

# Court, inquiry or arbitration records (section 32)

## Freedom of Information Act

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in the [Guide to freedom of information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how the exemption works to protect information in documents connected to court, inquiry and arbitration proceedings.

## Overview

- Section 32 covers information held 'only by virtue' of being contained in documents that are created or held for the purposes of court, inquiry or arbitration proceedings.
- Courts and inquiries aren't subject to FOIA, so the authorities most likely to use this exemption are those whose functions involve regular interaction with the courts system, or who are party to court, inquiry or arbitration proceedings.
- To be caught by section 32, the information must be:
  - contained in a type of document specified by the exemption; and
  - held 'only by virtue' of being contained in that document.
- In determining whether the information is held 'only by virtue', the authority will need to consider the route by which the information was acquired, and in some cases the purposes for which it is held.
- Section 32 is an absolute exemption so there's no requirement to carry out a public interest test.
- The exemption won't be engaged unless the court, inquiry or arbitration proceedings are already underway, or at the very least definite steps have been taken to initiate them.

- An authority may still claim Section 32 where the proceedings concerned have concluded by the time of the request.

## What FOIA says

### 5. Section 32 states:

**32.**—(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.

6. We believe that section 32 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.
7. In effect, section 32 ensures that FOIA can't be used to circumvent existing court access and discovery regimes. Also, public authorities won't be obligated to disclose any information in connection with court, inquiry or arbitration proceedings outside those proceedings.
8. Court access procedures have been developed to ensure the right to a fair trial including the presumption of innocence. Broadly speaking, the effect of the rules is that a party to proceedings will have rights of access to information under the normal disclosure rules. Third parties, including the press, will have access to information which is made public in open court (and conversely no access to information which is subject to proceedings in private “in camera”).
9. Section 32 is an absolute exemption so there is no requirement to carry out a public interest test. If the authority is satisfied that the exemption is engaged then it can refuse the request without any further qualification.
10. Section 32(1) covers court records. It provides an exemption for information held only by virtue of being recorded in a document that has been:

- filed or placed in the custody of a court;
  - served on, or by, a public authority; or
  - created by the court of a member of the administrative staff of the court.
11. Section 32(2) covers inquiry and arbitration records. It provides an exemption for information held only by virtue of being recorded in a document that has been:
- filed or placed in the custody of a person conducting an inquiry or arbitration; or
  - created by the individual or body conducting the inquiry or arbitration.

### **The scope of the term 'court'**

12. The term 'court' encompasses the UK civil and criminal courts, including magistrates' courts, county courts, the Crown Court the High Court, the Court of Appeal and the Supreme Court.
13. It also extends to Judicial Committees of the House of Lords and the Privy Council and the judicial functions of Coroners.
14. Section 32(4) expressly states that 'court' can also mean 'any tribunal...exercising the judicial power of the state'. It follows that those tribunals which are part of HM Courts and Tribunals Service (such as Employment Tribunals and Social Security Tribunals) are also likely to fall within the exemption.
15. Furthermore, the presence of the word 'includes' in section 32(4)(a) clearly infers that the definition of 'court' isn't just confined to bodies which exercise the judicial power of the state. In our view, therefore, the term 'court' will also encompass international courts whose jurisdiction is recognised by the UK, such as Court of Justice of the European Union<sup>1</sup> and the European Court of Human Rights.

### **The scope of the term 'inquiry'**

16. Section 32(4) explicitly restricts the definition of the term 'inquiry' to those inquiries which are governed by statute.

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<sup>1</sup> Where applicable following the UK's exit of the EU

17. If the authority is uncertain whether the proceedings concerned meet this criterion, then it should check the status of the inquiry and its terms of reference. If the authority is still in doubt after this then it should seek further guidance from the inquiry itself, if possible.

