

Date: 11 March 2024

Case Reference IC-280344-G9N4

Review of response to information request

I write further to your emails of 06/02, 07/02 and 12/02/2024 in which you request a review of the handling of your request dealt with under the reference number IC-280344-G9N4

As a result, we have conducted an internal review of our response to your information request which was handled under the above reference number. I am a Group Manager in the Information Access Team, and I can confirm that I have had no prior involvement in the handling of this request.

Request and response

On 09/02/2024 we received a request from you which said:

I refer to the attached list showing a search result from the BAILII database of GRC reported decisions. The search term was "closed witness statement."

The six cases numbered 3, 4, 6, 7, 9 and 10 on the list are all GRC decisions from 2022 and later, where the applicant (for information) challenged the IC's Decision Notice. Each case involved 'closed material' (beyond the withheld information), such as (parts of) witness statements and other documentation.

Regarding each of these six cases, please provide any recorded information:

- 1) indicating that the Information Commissioner made any submissions to the First Tier Tribunal concerning the content of any closed materials (excluding the withheld information); additionally*
- 2) relating to any evaluation by the IC as to whether or not it would be appropriate for the IC to make submissions concerning the content of such closed materials.*

If there is no such recorded information for a particular case, please say so.

To be clear, I do not ask to see any such submissions. I only want to know, concerning the individual cases, if there is any recorded information indicating that the IC made submissions concerning the content of the closed (parts of) witness statements and other closed materials (excluding the withheld information). And/or indicating that the IC evaluated the appropriateness of making such submissions..

We responded on 06/02/2024 and withheld all the information held citing exemptions 32 and 42.

Review

On receipt of the response, you requested an Internal Review followed by a further two clarification. I have summarised your emails below in italic font.

Concerning item #1

- *1) Indicating that the Information Commissioner made any submissions to the First Tier Tribunal concerning the content of any closed materials (excluding the withheld information); additionally*
- 1) *Section 32(1) FOIA applies to documents filed with or placed in the custody of a court/tribunal. Any covering email or letter from the ICO sending submissions to the FTT is not a document that has been filed with or placed in the custody of the FTT, within the terms of section 32(1) exemption. As the ICO's letter confirms, "the exemption is intended to protect court documents," i.e. in the case of my FOIA Request, to protect any actual submissions that were made. I do not seek those submissions. But section 32(1) does not apply to covering emails/letters; they are not (using the ICO's term) 'court documents.*

On 06/02, the following clarification was added to the above point:

Concerning paragraph 1a of my 6 February email, as per the original 9 January email, "covering email or letter sending submissions to the FTT" is to be construed as referring to IC submissions concerning the content of any closed materials (other than the withheld information). And not to IC submissions generally, not concerning the content of such closed materials.

Accordingly, and as per my original FOIA request ("Regarding each (my emphasis) of these six cases, please provide . . ."), separately and in relation to each of the six listed cases, please provide any such covering email or letter sending submissions to the FTT or confirm that no such email/letter exists. As per my original 9 January email, I do not ask to see any wording in such an email/letter that reveals the contents of the submissions it sends.

Please take account of the list of examples of documents covered by the section 32(1)(a) and (b) exemption, appearing in paragraph 29 of the Commissioner's publication: "Court, inquiry or arbitration records (section 32)" (copy attached). As is evident from those examples, the exemption does not apply to covering emails/letters, sending submissions, etc, to the Tribunal.

On 12 February the second clarification was made to the case:

The purpose of Item 1) of my FOIA Request is to discover in which of the six identified appeals to the FTT the IC made submissions on any closed witness statements, or on any PA's closed submissions or other closed materials/evidence, apart from the withheld information. Any such submissions by the IC would presumably themselves have been closed, and subject to a GRC Rule 14(6) Direction.

As per my email below, I do not accept that the Section 32(1) exemption applies to covering emails or letters sending such submissions. But in any event, I respectfully draw the ICO's attention to para 67 of the Commissioner's publication: "Court, inquiry or arbitration records (section 32)", set out below. This indicates that a PA should confirm or deny the existence of the requested information unless there is a need not to do so.

Accordingly, I ask that the ICO send a narrative response in relation to item 1) of my FOI Request, identifying in which of the six identified appeals the IC made such submissions. If that information can be provided, I would not ask to see the covering emails or letters sending such submissions. Alternatively (if the information can't be provided), please would the ICO clarify why it is necessary to rely on the NCND exclusion in relation to item 1) of my FOI Request.

If convenient for the ICO, I would accept that any such 'narrative response' (alternatively, the clarification) is provided in any response to the internal review request.

66. As section 32 is an absolute exemption, the authority can issue a NCND response without further qualification. There is no requirement to demonstrate prejudice or conduct a public interest test.

67. Nonetheless, authorities shouldn't issue NCND responses as a matter of routine. Therefore unless there is an obvious need to rely on the NCND exclusion, the authority should consider issuing a 'confirm or deny' response as usual.

Concerning item #2.

