IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0122

BETWEEN:

PENINSULA BUSINESS SERVICES LIMITED

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

-and-

The MINISTRY OF JUSTICE

Second Respondent

Before

Brian Kennedy QC
Melanie Howard
Gareth Jones

Representation:
For the Appellant: Ben Hooper – Counsel
Mark Owen – Solicitor

For the First Respondent: Holly Stout – Counsel
Richard Bailey - Solicitor

The Second Respondent: Whilst not forwarding any legal submissions, does oppose the appeal in adopting the reasons set out by the First Respondent. The Second Respondent did provide background information on the Register and the ETHOS database – concerning the storing of information, subject of this appeal.

Date of Hearing: Thursday 17th January, Court 7, Field House, 15, Bream's Building, London.

DECISION

This Tribunal dismisses the appeal and the respondent's Decision Notice is upheld.

REASONS

Introduction

1. The decision concerns an appeal of a Decision of the first respondent dated 23 May 2012, reference: FS50427263 **("the Decision Notice")**.

2. In the Decision Notice the first respondent held that the second respondent had correctly withheld requested information from the appellant pursuant to s 32 of Freedom of Information Act 2000 **("the FOIA")**.

3. The requested information, in brief, concerned the names and addresses of employing organisations involved in Employment Tribunal claims, for England, Scotland and Wales for a specified period (full details of request set out below at §6).

4. The legislation concerning the recording of the requested information relating to legal proceedings has changed (discussed in detail below at §§20-23). Therefore the requested information which was previously readily available to the appellant is no longer readily available since those legislative changes have occurred.

5. Prior to the aforementioned legislative changes, the appellant had access to the information which the appellant used for marketing purposes in order to identify

potential clients for the employment litigation advisory services (see paragraph 6 of the 2008 case – which is discussed at paragraph 7 herein).

Background concerning requested information

6. On 18 August 2011, the appellant originally wrote to the second respondent requesting information in the following terms:

> "Will you please treat this letter as my client's formal request under the 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."

7. The request concerns information which was originally filed and recorded by Her Majesty's Courts and Tribunals service **("HMCTS")** who are an executive agency of the second respondent herein. The second respondent now holds the requested information on an ETHOS database (explained at §§25-29 below).

8. Substantively the same request was made by the appellant in 2005, when the Information Tribunal (as it then was), held that the information was exempt from disclosure under s 32(1) (a) and/or s 32(1) (c) (ii) of the FOIA. This was the decision in the case of *DBERR v IC and Peninsula* (EA/2008/0087) **("the 2008 Decision")**.

9. The appellant submits that the legal position has now changed in light of the "*first*" Court of Appeal decision in *Kennedy v The Information Commissioner* [2011] EWCA Civ 367, [2011] EMLR 24 ***("Kennedy")***. We refer to the "*first*" Court of Appeal decision as *Kennedy* returned to the Court of Appeal for a second time in relation to the question of the effect of Article 10 of the ECHR on the interpretation of s32(2). Judgment was handed down on 20 March 2012: see [2012] EWCA Civ

317, [2012] EMLR 20. Permission to appeal to the Supreme Court may be granted in that appeal to consider further the interpretation of s 32 that is at issue in this case. However, it appears that all parties are content for this Tribunal to proceed to give judgment and it is not suggested that this case should be stayed pending the Supreme Court decision in *Kennedy*.

Grounds of Appeal

10. The appellant's grounds of appeal, in summary are:

    a) The Commissioner misdirected himself on the scope of s 32(1) (a) of the FOIA, and in particular failed either to understand or to follow *Kennedy*, in particular Ward LJ at paragraph 25.

    b) Further, the Commissioner failed even to address the appellant's arguments on s 32(1) (c) (ii) of the FOIA, and in any event failed properly to apply that provision to the circumstances of the present case.

Relevant legislation

11. Under s 1(1) of the FOIA a person who has made a request to a "*public authority*" for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested [s 1(1) (a)] and, (b), if it does, to have that information communicated to him [s 1(1) (b)].

12. The duty to provide the requested information under section 1(1) (b) will not arise where the information is itself exempted under provision contained in Part II of the Act. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Qualified exemptions are subject to a public interest test under s 2(2) of the FOIA. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Absolute exemptions are not subject to a public interest test.