### **The scope of the term 'arbitration'**

18. 'Arbitration' should be interpreted to mean any statutory arbitration that is governed by Part I of the Arbitration Act 1996 (and thus subject to a written arbitration agreement).
19. Again, if the authority is unsure about the status of the arbitration it should check the terms of the arbitration agreement or seek guidance from the arbitrator.

### **Inquests and post mortems**

20. Inquests and post mortems will be covered by the exemption too as section 32(4) specifically states these both fall within the definition of 'proceedings in a particular cause or matter'.

### **Who might claim the exemption?**

21. Courts and public inquiries are not public authorities for the purposes of FOIA. However, an inquiry conducted by a public authority will fall under FOIA, provided it meets the criteria detailed above.
22. Inquiries that have a sponsoring public authority (usually a government department) may also be covered, although only in cases where that inquiry isn't legally independent of the authority in question.
23. The exemption is most likely to be claimed by:
  - public authorities whose functions involve regular interaction with the court system, such as police authorities, the Legal Commission and the Crown Prosecution Service;
  - public authorities who are party to litigation proceedings;
  - public authorities who are party to inquiry or arbitration proceedings; and

- public authorities that conduct (or sponsor) statutory inquiries.

## General approach to section 32

24. For section 32 to be engaged the information must be:
- contained in (or obtained from) a type of document specified by the exemption; and
  - held 'only by virtue...' of being contained in that document.

These criteria are discussed in more detail below.

25. The order in which the authority considers these criteria will most likely depend on the individual circumstances of the case.
26. For example, if the authority isn't sure whether a document containing the information is a court record, it would make sense to begin by looking at the type of document in which the information is held.
27. Conversely, if the information is clearly contained in a court record (or other relevant document) but the main issue of contention is whether it is held 'only by virtue' of that fact, then the most logical approach would be to address that first.

## Types of document specified by the exemption

28. Information can only be caught by section 32 if it is recorded in or was acquired from a document that falls within one of the categories listed in sections 32(1) or 32(2).

### **Sections 32(1)(a) and (b): documents filed or placed in the custody of a court; or served on, or by, a public authority**

29. The following are examples, but not an exhaustive list, of the types of documents that are likely to fall within the scope of sections 32(1)(a) or (b):
- claim forms or other statements of case (particulars of claim, defence, a reply to a defence etc);
  - committal documents in criminal proceedings;

- witness statements, medical or other expert reports and exhibits;
- skeleton arguments;
- application notices;
- trial bundles;
- standard disclosure lists;
- notices of appeal;
- letters before action (provided proceedings have been brought by or are still anticipated at the time of the request); and
- records of a defendant's submissions for costs.

**Section 32(1)(c) 'documents created by a court' or 'a member of the administrative staff of a court'**

30. Section 32(1)(c) provides an exemption for documents that have been created by a court (32(1)(c)(i)) or a member of the administrative staff of a court (32(1)(c)(ii)).

31. When interpreting the term 'created by a court', authorities should follow the definition provided by the Information Tribunal in [Mitchell v ICO EA/2005/0002 \(10 October 2005\)](#). It concluded that this phrase refers to documents created by the judge:

'Documents created by members of court staff are dealt with in s.32(1)(c)(ii) so that the creator for the purposes of subparagraph (i) must be somebody outside their ranks. In our opinion, this can only be the judge, for whom the term "court", or more often "the court", is a familiar synonym...We acknowledge that such a construction results in "a court" being given a different meaning in s.32(1)(c) from s.32(1)(a), where the reference is to the institution...We are nevertheless driven to the conclusion that s.32(1)(c)(i) must refer to judicially created documents...' (Para 42)

32. The term 'member of the administrative staff' will cover any person who is engaged to assist the proceedings of a court by carrying out administrative duties.



33. This will include court clerks, ushers, listing officers, jury bailiffs and back-office staff such as those who prepare case files and court orders.
34. However, the individual doesn't have to be employed by the public authority providing administrative support for the court or tribunal. The scope of the term will also extend to anyone employed, contracted or otherwise engaged for these purposes. This is of particular significance given that courts and tribunals often employ outside firms to transcribe audio or shorthand records of their proceedings into longhand.

