

## Section 32: Court Records

Section 32 exempts information contained in certain litigation documents and court, tribunal and inquiry records and will apply regardless of the content of the information. There are separate and specific regimes for gaining access to court and tribunal records and section 32 ensures that those regimes are not superseded by the FOI Act.

Key points:

- Section 32 will apply only if the public authority concerned holds the information **solely because** it was contained in one of the specified documents.
- Section 32 applies regardless of the content of the information
- The application of section 32 is **not** subject to any public interest balance.

## Chapter 01: The exemption under section 32

Stating the exemption

Section 32 of the Freedom of Information Act provides that:

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.
2. Information held by a public authority is exempt information if it is held only by virtue of being contained in-
  - (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
  - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
3. 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.
4. In this section-
  - (a) "court" includes any tribunal or body exercising the judicial power of the State,
  - (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
  - (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
  - (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

**1.1** Section 32 exempts information contained in those litigation documents and court, tribunal and inquiry records to which it applies. It exempts information held by a

public authority if it is held solely by virtue of its being contained in those categories of document. That is an important qualification because if a public authority has also obtained the information in question from another source or by another means (for example, if the public authority had obtained the information from a published source) then this exemption will not apply. Unusually in the context of the FOI Act, the applicability of this exemption depends to some degree on the form of the information, rather than its substance. The information must be included in a particular type of document and must be held by the public authority only by virtue of this. However, if the information is so held, it will be exempt regardless of its content and for the reasons set out below public authorities should refuse the request. This applies both to the document itself and to any copies of that document or copies of the information which it contains. If there is any doubt about whether particular information falls within this exemption then advice should be sought.

**1.2** Section 32 is an absolute exemption - it is not qualified by reference to the balance of the public interest in disclosure and non-disclosure. The obligation to confirm or deny that the requested information is held does not arise in relation to such information.

## **Chapter 02: General**

**2.1** Courts and tribunals are not 'public authorities' for the purposes of the FOI Act and are therefore not themselves subject to it. But the Court Service, Northern Ireland Court Service and other public authorities within central government which provide administrative support to courts and tribunals are subject to the FOI Act. Such public authorities may hold information 'on behalf of' courts and tribunals as quite separate entities - in which case they are not regarded as holding the information themselves at all for the purposes of the FOI Act (and the question of the application of this or any other exemption would not need to arise). Where they do hold the information in their own right, they may deal with the files of courts, tribunals and inquiries solely as a matter of administrative convenience. In cases of doubt as to whether a public authority holds information itself, or 'on behalf of another', legal advice should be sought.

**2.2** There are separate and specific regimes for access to information held by courts and tribunals, designed to give those bodies themselves a measure of control over that information. For example, Rule 5.4 of the Civil Procedure Rules deals with access to court documents in civil proceedings in the county courts, the High Court and the Court of Appeal. It allows any person, on payment of the prescribed fee, to inspect and take a copy of (a) a claim form which has been served, (b) a judgment or order given or made in public, and (c) any other document if the court gives permission. Where a person has the right to inspect a document without permission, a request can be made to the court staff. Where permission is required, an application must be made to a judge. The Civil Procedure Rules do not include any guidance on the court's exercise of its discretion but the court will take account of all the circumstances of the case and the competing principles of open justice and the right to privacy of persons who may be mentioned in court documents.

**2.3** Rules of court already provide a comprehensive code governing the disclosure of court records and documents served in the course of proceedings. For certain types of proceedings only limited classes of persons may have access to court documents due to the sensitivity of the issues involved (for example, in family proceedings there is a need to protect the identity of any children involved). It was not the intention that the FOI Act should provide indirect access to these court records; the greater public interest was

considered to lie in the preservation of the courts' own procedures for considering disclosure. This exemption therefore ensures that the courts can continue to control the disclosure of that information in the proper exercise of their jurisdiction.

### **Chapter 03: What constitutes information of the type covered by this exemption?**

**3.1** This exemption applies to information which is held by a public authority only by virtue of being contained in a document which falls within one of the listed categories. If the exemption applies, a public authority should refuse the request; disclosure will be a matter for the court body in question. If the public authority also holds the information for another reason, in other words it has also obtained or been provided with the information by virtue of another source or another means, the exemption will not apply. The question to be asked is: does the public authority only hold the information because it was contained in a document to which section 32 applies? That is a question about the historical origin of the information, not about the purpose for which it is held. If the public authority holds the information only because it obtained it from a relevant document, it will fall within this exemption regardless of the purpose or purposes for which it was obtained or held, and regardless of the form into which the authority may itself later convert it (for example by copying or quoting from the document in question). But, for example, if the authority previously held the information before it became contained in a court document, or it subsequently acquires it from some quite unrelated source, then this exemption will not apply to that information.

