



Appeal number: EA/2019/0205

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

MINISTRY OF JUSTICE

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

- and -

STEPHEN KNIGHT

**Second
Respondent**

**TRIBUNAL: JUDGE CLARE GOODMAN
MR DAVID WILKINSON
MR ROGER CREEDON**

**Determined on the papers, the Tribunal sitting in Field House
on 22 January 2020**

DECISION

1. The appeal is allowed.
2. The requested information is exempt by virtue of Section 32(1)(c) of the Freedom of Information Act 2000 (“FOIA”) and therefore not covered by Section 1(1) FOIA. The Ministry of Justice is not required to disclose the information to the Second Respondent.

REASONS

Background to Appeal

3. The Second Respondent made an information request to the Ministry of Justice (“MoJ”) on 18 May 2017.
4. The MoJ refused to provide some of the information requested in reliance on s.31(1)(a) of the Freedom of Information Act 2000 (“FOIA”). After an internal review, the MoJ relied instead on s.31(1)(c) of FOIA.
5. The Information Commissioner issued Decision Notice FS50759893 on 9 May 2019. She decided that s.31(1)(c) was not engaged and required the MoJ to disclose the requested information.
6. The MoJ appealed against the Commissioner’s Decision Notice. In its Grounds of Appeal, the MoJ relied on s.32(1)(c) of FOIA in addition to s.31(1)(c). In her Response, the Commissioner maintained that s.31(c) was not engaged, but agreed that s.32 was engaged. Section 32 is an absolute exemption and therefore not subject to the public interest test. The Commissioner invited the Tribunal to allow the appeal.
7. The Second Respondent was joined to the appeal. The Second Respondent maintained in his Response that neither s.31(1)(c) nor s.32 applied to the withheld information.
8. The background to the request can be summarised as follows.
9. Under Schedule 10 to the Immigration Act 2016, any person who is detained under specified provisions of immigration legislation may apply to the First-tier Tribunal (Immigration and Asylum) Chamber (“IAC”) for release on bail.
10. Information about bail applications filed with the IAC is recorded by staff of Her Majesty’s Courts and Tribunals Service (HMCTS) on a case management system called ARIA. HMCTS is an executive agency of the MoJ. Records of proceedings in relation to bail applications created by HMCTS staff are also held on ARIA (see paragraphs 32 to 34 of the Commissioner’s Response).
11. The Second Respondent’s request of 18 May 2017 was as follows:

“I am writing to request the following information under the Freedom of Information Act 2000.

1. How many applications for bail were made to the First-tier Tribunal (Immigration and Asylum Chamber) in 2016? If you cannot provide figures for 2016, then provide figures for the latest annual period, or shorter or longer period, for which figures are available?

1. What proportion of those applications for bail were successful?

2. What proportion of those applications for bail were withdrawn?

3. What proportion of those applications for bail were unsuccessful?

2. How many applications for bail were considered by [a particular judge] who regularly sits at [venue], in 2016? If you cannot provide figures for 2016, then provide the figures for the latest annual period, or shorter or longer period, for which figures are available.

1. What proportion of those applications for bail were successful?

2. What proportion of those applications for bail were withdrawn?

3. What proportion of those applications for bail were unsuccessful?

8. The MoJ responded to the request on 13 June 2017 by providing statistics for the total number of bail application disposals in the IAC from January to December 2016 and the percentage of those disposals which were (1) successful, (2) withdrawn, and (3) unsuccessful.

9. The MoJ also provided the number of bail applications over which the named judge had presided in the period from January to December 2016. The MoJ advised the Second Respondent that it was not obliged to provide information about the outcomes of those applications under s.31(1)(a) of FOIA because this would prejudice law enforcement and that the public interest favoured withholding the information at that time.

10. At the request of the Second Respondent, the MoJ carried out an internal review. On 26 June 2018 – more than a year after the Second Respondent’s request - the MoJ informed the Second Respondent that it had been wrong to rely on s.31(1)(a) to refuse part of his request. However, the MoJ concluded that it could instead rely on s.31(1)(c) FOIA because disclosure would prejudice the administration of justice and the public interest favoured withholding the information at that time.

11. The Second Respondent complained to the Commissioner. The Commissioner concluded in the Decision Notice of 9 May 2019 that s.31(1)(c) was not engaged and required the MoJ to disclose the withheld information.