The case of [\*Ministry of Justice v ICO\* EA/2007/0120 & 0121 \(29 July 2008\)](#) concerned two unrelated requests for audio records of proceedings in the Crown Court and High Court, both of which the Ministry of Justice (MOJ) had refused under section 32 of FOIA.

The requesters complained to the Commissioner who ruled that transcript or audio recordings of those proceedings wouldn't be covered by the exemption. However, the MOJ disputed his decision and brought an appeal to the Information Tribunal.

The Tribunal acknowledged that all Crown Court and High Court proceedings are recorded and transcribed by various independent companies under contract with the MOJ through an executive agency (Her Majesty's Court Service).

It concluded that, because those companies held the recordings as agents for the MOJ, their employees could be counted as members of the administrative staff of the court.

'We have accepted the submission that the contractor holds the tapes as an agent for the Appellant. That being so, we agree that the member of his staff who recorded the tapes can properly be regarded as a member of the administrative staff of the court. "Administrative" is a very broad term. His or her status as a member of the court staff cannot be dependent on the terms on which he or she is engaged.' (Para 29)

35. The following are examples, but not an exhaustive list, of the types of documents that are likely to fall within the scope of Section 32(1)(c):

- judgments and orders of the court (where these haven't been published);
- notebooks of judges, tribunal members, coroners and other judicial officers;
- notices of hearings;
- summaries prepared by judicial assistants;
- court or tribunal internal memoranda;
- correspondence which relate to particular proceedings;
- records of when and how a fine is paid;
- warrants issues by a magistrate at his home;
- records held in a case management system;
- diary sheets;
- a register of cases to be heard before a magistrate;
- court files containing information about the outcome of Tribunal cases; and
- certificates of conviction.

**Sections 32(2)(a) and (b): documents filed or placed in the custody of an inquiry or arbitration**

36. The nature of arbitration and inquiry proceedings means that there will be an overlap between the types of documents caught by section 32(2) and those covered by section 32(1). For example, just as with court proceedings, the documents filed with an arbitration can include statements of defence, details of claim and counterclaim, skeleton arguments and witness statements.
37. With respect to documents that are peculiar to inquiry and arbitration proceedings, examples of the kinds of records likely to fall within the scope of section 32(2) are:
- notes taken by an arbitrator or the head of an inquiry;
  - written decisions or reports of the inquiry;

- a written arbitration agreement 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.

### Establishing whether the information is held ‘only by virtue...’

38. The question of whether the information is held ‘only by virtue...’ will largely depend on the route by which the authority obtained that information, although in some circumstances the purposes for which that information is being used will also be a relevant consideration.

#### **Information originally created or obtained for the purposes of proceedings**

39. If the requested information was originally created or obtained for the purposes of proceedings, and not acquired by any other route, then it will be held ‘only by virtue’ of being contained in a specified document.

[FS50461639](#) concerned a request to Her Majesty’s Courts and Tribunals Service (HMCTS) for the full names of the barristers who had acted for the defendants in a specific case.

HMCTS refused the request under sections 32(1) and 40(2) of FOIA.

During the Commissioner’s investigation, HMCTS explained that the withheld information was recorded in listing documents and judgment orders that had been created by the court when handling the proceedings, and that these documents formed part of the case records.

The Commissioner agreed that the requested information was held only by virtue of being contained in court records. He observed that;

‘...HMCTS did not hold the withheld information outside of the court records, and the withheld information was only created

and used for the purposes of proceedings.