13. *"Public authorities"* are defined for the purposes of FOIA by s 3. The second respondent (the Ministry of Justice) is a public authority as defined. Courts and tribunals are not public authorities as defined. HMCTS is an executive agency of the Ministry of Justice who are the public authority for the purpose of this request.

14. By virtue of s 3(2), information will only be held by an authority for the purposes of FOIA if it is (a) *"held by the authority, otherwise than on behalf of another person"* or (b) *"held by another person on behalf of the authority"*.

15. *"Information"* is defined for the purposes of the FOIA by s 84 as *"information recorded in any form"*.

16. The relevant exemption for the purposes of this appeal is s 32(1) of the FOIA relating to court records which states (so far as is relevant to this appeal) as follows:-

> "(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.
>
> …
>
> 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".

17. S 32 is an absolute exemption and as such is not subject to the public interest test under s 2 of the Act.

The Register, the ETHOS Database, and Legislative Changes in relation to same (as summarised by the second respondent)

The Register

18. The Register is a public record of judgments made by employment tribunals, in the jurisdictions of England and Wales and, separately, Scotland.

19. Disclosure of information contained in the register was governed by the Employment Tribunal (Constitution and Rules of Procedure) Regulations 1993 which provided, under regulation 9, that:

> "The Secretary of State shall maintain a Register of applications, appeals and decisions at the Office of the Tribunals which shall be open to the inspection of any person without charge at all reasonable hours".

20. The 1993 Regulations were revoked and replaced by the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001 **("the 2001 Regulations")**. These also permitted the Register to record, amongst other information, the name and address of the respondent.

21. On 5 December 2003 the Department of Trade and Industry, as the department then in charge of policy for Employment Tribunals, published a public consultation, titled "Routes to Resolution" **("the Government's 2003 Public Consultation")**. The consultation sought views, amongst other matters, on where the public interest lies with the disclosure of information on the register and whether it was desirable to change the information held on the register.

22. The government decided, in light of consultation responses, that details of the respondents should not be placed on the register. The decision was based on the following evidence:

    a) Publicity surrounding an employment tribunal claim can threaten the reputation of employers, particularly small employers, even though the

claim may ultimately fail, or be misconceived or ill-founded. Evidence from the CBI suggested that where the fact of a claim has been made public, businesses may feel compelled to fight to clear their names rather than settle the case through conciliation (especially when facing claims of unlawful discrimination).

b) Maintaining the confidentiality of the parties prior to a case being listed for a hearing may encourage conciliation and the possibility of settlement, in particular because it may make it easier for both claimants and respondents to compromise.

c) Evidence that the publication of parties details compromised their privacy, leaving them open to receiving unwelcome, and in some cases misleading, approaches from companies offering services to assist respondents.

23. In light of the consultation, the 2001 regulations were revoked and replaced with the Regulation of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 **("the 2004 Regulations")**, which provided, under regulation 17 that:

> "The Secretary shall maintain a Register of all judgments and any written reasons which shall be open to the inspection of any person without charge at all reasonable hours".

24. The 2004 Regulations made no provision for the inclusion of any other information (such as the names and addresses of the employer organisations on the Register).

ETHOS

25. ETHOS is the Employment Tribunal's case management database system. It is comprised of a centrally managed database for all Employment Tribunals. The information on the database is located on the local tribunal office servers. Each of the Tribunal offices that receive claims has full access to the ETHOS database system and any information on their local server. **Offices do not have access to servers located in other offices and so, for example, a member of staff in Leeds could not access case details on a case that has been registered in Manchester.**

26. **ETHOS** stores information populated from data supplied by parties, or their representatives, in Employment Tribunal cases. The information stored in each case will vary depending on how much information is submitted by the parties. At a minimum, ETHOS will always include the claimant's first name, the claimant's address and the respondent's name. Other details that will be recorded if provided include the claimant's contact details, the name and address of the claimant's representative, the jurisdiction code (which indicates the nature of the complaint e.g. unfair dismissal or sex discrimination), whether the claim is resisted, the respondent's contact details and the name and contact details of the respondent's representative. This information is originally sent to the Employment Tribunal on a form ET1 (essentially the 'claim' form) or ET3 (the 'response' form). This information is inputted into ETHOS manually or by uploading electronically submitted material by the HMCTS employees.

