions should continue to govern availability. That explanation may echo in some degree those which underlie the exemptions for parliamentary material and information to which the Data Protection Act 1998 applies.
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> …
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> 37 ... As to subparagraph (ii) [of s 32(1)(c)], the extent of the class of documents created by members of the administrative staff to which the exemption applies is not immediately obvious. It cannot, we think, extend to public orders of the court such as witness summonses or orders under the Contempt of Court Act 1981. It must refer to internal documents such as notes to a judge from a court officer relating to the conduct of a particular case. It is not difficult to see good reasons for leaving to the judge the decision how far, if at all, such material should be published."

29. Further, the Tribunal held earlier in its decision that the fact that s. 32(1) referred to the information being held in a *"document"* did not mean that that document had to be in paper form:

> “21. As to (i), we are in no doubt that the tapes are themselves a "document" for the purpose of s.32(1), as the Respondent contends, since that term is broadly construed in an age offering so many recording media. It would be remarkable if exemption depended on whether a tape was recorded or a stenographer produced a shorthand note. Transcripts of tapes are analogous to copy documents. We further conclude that they were created for the purpose of proceedings in a particular cause, for example, use in the event of an appeal. In our view, their character is not changed because they are transcribed or later copied for the purposes of interested third parties. What matters is the purpose for which the original tapes were created. Transcripts or copies are not to be regarded as new documents created for a different purpose.”

The evidence

30. Mrs Mayer gave evidence that information from the ET1 and ET3 and subsequent pleadings and directions are entered onto ETS’s computer case-handling system, ETHOS. ETHOS is also used as a tool to assist with communication with the parties and their representatives throughout the duration of the case. Through ETHOS, ETS (now TS) identifies which standard letters are to be sent to the parties or their representatives. Copies of the ET1 and ET3 forms are also passed to ACAS in order to allow the fulfilment of its statutory duty to conciliate in employment disputes.

31. Mrs Mayer also informed us that ETHOS is used to produce different types of *ad hoc* reports for management and policy purposes - for example, performance information on the achievement of individual employment tribunals against key performance indicators, such as the speed with which cases are brought to hearing. Exceptionally respondents’ postcodes may be used when Presidents of ETs, in consultation with ETS, consider making a change to office boundaries in order to manage caseloads across the different tribunal offices. This may happen perhaps every three or four years. ETHOS data will then be used to create an *ad hoc* report using the first three digits of the respondent’s postcode field to help Presidents and ETS to identify the impact of a specified post code being transferred from one office to another. An example of a report was provided in evidence, which clearly showed that the last three digits of a respondent’s post code had not been used.

32. Mrs Mayer also gave evidence that data from ETHOS is used in periodic SETA (Survey of Employment Tribunal Applications) research exercises. Surveys were undertaken in 1987, 1992 and 2003, with the latest, commenced in 2008, still underway. No details of parties in any "live" cases are passed on. Only historic data is used of cases which have been determined, withdrawn or settled at least 8 months prior to the period of the research. These surveys are carried out by statisticians within, or working for, BERR using a random sample of applicants and respondents involved in employment tribunal claims. Their purpose is, variously, to update and make comparisons with findings from previous surveys, assess the impact of changes in legislation and obtain information about a variety of matters to help with the management of ETs. The reports and datasets used are anonymised.

33. There was no evidence that a specific report containing the requested information was held by ETS, although it was accepted that such a report could easily be extracted from ETHOS.

Legal arguments

34. Mr Hooper argues on behalf of Peninsula that the plain and ordinary meaning of s. 32(1)(a) is that it applies to information that is held only by virtue of being contained in a court document. In other words, if a public authority extracts information from a court document and puts it into a database, or another document, s. 32(1)(a) ceases to apply as that information is no longer held only by virtue of being contained in a court document.

35. He further contends that this unique feature of s. 32 makes plain that Parliament intended the focus to be not on the source of the information (*e.g.* information coming from a tribunal, or a party in tribunal proceedings) but on its location - *i.e.* information that is contained in a court document, etc. and this is further supported by the title of s. 32: "Court records, etc".

36. In any event, Mr Hooper argues, insofar as there is any ambiguity in an absolute exemption such as s. 32(1)(a), it should be read restrictively so as to result in a more liberal reading of FOIA overall and refers us to *Common Services Agency v. Scottish Information Commissioner* [2008] UKHL 47, *per* Lord Hope at §§4 and 14 and the observation of

Stanley Burnton J in *Office of Government Commerce v. Information Commission* [2008] EWHC 737 (Admin), at §71, that there is an "assumption" built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest.