Consequently the Commissioner is also satisfied that the second test of section 32(1)(c)(i) is met as the withheld information is only held by HMCTS by virtue of being contained within a document created by the court. The Commissioner is therefore satisfied that the exemption at section 32(1)(c)(i) does apply to the withheld information in this case.' (Paras 13 and 14)

40. The information won't lose its exempt status if the authority goes on to use it for another purpose. This is consistent with the position taken by the Information Tribunal in [Department for Business, Enterprise and Regulatory Reform v ICO and Peninsula Business Services](#) EA/2008/0087 (28 April 2009).

'...There is nothing in the section which limits the way in which that information may be used or processed by the public authority provided it is, in effect, only acquired by virtue of being in a 'court record' (ie a document falling within s.32(1)(a),(b) or (c). Therefore if the information, once acquired, is used for management or policy matters, it is still covered by the exemption.' (Para 53)

41. This position was later confirmed by the Upper Tribunal in the subsequent appeal hearing ([Peninsula Business Services v ICO and SOS for Justice and Lord Chancellor \[2014\] UKUT 284 \(AAC\) \(12 June 2014\)](#)).
42. Whilst these decisions were only concerned with the application of Section 32(1), in our view, the same principle will also apply to Section 32(2) cases.
43. The case below illustrates how the line taken in these cases operates in practice.

[FS50573033](#) concerned a request to the Ministry of Justice (MOJ) for a list of convicted corporations held on a specified database.

The MOJ refused the request under sections 32 (court records), section 40(2) (personal information), and section 43(2) (commercial interests).

The information on the database was originally derived from Magistrate and Crown Court records. However, the MOJ was

now using it for statistical purposes, to release aggregate information into the public domain about prosecution, conviction and sentencing trends and to assist with the management of the court system.

The Commissioner concluded that the contents of the database were still covered by section 32. He ruled that;

'...whilst the requested information was taken from the Magistrate' Court and Crown Court databases in England and Wales by the MOJ and stored within its Court Proceedings database it nevertheless originated as a 'court record' created by the courts...In this case the details of the prosecutions or inquiries and associated sentencing of the specified corporations are held only by virtue of having been obtained via the aforementioned records. Although it is now being used for a different purpose, the Commissioner finds, following the reasoning set out in the DBERR decision...that the requested information is captured by section 32(1)(c) and section 32(2)(b).' (Para 20)

### **Information originally obtained for another purpose**

44. If the authority originally acquired the information through a route other than from court, inquiry or arbitration documents and is still holding it for the purposes for which it was originally obtained, then that information won't be held 'only by virtue...'.

#### **Example 1**

A local authority takes its catering supplier to court on the grounds that it has breached its ongoing contractual obligations.

The authority files a copy of the contract with the court as evidence in support of its case.

The court action is brought to the attention of a local MP who asks the authority to provide her with a copy of the contract under FOIA.

The authority won't be able to claim section 32 in these circumstances because:

- it obtained the requested information through the

drawing up of a contract, and not through the route of court inquiry or arbitration proceedings; and

- the contract is still in force, which means that the information is still being used for the purposes for which it was originally collected.

This means that the authority isn't holding the information 'only by virtue' of the fact that it was placed in the custody of a court.

### **Example 2**

A government department orders a public inquiry following allegations of financial mismanagement at a hospital.

The hospital provides the inquiry with a bundle of supporting evidence, including a record of contractors' invoices from the last two financial quarters.

The hospital subsequently receives an FOI request for copies of these invoices.

The hospital originally obtained the invoices for accounting and auditing purposes and is still using them for those functions. It therefore doesn't hold the requested information solely by virtue of the fact that it was placed in the custody of the inquiry.

This means that the hospital won't be able to claim section 32 for that information.

45. However, if the information is no longer being kept for the purposes for which it was originally obtained, and is now held solely for the purposes of proceedings, then it will be covered by the exemption.

### **Example**

A university carries out a risk assessment of potential safety hazards around the campus. It uses the findings of this assessment as the basis of its new health and safety policy.

Once the new policy is finalised, the risk assessment becomes redundant and the university consigns it to its archives.

