

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2014

Public Authority: Ministry of Justice¹

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a copy of an audio recording of an appeal hearing before the Upper Tribunal Administrative Appeals Chamber.
2. The Commissioner's decision is that the public authority was entitled to withhold the audio recording on the basis of the exemptions at sections 32(1)(c) (i) and (ii) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Background, Request and response

4. On 29 January 2013 the complainant requested information in the following terms:
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¹ The request for information was made to Her Majesty's Courts and Tribunals Service (HMCTS), an executive agency of the Ministry of Justice but not a public authority in its own right for the purposes of the FOIA. Therefore, although the request was actually dealt with by HMCTS, the Ministry of Justice is referred to throughout in the notice as 'the public authority'.

'I hereby request a copy of the audio recording that HMCTS holds of the public appeal Hearing that the UT (HHJ Jacobs) conducted on 5th November 2012. HMCTS may provide the requested information on inter alia a CD(s) or DVD(s). I would ask HMCTS to treat this as a request for information under DPA 1998 and/or FIA 2000.'

5. The public authority explained that the information requested is a copy of the audio recording of the oral hearing before Judge Jacobs of an appeal to the Upper Tribunal Administrative Appeals Chamber (UT/AAC)² against a decision of the First-tier Tribunal (Information Rights). The complainant was the second respondent in the UT/AAC proceedings, with the Information Commissioner as appellant, and the Financial Services Authority as first respondent.
6. The public authority informed the Commissioner that the request was made to the UT/AAC who dealt with it as part of Tribunal business rather than as a request under the terms of the FOIA or the Data Protection Act 1998 (DPA). A copy of the hearing recorded on CD was subsequently supplied to the complainant as ordered by Judge Jacobs.
7. The complainant wrote back to UT/AAC on 9 May 2013 and requested that the request be dealt with under the terms of the DPA and the FOIA as originally specified in his request. On 21 June 2013 the public authority informed the complainant that it considered the information requested exempt from disclosure on the basis of section 32 FOIA. On 12 July 2013 the public authority confirmed its decision and additionally relied upon the exemptions at sections 40(1) and 40(2) FOIA to withhold the information requested.

Scope of the case

8. Although the complainant was already in possession of the information requested above on 29 January 2013, he wrote to the Commissioner on 3 September 2013 to dispute the public authority's claim that it was exempt on the basis of sections 32, 40(1) and 40(2) FOIA.
 9. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold the information
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² Information Commissioner v the FSA and [redacted]. Full citation redacted.

requested on 29 January 2013 (the disputed information) on the basis of sections 32, 40(1) and 40(2) FOIA.

The disputed information

10. As mentioned, the disputed information is an audio recording of the oral hearing in *Information Commissioner v the FSA and [redacted]*.

Section 32 – court records etc

11. 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.
12. The public authority clarified that it specifically considered the disputed information exempt on the basis of sections 32(1)(c) (i) and (ii). The exemptions apply because the disputed information is a record of the oral hearing in *Information Commissioner v the FSA and [redacted]* which was created by the UT/AAC for the purpose of those proceedings. It is therefore a document created for the proceedings in a particular cause or matter. Under section 32(4)(a) FOIA, UT/AAC is a court for the purposes of section 32 FOIA.
13. The complainant argued that section 32 was not properly engaged for a number of reasons. The Commissioner has reproduced below the arguments he considers relevant to the case.
14. The complainant submitted that the appeal hearing was held entirely in public. Any member of the public (including the press) that attended the appeal was free to report it. The Tribunal's decision (UT/AAC) including Judge Jacobs' version is publicly available.
15. HMCTS (Her Majesty's Courts and Tribunals Service) created the disputed information for its purposes rather than for the purposes of the proceedings.

16. The words '*court records*' do not appear in section 32. However, the word '*document*' does appear there.

Commissioner's decision

17. Section 32(1)(c) is a class based exemption. This means that *any information* falling within the category described is automatically exempt from disclosure regardless of whether or not there is a likelihood of harm /prejudice if disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available. What is important is that the information fits the description in section 32(1)(c). The disputed information is an audio recording of an oral hearing at UT/AAC. The recording was clearly made for the purposes of the proceedings.
18. The Commissioner considers that in its original form, the record of proceedings, whether taken on paper, electronically or on audio tape, is a '*document*' created for the proceedings in a particular cause or matter. In other words, the Commissioner considers that records of proceedings in court are documents within the meaning in section 32 FOIA.
19. The Commissioner therefore finds that the disputed information is exempt from disclosure on the basis of sections 32(1)(c) (i) and (ii).
20. Section 32(1)(c) is an absolute exemption so there is no requirement to consider whether there was a public interest in disclosure.
21. In view of his finding above, the Commissioner did not consider the remaining exemptions.

Right of appeal

22. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

23. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
24. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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