27. **ETHOS** is used as a case management system and is a key business support application in individual cases. The primary purpose of ETHOS is to assist with the administration of proceedings in a particular case. It provides an auditable case-management history of progress from receipt of the originating application through to the conclusion of proceedings. Information held on ETHOS is used to locate physical files, record the clerk responsible for the hearing and to book hearing rooms and staff for a tribunal hearing. **These functions assist the Employment Tribunal in the management of cases and contribute to the case of progressing in an efficient and effective manner.**

28. Although **ETHOS** was designed to assist with individual case management, it can also be used to create statistical and analytical reports. These reports have been used to a very limited degree to monitor workloads, plan for future work and report against key performance targets and service standards in the HMCTS annual report (for example, reporting on the number of single claims that have a substantive hearing within 26 weeks or the number of judgments that are promulgated within 28 days of the hearing).

29. Only Employment Tribunal offices use ETHOS as an operating system, but other courts and tribunals have their own case management databases which record substantially the same information and are used for similar purposes.

Issues for this Tribunal to consider

Main issue

30. The main concern in this appeal is whether the FOIA grants persons a right to obtain upon request the names and addresses of respondents to employment tribunal claims.

The Government's 2003 Public Consultation

31. As submitted by the first respondent, HMCTS is an agency of the second respondent – the second respondent being the public authority under the FOIA. The individual Employment Tribunals are not public authorities under the FOIA and are therefore not required to disclose information following a request under the FOIA. The Employment Tribunals have their own rules for processing information including its disclosure. If these rules could be circumvented just because the computer system for their administrative processes are provided by an organisation which is a public authority (in this case the Ministry of Justice), this would defeat the purposes of these rules and limit the authority of the Tribunals. This Tribunal agrees with the submissions of the first respondent, i.e. this could clearly not have been what Parliament intended and why Parliament made section 32(1) an absolute exemption under the Act.

32. In the Government's 2003 Public Consultation, a majority favoured abolishing the Register in its then current form. As per the submissions of the first respondent, it was found that:

> "The balance of views was that its advantages – in terms of freedom of information and access to sources of advice and support that the parties might not otherwise know to approach – were outweighed by its significant disadvantages. The disadvantages cited included compromising the privacy of the parties, and leaving them open to receiving numerous unwelcome, and in some cases misleading, approaches from 'ambulance chasers'. Evidence of such approaches was provided by some consultees."

33. Some specific relevant findings that the Government noted in the 2003 Public Consultation document were highlighted by the first respondent as follows:

> "67. …each individual claim is a private matter. Individuals have rights to privacy. The Government has received numerous complaints from parties who have found it very intrusive and highly unwelcome to be contacted by third parties offering advice or other services…There have also been suggestions that parties are less willing to settle a dispute between themselves once it is public knowledge…
>
> 68. In the civil courts, and in other types of tribunals, it is not generally the practice or requirement that details of the parties to a case are entered on a public register or otherwise made publicly available in advance of the case being determined. The Employment Tribunal system is thus unusual in this regard…

The 2008 Decision

34. The appellant submits that the Tribunal was wrong in the 2008 Decision as regards s 32(1) (a) because, whatever the original reason for gathering the withheld information, this information was now held on the second respondent's ETHOS system – and thus state that as such the information does not exist for the purpose of proceedings in a particular cause or matter.

35. The Tribunal held in the 2008 case that the requested information was exempt as it was information which was only *acquired* by virtue of being contained in a document filed with the Employment Tribunals. It was information originally taken from the ET1s and ET3s and filed on ETHOS, "at the very least the administrative staff…are creating a document…for the purposes of proceedings in a particular cause or matter" (§51), and "There is nothing in the section which limits the way in which that information may be used" subsequently (§53).

36. The Tribunal in the 2008 case also held that:

> "To the extent that the information requested might now be mixed with other information not falling within s 32(1), then the Tribunal should apply a **dominant purpose test** to determine whether the information still fell within the exemption (see §55 – although on the facts this issue did no in fact arise §56).