Soon after the policy comes into force, a student is injured after tripping over a computer cable in the university library.

The student decides to sue the university for compensation and the case goes to court.

The university provides the court with a copy of the risk assessment as part of its dossier of supporting evidence.

In the meantime, a local newspaper picks up the story and makes an FOI request to the university for any information it holds relating to the incident, including any risk assessments that were carried out beforehand.

By this time, the university is only holding a copy of the risk assessment for the purposes of the court case.

This being the case, the assessment will fall within the scope of section 32, even though it wasn't originally created for the purposes of court proceedings.

### **Information acquired from more than one source**

46. Where information was originally only held for the purposes of proceedings but the authority subsequently acquires the same information from another source, that information won't be covered by section 32 anymore because it will no longer be held 'only by virtue'.

#### **Example**

A government department set up a public inquiry following a local authority's proposal to allow developers to build 250 homes near a local nature reserve.

To support its case, the local authority asked a local housing association to provide it with some statistics on the current provision of housing in the borough. It then compiled the statistics in a document which it submitted to the inquiry.

At that point, the Council was only holding the statistics for the purposes of the inquiry proceedings. The information was

therefore exempt from disclosure under 32(2)(a).

However, later that year the housing association provided the local authority with a copy of its annual report as part of its ongoing commitment to collaborate on tackling homelessness in the area. This report contained the same statistical information that the local authority provided to the public inquiry.

From this point onwards, the local authority no longer held the statistics 'only by virtue' of the fact that they are contained in a document that it provided to the inquiry. It therefore follows that the statistics were no longer be covered by the exemption.

### **Information extracted from a relevant document**

47. Information that has been extracted from a relevant document will also be covered by the exemption even if it is later transferred to other documents or held or used in other ways.

In [Peninsula Business Services v ICO and SoS for Justice and Lord Chancellor \[2014\] UKUT 284 \(ACC\) \(13 June 2014\)](#) the requester had asked HMCTS for the names and addresses of all respondents to Employment Tribunal cases for a specified period of time. HMCTS refused the request citing Sections 32(1)(a) and 32(1)(c) of the Act.

HMCTS had acquired these contact details from the ET3 forms that the respondents had filled in when an Employment Tribunal claim was filed against them. The details on the forms were subsequently transferred onto an electronic database called ETHOS.

In its submissions to the Upper Tribunal, Peninsula Business Services argued that the information contained in ETHOS fell outside the scope of Section 32 because it was a separate 'document' to the ET3 forms and wasn't created for the purposes of proceedings in a particular cause or matter. Rather, they argued, ETHOS was a database of current cases in an office or region.

The question for the Tribunal was whether the information recorded on the ET3 forms still possessed the quality of being held 'only by virtue' once it was transferred onto ETHOS.



The Tribunal concluded that the information on ETHOS was still covered. In summing up it commented;

'...where did the requested information come from?...the parties completed the relevant forms ET1 and ET3...Did the Tribunal hold the information only by virtue of that? The evidence is that these forms are the sources of the data migrated either automatically or by an individual officer of HMCTS staff to the relevant ETHOS. Why did the HMCTS acquire that information? The answer is that the parties were required to provide that information...so that they could start, or in the case of the respondent defend, an action.' (Para 47)

'...Given that that is the source, and on the evidence before the tribunal the only source, of the information that is migrated to ETHOS, then it must follow that the information is also protected from disclosure by section 32(1)(c).' (Para 48)

48. It follows that information that has been converted from one format to another will still be exempt in its new form. For example, if an authority extracts information from an original paper court document and records it on a computer, then the electronic version of the information will also be exempt.
49. This also follows that transcripts of court proceedings taken from original audio or shorthand records will fall under the section 32 exemption, irrespective of the format of the format onto which they were transferred.