**3.2** The fact that a public authority is engaged in litigation or is involved in an inquest does not bring all the information which it holds in relation to those proceedings within the scope of this exemption. For example, a public authority enters into a contract with a supplier for goods. The contract is later the subject of a dispute which is to be resolved in court. The case goes to court and the contract becomes part of the court file. The public authority which entered into the contract cannot claim this exemption to justify not disclosing the contract. The public authority does not hold the information contained in the contract only by virtue of it being contained in a document filed with a court. It holds it because it is a party to the contract.

**3.3** This exemption is in two parts. Part (1) deals with documents served in the course of proceedings and court records, and Part (2) deals with inquiry and arbitration documents. Documents, for these purposes, may include books, maps, plans, drawings, photographs, graphs, discs, tapes, and films.

#### **Part (1): Courts and Tribunals**

##### **Information to which this exemption applies**

**3.4** Part (1) relates to documents filed with the court or served upon a public authority or created by a court, for the purposes of proceedings in a particular cause or matter. A court is defined by the exemption as including "any tribunal or body exercising the judicial power of the State". As well as the system of civil and criminal courts (magistrates' courts, county courts, the Crown Court, the High Court and the Court of Appeal) it includes the Judicial Committees of the House of Lords and the Privy Council and the judicial functions of coroners.

**3.5** The inclusion of tribunals brings in a great many bodies, most of them statutory, which have specific, limited jurisdiction that is usually based on the subject matter of the

issue in question. Their procedures, hearings and approach to overseeing the preparation of cases can be simpler and more informal than the courts, with parties often conducting their own cases, without representation. The great majority of tribunals are concerned with the resolution of disputes between the citizen (whether an individual or a corporation) and the state, from disputes about the late submission of tax returns to reviewing detention under the provisions of the mental health legislation. Some, however, deal with disputes between individual parties, such as employment disputes or those which concern the mutual obligations of landlords and leaseholders. Like court rules, tribunal rules may provide for the disclosure of information and documents.

**3.6** Part (1) also refers to the administrative staff of a court or tribunal. This term includes court clerks, ushers, listing officers, jury bailiffs and back-office staff such as those who prepare case files and court orders.

**3.7** Part (1) refers to documents being filed, served or created for the purposes of proceedings in a particular cause or matter. The term "proceedings in a particular cause or matter" predominantly includes "litigation", where a person seeks to invoke the jurisdiction of the court in relation to an action or dispute, or where a person asks the court to make a particular decision. For example, an action in the High Court for breach of contract or defamation; an application for an injunction in a county court in matrimonial proceedings; an application in the High Court for judicial review of an administrative decision; and a claim for unfair dismissal brought in an Employment Tribunal and criminal proceedings in the Crown Court. The term includes not only the main action or matter itself but also any proceedings which are incidental to it, for example the enforcement of a court order, interim applications and costs. Litigation will usually involve two or more opposing parties but some matters will involve only one person who is applying to a court or tribunal to ask it to make a particular decision, for example in adoption cases. The term also expressly includes any inquest or post-mortem examination.

### **When to use this exemption**

**3.8** Part (1) covers information held by a public authority only by virtue of its being contained in:

1. a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter;
2. a document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter; and
3. a document created by a court or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter.

The first two categories are principally concerned with documents created by the parties to litigation, the third with documents created by or on behalf of the court or tribunal itself in connection with proceedings in a particular cause or matter.

**3.10** The first category might include information contained in:

- claim forms and statements of defence;
- committal documents in criminal proceedings;
- witness statements, medical or other expert reports and exhibits;

- skeleton arguments;
- public interest immunity certificates;
- allocation questionnaires or pre-trial checklists (listing questionnaires);
- notices of a part 36 payment into court (a payment of money into court which is made pursuant to Part 36 of the Civil Procedure Rules);
- application notices;
- public interest immunity applications;
- applications under sections 76 and 78 of the Police and Criminal Evidence Act 1984;
- trial bundles;
- response to a Request for Further and Better Particulars (Civil Procedure Rules Part 18); and
- any other documents which are placed before a court for the purpose of a decision or ruling.