37. In the present case this Tribunal finds that the 'dominant purpose' of the requested information – concerns information which is held, as per s 32 of the FOIA "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". Thus the 'dominant purpose' of recording and filing this information was specifically for legal proceedings, and the subsequent storing of same on ETHOS was merely for administrative purposes – rather than any other subsequent use.

38. In addition to the 'dominant purpose' test, this Tribunal holds that in a case where there is mixed information – some details falling under the exemption, others not, it is relevant to consider a balance of advantages over disadvantages in disclosing such information. This Tribunal adopts the balance of views set out by the Government's 2003 Public Consultation in that the advantages were outweighed by its significant disadvantages (see §31 herein).

39. In furtherance of the above, an example submitted by the first respondent, given in the Commissioner's *"Freedom of Information Act Awareness Guidance No. 9"* is also very helpful as set out below.

The Commissioner's "Freedom of Information Act Awareness Guidance No. 9: Information contained in court records"

40. The first respondent made reference to the following example as set out by the Commissioner in those guidelines:

> "The phrase, 'only by virtue of', implies that **if** the public authority also holds the information elsewhere it may not rely upon the exemption. For instance, a public authority may have a set of financial records which are the subject of litigation. If those records are held only for the purposes of litigation and are contained in court records, then they are exempt. However, if it also held the records for another business purpose then they would not be exempt".

41. The first respondent submitted that only if the financial record have an independent purpose or 'life' without the litigation that they will not be exempt. In the present case, the requested information would have no independent purpose or 'life' without the legal proceedings in which they were involved, as a result of employees taking claims against them as employers.

42. Thus in the present case, the information held is only on record as a direct result and consequence of the parties involvement in Employment Tribunal Proceedings. Other than this, such information would not be stored on the ETHOS database. The sole reason that the respondent's information is on ETHOS is because legal proceedings were taken against them in Employment matters, and it is suggested, the sole reason why the appellant is seeking such information is so they can "ambulance chase" potential clients.

43. This tactic - when considered against an individual's right to privacy (Article 8 of the ECHR Act is engaged) in relation to legal proceedings, and not to be left open to receiving numerous unwelcome, and in some cases misleading, approaches from 'ambulance chasers' – as cited by the Government's 2003 Public Consultation (see §§31 and 32 herein) – is, in our view, disproportionate and unacceptable.

The Kennedy Decision

44. Ward LJ observed at paragraph 29 of *Kennedy* that "decisions over court documents should be taken by the court". This tribunal accepts that as this information was recorded for the purpose of employment hearings, the Employment Tribunals are the appropriate body to make decisions over these documents – not the second respondent who is only holding such information as a direct result of the legal proceedings being initiated.

45. As highlighted by the first respondent, the approach taken by the Tribunal at first instance in the *Kennedy* case (EA/2008/0083 at §87) is as follows:

> "…the adverbial phrase 'for the purposes of the inquiry or arbitration' qualified the word 'placed' in s 32(2)(a) and not the word 'held' in the preceding general words to s 32(2). Subsequent events cannot alter the purpose for which a document was placed in somebody's custody. The words 'held only by virtue of being contained in' simply provides a casual connection between the presence of the document in the public authority's records and the placement with the person conducting the inquiry. However, we find that it does not limit the exemption. If that information was also **received independently** for other source it may not be exempt".

46. This confirms the example (as per the Commissioners guidance on freedom of information contained in court records) discussed above at §39 herein, and also confirms the discussion of 'sole purpose' discussed at §§40 – 42 herein. Namely, the requested information, now held on ETHOS was not received independently, but only as a direct consequence and result of legal proceedings issued against the respondents in employment matters. As submitted by the first respondent – in the present case, the *only* means by which the second respondent comes to be holding the information requested in this case is because it is contained in documents filed with the Employment Tribunals for the purposes of particular claims. Accordingly, this Tribunal is of the view that the exemption applies.