37. Alternatively, he argues that even if we do find a different construction of s. 32(1)(a), it cannot be the case that the exemption will apply to such information irrespective of how it is (or might be) used. Where, for instance, a public authority fortuitously acquires information from one or more court documents that come into its possession, and uses that information for purposes wholly unconnected with legal proceedings or the administration of justice generally, it could not have been Parliament's intention that the information in question should nevertheless remain absolutely exempt for 30 years (see s.63 FOIA).

38. Mr Facenna on behalf of BERR considers that these arguments are wrong, for the following reasons:

a. S. 32 FOIA does not cover *only* information that is "contained in" a court document. It is not an exemption that applies to a particular class of *documents*, but an exemption that applies to a particular class of *information*, i.e. information that is "held by a public authority…by virtue of being contained in any document filed with…a court…" (and for no other reason);
b. if Parliament had intended s.32 FOIA to have the narrow meaning contended for by Peninsula, s. 32 would have read: "*Information held by a public authority is exempt information if it is contained in…a ['court document']*". It does not: the exemption focuses on the *reason* the public authority acquired the information, not the form in which it is held (FOIA defines "information" as "information recorded in any form" (s. 84));
c. neither BERR nor the IC contends that the ETHOS database is itself a 'document filed with a court', as Peninsula seems to suggest. As Mrs Mayer explained, the names and addresses of parties are entered into ETHOS using the ET1 and ET3 forms filed (in hard copy or electronically) with TS. The *information* within the ETHOS database is information held by virtue of being contained in 'documents filed with a court'; and
d. in any event, the Tribunal has confirmed that the term 'document' in s. 32 does not apply only to paper documents but should be "broadly construed in an age offering so many recording media" (see *Mitchell* above and *MoJ* at [16]).

39. Mr Hooper contends that s.32 ceases to apply where a public authority holds information for *other purposes*, such as the development of policy. He argues that s. 32 does not apply to respondents' details held by ETS because information of that "type" *may* be used for the SETA surveys described in Mrs Mayer's evidence. He relies on the Tribunal's decision in *BBC v IC* (EA/2008/0019, 0034, 0051 and 0058), and, in effect, contends that information is 'held' for a purpose if it is held 'in case it may be needed for that purpose'.

40. Mr Facenna further submits that this contention was without merit because:
    a. even if it were right that the purpose for which information is subsequently held by a public authority is relevant to whether the s.32 exemption applies, information which is merely of a "type" that *may* be used for a particular purpose in future cannot itself be regarded as information held for that purpose. In the present case, the fact that BERR statisticians may intermittently use historic data from employment tribunal cases for the SETA survey does not mean that every name and address of a respondent filed with the ETS on an ET1 or ET3 form must be regarded as being held for the purposes of that survey. The Tribunal's decision in the *BBC* case does not provide any support for such an approach; and
    b. in any event, the correct interpretation of s.32(1) FOIA is that the exemption applies to information that is held only by virtue of being contained in one of the documents listed in s.32(1)(a) to (c). The words "*for the purposes of proceedings in a particular cause or matter*" in that section relate to the purpose for which the document containing the information was originally filed / served / created; they do <u>not</u> relate to the purpose for which the information within that document is subsequently held by the public authority.

41. Ms Stout on behalf of the IC contends that the ETHOS records are themselves documents created by a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter, within the meaning of section 32(1)(c)(ii) FOIA.

42. The IC agrees with BERR that where the information requested in this case is held by BERR in the (paper or electronic) ET1s and ET3s completed by the parties to employment tribunal proceedings, it is exempt under s 32(1)(a). It matters not, Ms Stout contends, *how* the documents (having been initially filed with ETs) came into BERR's

possession, or how they are filed or whether copies of those documents are made.

43. Ms Stout concludes that the entry of the information from ET1s and ET3s onto ETHOS by ETS staff is the 'creation of a document' by 'a member of the administrative staff of a court' and, providing that 'document' is created 'for the purposes of particular proceedings', then the information is exempt under s 32(1)(c).

44. Ms Stout further submits that in determining whether or not a document that is used for mixed purposes has been 'created … for the purposes of proceedings in a particular cause or matter' within the meaning of s 32(1)(c), the proper approach is to consider the dominant purpose for which the document was created, consistent with the test approved by Davis J in the High Court in *BBC v Sugar and IC* [2007] EWHC 905 (Admin), [2007] 1 WLR 2583 (at [63(iii)]) for determining whether information is 'held for purposes other than those of journalism, art or literature' within the meaning of Part VI of Schedule 1 of FOIA.

45. Ms Stout concludes that the Commissioner is satisfied that the dominant purpose for the creation of such 'documents' in the ETHOS database is that of administrating proceedings in a particular cause or matter and that, accordingly, the information requested is exempt under s 32(1)(c) insofar as it is held in the ETHOS database.