**Applying Section 32(1)(c) or 32(2)(b) where the purpose for the creation of the document containing the information is unclear**

50. In some cases, it might not be immediately obvious whether the document containing the information was created for the underlying purpose of proceedings.
51. If in doubt, the authority should conduct a 'dominant purpose test' to determine the **main purpose** for which the information was created.
52. The test is straightforward; if the authority is satisfied that the main purpose for the creation of the document was proceedings in a particular cause or matter, or an inquiry or arbitration then it may apply the relevant provision to the information concerned.

53. However, if the authority finds that the document was primarily created for another purpose then it won't be able to rely on sections 32(1)(c) or 32(2)(b).
54. This follows the line taken by the Tribunal in [\*Department for Business, Enterprise and Regulatory Reform v ICO and Peninsula Business Services EA/2008/0087\*](#) (28 April 2009).

In [\*Department for Business, Enterprise and Regulatory Reform v ICO and Peninsula Business Services EA/2008/0087\*](#) (28 April 2009) the counsel for the Commissioner proposed that the correct way to determine whether a document which is being used for mixed purposes is exempt under Section 32(1)(c) is to establish the dominant purpose for which that document was created.

The Tribunal accepted this reasoning when it came to consider how Section 32 would apply to the Employment Tribunal Services' own management and policy reports. These reports contained information derived from a database of employment tribunal respondents. The Tribunal commented;

'What happens...when the information held is mixed with other information which is not held only by virtue of being contained in a court record to produce ad hoc reports? Then we agree with the IC [Information Commissioner] that a dominant purpose test should be applied to determine whether or not the report can benefit from the exemption'. (Para 55)

In reaching a decision, the Tribunal accepted the Commissioner's arguments that the dominant purpose of the creation of the 'documents' in the ETHOS database was the administration of proceedings in particular cause or matter, meaning that the information was exempt under section 32(1)(c)(ii), in so far as it was held on the ETHOS database.

55. Although the Tribunal's ruling was only concerned with the application of section 32(1)(c)(ii), we consider that the same principles will also apply to sections 32(1)(c)(i) and 32(2)(b).
56. Where considering section 32(1)(c) authorities should be mindful that the exemption can't be applied if the requested information was **already held for another purpose. This is the case** even where the dominant purpose for creating the document was proceedings in a particular cause or matter.

## Timing

57. For section 32 to be engaged the court, inquiry or arbitration proceedings must be underway, or at the very least definite steps must have been taken to instigate them by the time of the request.

### Example

A public authority dismissed its chief executive for gross misconduct after his colleagues accused him of bullying.

The chief executive disputed the allegations and decided to take his case to an employment tribunal on the grounds of unfair dismissal.

However, before doing so he sent the authority a letter in which he set out his case and made an offer to settle outside the tribunal.

Two days later a national newspaper received a tip off that the chief executive was planning to take the matter further so it made an FOI request to the authority for any information it held regarding his grounds for appeal.

In this case, the authority would be able to use section 32(1)(b) to withhold any documents the chief executive had served on it in connection with the impending tribunal proceedings, despite the fact those proceedings were not underway at the time it received the FOI request.

This is because the letter was a definite step towards instigating tribunal proceedings in that it placed the authority on notice that proceedings were imminent unless the respective parties could arrive at a settlement themselves.

58. The exemption won't apply where proceedings are merely contemplated, although in such cases the authority may be able to rely on the legal professional privilege exemption instead (see our guidance [the exemption for legal professional privilege \(section 42\)](#)).
59. An authority may still claim section 32 after the relevant court, inquiry or arbitration proceedings have concluded. This was confirmed by the Supreme Court's decision in *Kennedy v The Charity Commission* [2014] UKSC 20 (26 March 2011).

[Kennedy v Charity Commission](#) [2014] UKSC 20 (26 March 2011) concerned an FOI request made to the Charity Commission for information about an inquiry it had held into a fund raising appeal launched by George Galloway.

The Charity Commission had refused this request under section 32(2).