47. The appellant draws specific reference to §25 of the *Kennedy* case. However, this Tribunal agrees with the submissions of the first respondent in this regard, that in so far as the question of interpretation at issue in this case is concerned, the Court of Appeal in *Kennedy* simply repeated the text of the FOIA and provided no explanatory 'gloss' on that at all.

48. This Tribunal further agrees with and adopts the submissions of the first respondent with regards to the *ratio* of the Court's decision in *Kennedy*, at §43, was that, the words "for the purposes of the inquiry" [in s 32(2)] or "for the purposes of proceedings in a particular cause or matter" [in s 32(1)] are to be interpreted as to relating to the reason why the document was placed in the custody of the court or inquiry in the first place, rather than as relating to the purpose for which the document is now held by the authority. Again, this refers back to and confirms the views of this Tribunal as set out above, and particularly as highlighted at §45 above. This Tribunal is of the view that main issue concerns a "But for" type test.

The "But for" test

49. The appellant submits that as EHTOS contains details of all Employment Tribunal cases, rather than the individual entries in a case, then it can not be a document "created…for the purposes of proceedings in a particular cause or matter". This Tribunal does not accept this argument. This information clearly relates to specific and individual cases and thus consists of information which was never intended for disclosure to the public. As this information is now held along with details of all other Employment Tribunal cases – this does not provide reasons to breach the privacy and protection afforded to the individuals involved in legal proceedings under normal circumstances, nor to subject them to 'ambulance chasing'. ***But for*** the fact that these individuals were involved in legal proceedings, ETHOS would not have these details on record at all.

50. This Tribunal further agrees with and adopts the submissions of the first respondent, namely that, both the first respondent's Decision Notice in this matter and the Court

of Appeal's judgment in the *Kennedy* are both consistent with the Tribunal's decision in the 2008 case. Both focused on **how** the information came to be held by public authority and not on the subsequent uses to which it was put.

51. As highlighted by the first respondent, the only difference between the *Kennedy* case and the present, is that, here, the information (which is plainly held only by virtue of being contained in court records) has been recorded in another form – *viz* on the ETHOS database. The first respondent also referred to the following case discussed immediately below.

Szucs v IC and UK Intellectual Property Office (EA/2007/0075)

52. That case observed a similar issue as the present case (§§31-33).

> "31. If follows that the disputed information came into the possession of the UKIPO only by virtue of it being contained in a document that was placed in the custody of the Assistant Comptroller conducting the inquiry into Mr Szucs' complaint.
>
> 32. Whether such a document is then filed by the public authority with papers that relate to matters other than that discrete issue is entirely irrelevant.
>
> 33. There is evidence that no copies of the disputed information have been made by the UKIPO for placement of files held by government organisations, other than on UKIPO files relating to the inquiry. <u>This seems to us also to be irrelevant; even if it had been copied and filed elsewhere by the UKIPO, the information is still held by virtue of being contained in a document that was placed in the custody of the Assistant Comptroller conducting the inquiry into Mr Szucs' complaint, regardless of where it may have been filed subsequently." (Our emphasis).</u>

53. Thus, as submitted by the first respondent, provided the public authority is only holding the information as a result of it being contained in a court document, it does not matter if that information is subsequently copied or transcribed or where or how that information is stored. This Tribunal holds that it would be a breach of the respondent's privacy and Article 8 rights to disclose such information to the public.

54. In fact, to refer back to §6 herein, detailing the appellant's specific request, the appellant clearly acknowledges that the request concerns information pertaining to the Employment Tribunal service:

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

Conclusion

55. In light of all the above considerations and for the reasons given above, this Tribunal rejects the submissions made on behalf of the appellant and accordingly dismisses the appeal herein.

Brian Kennedy QC

25th February 2013.

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BETWEEN:

PENINSULA BUSINESS SERVICES LIMITED

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

-and-

The MINISTRY OF JUSTICE

Second Respondent

APPLICATION FOR LEAVE TO APPEAL
THE TRIBUNALS DECISION OF 25 FEBRUARY 2013.

The Tribunal has considered the appellants' application for leave to appeal to the Upper Tribunal dated the 19th March 2013 and the Grounds attached thereto and grants leave to appeal.

[Signed on original]

Brian Kennedy QC
Judge

27 March 2013