**3.11** The second category might cover information contained in:

- documents falling under the first category which are also served on a public authority or are served by a public authority on another person;
- standard disclosure lists (lists of documents).

**3.12** The third category might include information contained in:

- judgements and orders of the court which have not been published;
- notebooks of judges, tribunal members, coroners and other judicial officers;
- notices of hearings;
- summaries prepared by judicial assistants; and
- court or tribunal internal memoranda and correspondence which relate to particular proceedings.

**3.13** The exemption will not cease to apply to information because it is not subsequently used in the proceedings. For example, a party may file evidence at court which is later found to be inadmissible: it will not be used in the proceedings. Courts often return inadmissible to the parties but this is not always the case. If information falls within this Part of section 32, it will not cease to be exempt if it is subsequently not used in the proceedings.

**3.14** The exemption will continue to apply after the proceedings are concluded or discontinued in the same way as it did during the currency of those proceedings.

**3.15** As explained above, Part 1 also concerns the judicial functions of coroners. The term "proceedings in a particular cause or matter" expressly includes any inquest or post-mortem examination and may also include a special examination or other examination conducted under the Coroners Act 1988: information relating to such matters may be exempt. For example, information which is only held because it was supplied to a coroner by a person involved in an inquest, by way of evidence (in the form of a witness statement or documentary evidence) will be exempt in the hands of any public authority who holds it only for that reason. Reports and documents which are given to a coroner in relation to sudden deaths that do not proceed to an inquest or a post-mortem examination but which lead to a notification to the Registrar that the

Coroner is not proceeding further will also be exempt if they are held only for that purpose.

## **Part (2): Inquiries and Arbitration**

**3.16** Part 2 relates to documents given to, or created by, a person conducting an inquiry or arbitration. An inquiry will only be subject to the FOI Act itself if it is part of the sponsoring department (that is, if it is not legally independent of that department) or if it is included in Schedule 1 to the FOI Act. If there is any doubt over whether an inquiry is itself a public authority for the purposes of the FOI Act, advice should be sought.

**3.17** In relation to inquiries, a public authority could find itself holding information which falls within these categories either because it conducted an inquiry itself or because it was the sponsoring department for an inquiry. However, the exemption places an extremely important limitation on the inquiries in relation to which it applies: it applies only to the documents of inquiries or hearings which are held under any provision contained in, or made under, an enactment, that is, an Act of Parliament. This might include, for example:

- inquiries which are required to be held by virtue of a specific statutory provision;
- a discretionary inquiry or hearing designated by an order under section 16(2) of the Tribunals and Inquiries Act 1992 (the relevant order is the Tribunals and Inquiries (Discretionary Inquiries) Order 1975 [as amended]);
- any inquiry set up by the exercise of a statutory power (eg. under s.250 of the Local Government Act 1972, under s. 81 of the Children Act 1989 etc.); and
- any inquiry to which the provisions of the Tribunals of Inquiry (Evidence) Act 1921 apply.

**3.18** Specific examples of inquiries set up under an enactment include:

- the Bloody Sunday inquiry (Tribunals of Inquiry (Evidence) Act 1921);
- the Marchioness Inquiry (Merchant Shipping Act 1995, s268);
- the Joint Inquiry into Train Protection Systems (Health and Safety at Work etc Act 1974, s14(2) (b));
- the Victoria Climbié Inquiry (Children Act 1989, s81, NHS Act 1977, s84 Police Act 1996, s49);
- an inquiry under the Local Authority Social Services Act s7c (inquiries) into how a local authority exercises its social services functions; and
- a planning inquiry (Tribunals and Inquiries Act 1972).

**3.19** This exemption will not apply to the documents of inquiries which do not owe their existence to statute, including those set up under the royal prerogative, even if a judge heads the inquiry. Examples of inquiries where the court records exemption could not be claimed would include

- departmental 'leak' inquiries;
- Lord Butler's review of the intelligence on weapons of mass destruction;
- Sir Michael Bichard's inquiry arising from the Soham murders;
- Lord Penrose's inquiry into Equitable Life; and
- Lord Phillips' inquiry into BSE.