One of the key issues before the court was whether section 32(2) could still apply after an inquiry had concluded.

The court looked at the plain meaning of the wording in the exemption and considered the implications of following the alternative interpretation (that section 32(2) ceased to apply after the proceedings). It noted that if this interpretation was given effect then:

- The information wouldn't even have the benefit of a balancing of the public interest in disclosure against the other interests provided by section 2(2)(b);
- other FOIA exemptions would afford only limited grounds for refusing disclosure; and
- the provision in section 63(1) that stipulates that section 32 can't be applied to the information in a historical record would serve no purpose.

With this in mind, the court went on to conclude that:

'...the construction is clear: section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records...' (Para 34)

## Historical records

60. Section 63(1) of FOIA specifies that section 32 can't be applied to the information contained in a historical record.

61. Originally, a historical record was one over 30 years old, or if forming part of a file, the last entry on that file had to be over 30 years old.
62. This 30-year time limit has now been amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. Details are set out in The Freedom of Information (Definition of Historical Records) (Transitional and Saving Provisions Order 2012 (SI 2012/3029).
63. In effect, from the end of 2015 the time limit was 27 years, and by the end of 2016 it was 26 years. It will reduce by another year every year until it reaches 20 years at the end of 2022.

### Neither confirm nor deny

64. Section 1(1)(a) of FOIA requires a public authority to confirm whether it holds the information that has been requested.
65. However section 32(3) provides an exclusion from this duty where the information falls under sections 32(1) or 32(2). This means that the authority has the option to issue a neither confirm nor deny (NCND) response.
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.

### Advice and assistance

68. Where an authority intends to refuse a request under section 32, we would consider it good practice to point the applicant to some other means by which that information may be obtained.
69. During the course of a trial, members of the public are often able to inspect documents presented to the court. Although a court will normally refuse to allow this if:

- it would compromise the interests of justice or the public interest;
  - it would reveal medical or other confidential information; or
  - it would adversely affect the interests of children.
70. A hearing can be held in public or in private. If it is held in public members of the public can obtain a copy of the judgment or order but will have to pay a fee. If the hearing is held in private a member of the public who is not a party to the proceedings has to seek leave of the judge who gave the judgment or made the order.
71. It is likely that authorities will refer applicants to the courts mainly in those cases where the applicant is aware of the likely contents of the court record but where the authority believes that a decision about disclosure is one that should properly be left to the courts.

## Interaction with other exemptions

### **Section 40: The exemption for personal data**

72. Information held in connection with court, inquiry or arbitration proceedings is likely to contain data about clearly identifiable individuals.
73. For example, the information in a court record may include personal information about the plaintiff, the defendant and any witnesses who provided testimony.
74. It follows that there will often be some overlap with section 40 (the exemption for personal data).
75. Further information on the application of section 40 can be found in our guidance [Personal information \(section 40 and regulation 13\)](#).

### **Section 21: Information accessible by other means**

76. Section 21 provides an exemption for information that is 'reasonably accessible' by other means.
77. The Civil Procedure Rules provide a separate right of access to court records for civil cases. However, this right is not absolute

because it is at the discretion of the court whether or not to release the information.

78. There is no equivalent access regime for criminal court cases. Whilst the Criminal Procedure Rules do require magistrates to maintain a register of the cases, this is not publically available and access is at the discretion of the magistrate concerned.
79. As the courts have the option to withhold the information they hold, it is our view that section 21 will not be engaged unless the authority dealing with the request knows for a matter of fact that;
  - the court would use its discretion to provide the applicant with the requested information, or;
  - the information is reasonably accessible outside the court system (for example it has been published in the press and is already in the public domain).

However, in the majority of cases the authority won't be party to the facts above, so we don't envisage that there will be many occasions where it will be possible to rely on section 21 to refuse the information.

## More information

80. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.
81. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
82. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
83. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at [www//ico.org.uk](http://www//ico.org.uk).