The Law

12. As the Commissioner explains at paragraphs 16 to 18 of her Response, the MoJ is entitled to rely on s.32 before the Tribunal, despite raising this exemption for the first time in its Grounds of Appeal. under section 58. A Three-Judge Panel of the Upper Tribunal confirmed in *Information Commissioner v. Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 that “*there is no limitation on the issues which the F-tT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away*” (paragraph 102).

13. As the Tribunal finds that the requested information is exempt under s.32, the Tribunal will set out only the law relating to s.32 in these Reasons.

14. Section 32(1)(c) of FOIA provides that:

(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) *a member of the administrative staff of a court,*

for the purposes of proceedings in a particular cause or matter.”

15. Section 32(4) provides that for the purposes of s.32, “court” includes “any tribunal”.

16. Section 32 is an absolute exemption pursuant to section 2(3)(c) of FOIA and therefore not subject to the public interest test under s.2(1)(b) of FOIA.

17. The underlying purpose of section 32(1) is so that courts and tribunals can rule on disclosure of their own records. This was affirmed by the Supreme Court in *Kennedy v The Charity Commission* [2014] UKSC 20 and in the line of cases which follow *Kennedy*. *Kennedy* concerned s.32(2) but it has been confirmed by the Upper Tribunal that s.32(1) and s.32(2) are to be interpreted in the same way (see for example, paragraph 13 of *Peninsula*).

18. In *Peninsula Business Services Limited v. Information Commissioner & Ministry of Justice* [2014] UKUT 0284 (AAC), the Upper Tribunal held that the names and addresses of employers who were respondents in Employment Tribunal proceedings was exempt information under s.32.

19. The employers' details were filed with the Employment Tribunal on forms ET1 and ET3 and then entered onto a local electronic case management database known as "ETHOS". The appellant argued that ETHOS was not a "document created for the purpose of proceedings in a particular cause or matter" because it was a dataset about all the current cases in an office or region and because it was held for multiple purposes, "*to manage the tribunals and produce relevant statistics as well as for individual cases*" (at paragraph 23).

20. The Upper Tribunal rejected these arguments. UTJ Williams found, applying *Kennedy*, that "*the question of purpose is to be determined when the relevant information came to be filed with or placed with the tribunal*" (at paragraph 35).

21. UTJ Williams also agreed with the Commissioner that the reference to information being held "only by virtue of" being contained in documents filed for the purposes of court proceedings, "*refers to the reasons why such documents were originally acquired, rather than any purposes for which they may continue to be held by a public authority*" (at paragraph 38).

22. In *Edem v. Information Commissioner & Ministry of Justice* [2015] UKUT 210 (AAC) the Upper Tribunal found, applying *Kennedy* and *Peninsula*, that s.32 applied to both written records and audio/video recordings of court proceedings. UTJ Wikeley agreed with UTJ Williams in *Peninsula* that the term "document" in s.32(1) "*carries a wide meaning covering any form or format in which the information is recorded in a form suitable for the conveying of that information*" (at paragraph 32).

23. *Kennedy*, *Peninsula* and *Edem* were applied in *Brown v. Information Commissioner & Ministry of Justice* [2016] UKUT 0255 (AAC). *Brown* concerned a request for statistics about non-molestation orders made by Leeds County Court under the Family Law Act 1996, including the number of applications granted ex parte and the number of certain types of injunction made by the court. That information was recorded by court staff in a database called "Familyman".

24. UTJ Knowles (as she then was) found that s.32(1)(c) applied because:

"the statistics requested could only be obtained by interrogating the individual records of proceedings. Those individual records were exempt because they constituted information contained in a document created by court staff for the purposes of proceedings. Thus, these requested statistics would be built from or drawn from exempt content and, in this context, I find they would take on the character of the information from which they were derived. That analysis is consistent both with the Supreme Courts' interpretation in Kennedy of what constituted the purposes of proceedings in section 32(1) and with the underlying purpose of section 32(1) itself" (paragraph 37).

25. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

Appeal to the Tribunal

26. In relation to s.32, the MoJ submitted that the withheld information was only held by the MoJ “*by virtue of being contained in one or more documents created by the [IAC] for the purposes of determining applications for immigration bail*”. It was, said the MoJ, “*abundantly clear*” that the withheld information fell within the scope of the absolute exemption under s.32(1)(c) FOIA (paragraph 34).

27. The Commissioner submitted that the individual bail application records held in ARIA are exempt under s.32(1)(c) because they constitute information contained in a document created by HMCTS staff for the purpose of the bail proceedings. The statistics requested by the Second Respondent would be obtained by pulling details from ARIA, and so also exempt under s.32(1)(c).