- *relating to any evaluation by the IC as to whether or not it would be appropriate for the IC to make submissions concerning the content of such closed materials.*
- 2) *Similarly, concerning the ICO reliance of section 42, please provide six distinct responses as to whether or not, in each of the six cases, there is any 'communication . . . made for the purpose of seeking or giving legal advice' that falls within item #2. As per my 9 January email, the information is sought regarding each of the six cases. And the exemption from the FOIA obligation to confirm or deny does not apply to the section 42 exemption.*

- 3) *Although I do not challenge the application of section 42 to any specific legally privileged communication falling under item #2, I am seeking (subject to any FOIA exemption) any other recorded information covered by item #2 of the Request.*

In regard to item #2, please confirm that the ICO does not rely on section 42 in relation to any recorded information responsive to item #2 that was pre-existing at the time of the corresponding communication subject to the assertion of legal advice privilege. For instance, any general guidance of the IC, or other document, which relates to evaluation of the appropriateness of making submissions concerning closed materials and that was consulted in the corresponding one of the six cases. Any such general guidance or other document so consulted would 'relate' to any such evaluation. Alternatively, if there was any such pre-existing recorded information that was consulted in any case, it should be provided. Note: any response should reflect in which of the six cases the corresponding general guidance or other document was so consulted.

Review Response

The purpose of this review is to look again at your request and the response that was provided to you, to ensure it was correct and that any exemptions applied were appropriate.

I can confirm that I have reviewed the correspondence on the information request and will respond to the comments made.

Concerning item #1

- *1) Indicating that the Information Commissioner made any submissions to the First Tier Tribunal concerning the content of any closed materials (excluding the withheld information); additionally*
- 4) *Section 32(1) FOIA applies to documents filed with or placed in the custody of a court/tribunal. Any covering email or letter from the ICO sending submissions to the FTT is not a document that has been filed with or placed in the custody of the FTT, within the terms of section 32(1) exemption. As the ICO's letter confirms, "the exemption is intended to protect court documents," i.e. in the case of my FOIA Request, to protect any actual submissions that were made. I do not seek those submissions. But section 32(1) does not apply to covering emails/letters; they are not (using the ICO's term) 'court documents.'*
- I do not agree with your assertion that covering emails or covering letters sent to the First Tier Information Tribunal are not considered to be filed or placed in the custody of a court or tribunal. I can confirm that such correspondence is sent for the sole purpose of providing information to the tribunal which is only for the use of the tribunal.

Therefore, I believe that the initial response was quite correct in its use of Section 32(1):

32(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in – any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter, any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or 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.*

This is because any documents falling within the scope of this question if held would have been served by the ICO solely for the purpose of proceedings in a particular case.

The initial response also went on to cite Section 32(3) which states that:
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.

I will repeat what was stated in the initial response in that we are neither confirming nor denying whether we hold information in respect of this point. I consider that this is a proper use of the legislation. The Commissioner has published guidance on section 32 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 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.

There are occasions when even confirming or denying if information is held can erroneously 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.

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.

Therefore in respect of this point, I consider that this was a correct and proper use of Section 32.

Concerning item #2.

- *relating to any evaluation by the IC as to whether or not it would be appropriate for the IC to make submissions concerning the content of such closed materials.*
- 2) *Similarly, concerning the ICO reliance of section 42, please provide six distinct responses as to whether or not, in each of the six cases, there is any 'communication . . . made for the purpose of seeking or giving legal advice' that falls within item #2. As per my 9 January email, the information is sought regarding each of the six cases. And the exemption from the FOIA obligation to confirm or deny does not apply to the section 42 exemption.*
- 3) *Although I do not challenge the application of section 42 to any specific legally privileged communication falling under item #2, I am seeking (subject to any FOIA exemption) any other recorded information covered by item #2 of the Request.*

I have concluded that the use of Section 32(1) and 32(3) in item#1 is quite correct. I have noted that in item#2, you are not questioning the blanket use of S.42 to information but are requiring me to specify which case files this may relate to. If I were to do this, this would undermine the use of S.32 as I would be disclosing information that circumvents existing court access and discovery regimes. Therefore, I believe that Section 42(2) applies to the information if it were to be considered separately. This is because confirming or denying that information was held would, in itself, reveal information that was legally privileged.

Section 42 – legal professional privilege

Section 42 of FOIA states that:

- (1) *Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*
- (2) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) [the duty to confirm or deny that relevant information is held] would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."*

In this case, I would be highlighting what was said in correspondence to the tribunal. By releasing specific legal advice on a case-by-case basis, it could be possible to work out what was in any relevant communication to the Tribunal. Therefore, the disclosure of any legal advice received to inform decisions surrounding tribunal cases would undermine the ICO's policies and procedures in such cases. I do not believe that this would be in the best interests of the public. Nor do I accept that it would be in the public interest to impede the ICO's ability to communicate in an open and candid manner in regard to tribunal matters.

I find that the public interest in maintaining the exemption, and protecting the principle of LPP, is sufficiently strong to outweigh the public interest in disclosure of any legal advice in respect of the six highlighted First Tier Tribunal cases.

I will repeat that the withheld information has not been made public and the privilege attached to it has not been waived.

You also enquired whether the ICO holds any general guidance which falls within the scope of this matter. I can confirm that the ICO does not. There is no general guidance falling within the scope of this matter.

For these reasons, your review is not upheld.

Complaint procedure

If you are dissatisfied with the outcome of this review, you can make a formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000. Please follow the link below to submit your complaint:

<https://ico.org.uk/make-a-complaint/>

Yours sincerely

Helen Sweeney

Group Manager Information Access

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
T. 0330 414 6673 F. 01625 524510 ico.org.uk twitter.com/iconews