46. For the avoidance of doubt, Ms Stout also argues that the Commissioner does not agree with the argument advanced by BERR that if information contained within documents filed with a court for the purposes of proceedings in a particular cause or matter is later transcribed, copied or placed onto a database, that does not alter the fact that the information is held by the public authority only by virtue of being contained into those documents. The Commissioner considers that once the information has been separated or extracted from the document filed with a court in which it was originally contained and entered into another document, it is no longer covered by s 32(1)(a), but s.32(1)(c).

Conclusions

47. The reason why s.32(1) is an absolute exemption is because ETs are not themselves public authorities under FOIA. The information required

by ETs for the purposes of their proceedings is in fact processed by the ETS (now TS) which is responsible for the administration of their cases. The ETS (TS) is an agency of BERR (MoJ) which is a public authority under FOIA. The ETs are not required to disclose information under FOIA. The ETs have their own rules for processing information including its disclosure. If these rules could be circumvented just because their administrative processes are conducted by an organisation which is a public authority this would defeat the purposes of these rules and limit the authority of the tribunals. We consider this was clearly not what Parliament intended and it is why Parliament has introduced s.32(1) as an absolute exemption under FOIA.

48. The wording of the section has given rise to much legal argument in this case and in *Mitchell* and *MoJ* and has given rise to a number of issues.

49. What is a "document" for the purposes of the section? All parties seem to argue for a broad definition in terms of the form of the document as espoused by differently constituted Tribunals in *Mitchell* and *MoJ*. We support the relevant findings in these cases. In our view Parliament intended that a broader definition be construed otherwise the object or reason for the exemption as set out in paragraph 47 above would be undermined. We consider that Parliament intended that the form in which a document was filed or created by a tribunal for the purposes of proceedings in a particular cause or matter would not be determinative as to whether it, or the information it contained, was exempt, particularly in this electronic age with case management systems. Otherwise it could have some strange effects. If a judge ordered by way of directions that a reply be served on the tribunal, and it was filed by way of email rather than hard copy, then in our view it must still be a document for the purposes of s.32(1). Otherwise it would mean that some of the pleadings in a particular cause or matter would be protected and others not. We believe Parliament did not intend such an effect.

50. We can look at it another way. The exemption under s.32(1)(a) covers information held by ETS if it is "held only by virtue of being contained in - any document filed with .. [the tribunal] for the purposes of proceedings in a particular cause or matter". Information is given a wide definition under s.84 FOIA – "information recorded in any form". So ETS may hold the information contained in a document in any form. This would seem to cover the extraction of information from the ET1

and ET3 and inserting it in ETHOS in order to facilitate the administration of proceedings in a particular cause or matter.

51. Even if we are wrong we accept the argument of Ms Stout at paragraphs 41 – 45 above that at the very least the administrative staff (ETS) are creating a document by populating ETHOS for the purposes of proceedings in a particular cause or matter under s.32(1)(c)(ii). We note that Mr Hooper contends that the whole of ETHOS is a document for the purposes of s.32(1)(c) rather than say the individual entries in a case. He makes this contention because if it is a whole document containing details of many cases than it cannot be a document "created...for the purposes of proceedings in a particular cause or matter". We do not accept this contention. ETHOS like many such databases is divided into files or pages of information or data for particular cases which we find can equate to documents in a particular cause or matter.

52. What happens, however, when ETS uses the information held in ETHOS for management and policy purposes which are no longer directly related to "proceedings in a particular cause or matter"? We were provided with examples by Mrs Mayer, as set out in her evidence above, including the monitoring of the performance of a particular tribunal or region and the setting of boundaries for tribunal venues.

53. S.32(1) applies to information held by ETS "only by virtue of being contained in - any document" filed or created for the purposes of proceedings in a particular cause or matter. 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.

54. Even if we are wrong, we adopt the arguments of Mr Facenna in paragraph 40 above.

55. What happens, however, when the information held is mixed with other information which is not held only by virtue of being contained in a court record to produce ad hoc reports? Then we agree with the IC that a dominant purpose test should be applied to determine whether or not the report can benefit from the exemption.

56. In this case there is no evidence that the requested information has been produced as an ad hoc report, although it is possible that some of the information may have been contained in data used to produce a report such as that provided to BERR to provide for the conduct of SETA surveys but there would be no easy means of identifying this (and the SETA reports do not themselves contain respondents' details). 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.

57. We find, having considered all the evidence and arguments in this case, that the requested information is held only by virtue of being contained in a court record and is therefore exempt under s.32(1) and therefore the appeal succeeds.

58. Our decision is unanimous.

Signed:

John Angel
Chairman

Date 28 April 2009