28. The Second Respondent submitted in his Response that the Commissioner had focussed wrongly on bail applications rather than decisions about those applications (paragraph 35). He submitted that the record of the outcome of a bail application created by HMCTS at the end of a case is created and held by HMCTS not only for the purpose of the individual proceedings, but also to assist with listing practices, for policy making and for Select Committee questions (paragraphs 52 and 54).

29. The Second Respondent distinguished *Peninsula* on the basis that the requested information in *Peninsula* was filed by the litigant for the sole purpose of a particular cause or matter. Whereas in this appeal, the requested information was created by the IAC for a number of purposes (paragraph 52). The MoJ had failed to adduce evidence that the only purpose for which the requested information was created was for a particular case or matter (paragraph 56).

30. The Second Respondent distinguished *Brown* on the basis that the First-tier Tribunal had found as a fact that the requested information was held in an electronic document created only for the purpose of a particular cause or matter, and not for any other purpose. He said that “*there was no suggestion in the Upper Tribunal of the information having been created for any other purpose*” (paragraph 42).

31. The Second Respondent submitted that *Kennedy* applied only to documents which a court or tribunal can order disclosed and not to aggregated statistical information (paragraph 57).

Conclusion

32. The information which is the subject of this appeal consists of statistics about the outcome of applications for immigration bail considered by a particular IAC judge in 2016 – namely, whether those applications were successful, unsuccessful or withdrawn.

33. For the purposes of s.32, “court” includes the IAC.

34. The Tribunal finds that when a decision is made on a bail application, or when an application is withdrawn, that outcome is recorded by a member of HMCTS staff on the individual case record in ARIA. At paragraph 32, the Commissioner states that the withheld information is acquired both when applications are filed and also when court records are created by HMCTS staff. The Commissioner states that data “such as that” contained in bail application is held in ARIA.

35. The Tribunal finds that the record created on ARIA about the outcome of a bail application falls within the wide definition of “document” set out by UTJ Wikeley in *Edem* (see paragraph 22 above).

36. At the time when the record is created, the information is held by HMCTS only by virtue of being contained in that record of the proceedings, which has been created for the purpose of those proceedings. According to UTJ Williams in *Peninsula*, this is the time when the question of purpose is to be determined (see paragraph 20 above). Although *Peninsula* was concerned with information filed at a Tribunal, UTJ Williams’s analysis was drawn from Lord Mance in *Kennedy*. Lord Mance explicitly considered the “purpose test” in the context of information created by a court, as well as information filed with it (paragraph 24 of *Kennedy*).

37. Even if the Second Respondent is right that the withheld information is also used for other purposes, the Tribunal finds that it is held by HMCTS only by virtue of being contained in a record created for the purposes of the bail application proceedings. It is not acquired by any other route.

38. The information requested by the Second Respondent in this appeal is very similar to the information requested in *Brown* about the outcome of applications for non-molestation orders. Like *Brown*, the information is held by HMCTS in a record created by administrative staff for the purpose of a particular cause or matter and is therefore exempt under s.32(1)(c)(ii), even if the record, once created, is also used for other administrative purposes.

39. In the same way as in *Brown*, in order to provide the statistics requested by the Second Respondent, reports would have to be created by drawing information from that exempt material. The reports would therefore “*take on the character of*” the

exempt information. Applying the reasoning of the Upper Tribunal in *Brown*, the requested information is therefore also exempt under s.32(1)(c)(ii).

40. This is consistent with the underlying purpose of s.32 which is to enable the IAC to rule on disclosure of its own records about the outcome of its proceedings.

41. The Tribunal does not accept that *Brown* can be distinguished from this appeal on the basis that the requested information in *Brown* was held in an electronic document created only for the purpose of a particular cause or matter. The First-tier Tribunal found as a fact in *Brown* that “*the Familyman records formed part of a larger database which had general administrative purposes extending beyond the requirements of a particular case/matter*” (paragraph 10).

42. It is also clear that the approach in *Kennedy* applies to requests for aggregated statistical information. *Brown* was a request for aggregated statistical information; UTJ Knowles applied *Kennedy* in reaching her decision in that case.

43. For all these reasons, we consider that the Commissioner’s Decision Notice is not in accordance with the law and allow the appeal. The withheld information is exempt by virtue of s.32(1)(c) and therefore not covered by s.1(1) FOIA. The Ministry of Justice is not required to disclose the information to the Second Respondent.

C. L. GOODMAN
(FIRST TIER TRIBUNAL JUDGE)

DATE: 24 February 2020

DATE PROMULGATED: 25 February 2020