But in each of these cases other exemptions may apply (see below).

**3.20** Arbitration is defined in the exemption by reference to Part I of the Arbitration Act 1996: the exemption can be claimed in respect of arbitration to which Part I of the Arbitration Act 1996 applies (NB. sections 85-87 and 92-98 of Part II of the Arbitration Act also apply Part I and are therefore covered by the exemption). Part I of the Arbitration Act applies only where there is a written arbitration agreement. Arbitration involves an impartial, independent third party hearing both sides (usually in private) and issuing a final and legally binding decision to resolve the dispute. It is now used widely for international disputes, disputes between major corporations and employment and consumer disputes.

### **Information to which this exemption applies**

**3.21** The second part of the exemption applies to information held by a public authority only by virtue of its being contained in:

1. a document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; and
2. a document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

**3.22** The first category will primarily include evidence which is filed by parties to the inquiry or arbitration.

**3.23** The second category might include information contained in:

- notes taken by an arbitrator or the head of an inquiry;
- written decisions or reports of the inquiry;
- a written arbitration agreement that is created by a person conducting an arbitration;
- internal correspondence between persons involved in the conduct of an inquiry or arbitration; and
- a letter from a person conducting an inquiry requesting further evidence.

**3.24** A public authority may also hold information within the second category because it was the recipient of a document created by a person conducting an inquiry. However, unless the document was created by the person conducting the inquiry, information which is held by a public authority solely because it is a party to that inquiry will not be exempt under section 32.

## **Chapter 04: Interrelation with other exemptions**

**4.1** Information which is not governed by the terms of this exemption but which relates to court and tribunal proceedings or inquests, inquiries and arbitration may still fall within another exemption. For example, if a party to litigation holds information contained in a document served by another party but does not only hold it for that reason, section 32 will not apply but it will be necessary to consider whether another exemption does apply. The following exemptions are likely to be particularly relevant in this context.

## **Section 39**

**4.2** Information contained in documents falling within the categories covered by this exemption might in some situations constitute environmental information within the meaning of the Environmental Information Regulations. If this is the case, the information will be exempt from the FOI Act under section 39 and its disclosure must be considered in accordance with the Environmental Information Regulations.

## **Section 41**

**4.3** If a public authority has obtained information from another person, that information will be exempt if its disclosure to the public (otherwise than under the FOI Act) by the public authority holding it would constitute a breach of confidence actionable by that other person. For example, information provided by another party in the course of "without prejudice" negotiations may be subject to a duty of confidentiality which may be breached by disclosure under the FOI Act.

## **Section 42**

**4.4** Information which does not fall within the terms of this exemption, but which relates to litigation or legal advice, may still be exempt by virtue of section 42 (legal professional privilege). It may, for example, cover a draft of a skeleton argument drafted by Counsel which has been submitted for ministerial clearance. It should be noted that, unlike section 32, section 42 is a qualified exemption: it cannot be relied on to refuse an FOI request unless the balance of the public interest, in all the circumstances, comes down in favour of non-disclosure.

**4.5** A document which falls within the categories of document covered by this exemption but which a public authority also holds by virtue of another source or by another means may also be exempt by virtue of section 42. For example, a claim to legal professional privilege may still be maintainable in legal proceedings in respect of a witness statement which has been prepared by a public authority itself from its own information and the information may therefore be exempt under section 42.

## **Section 44**

**4.6** Section 44 creates an absolute exemption for information which is subject to certain forms of legal prohibitions on disclosure. In particular, public authorities must not disclose information if the disclosure is prohibited by a rule of court or a court order or the disclosure would constitute or would be punishable as a contempt of court. For example, the Family Proceedings Rules 1991, rule 4.23, prohibits the disclosure of a document held by a court (other than an order) to anyone except the persons concerned in the proceedings. The documents whose disclosure is prohibited include not only those filed by the parties before the hearing but also reports by the children's guardian and welfare officer, notes of evidence taken by the judge, documentary exhibits handed in during the hearing and any transcript or written note of the judgment. Once a written statement has been filed by a party by way of evidence, this will be covered by rule 4.23.

## **Chapter 05: Time limits**

**5.1** If information is contained in a record which has been in existence for over thirty years (beginning with the year following that in which it was created), this exemption will not apply.



