

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 November 2012

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps)

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1. The complainant has requested information about powers of attorney and 'proof' to substantiate comments made by a Judge in an interview. Some information has been provided, the public authority saying that no further recorded information is held. The Information Commissioner's decision is that the public authority has complied with the FOIA and he requires no further steps to be taken.

#### Background

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2. The request concerns the Court of Protection (the "COP") and the Office of the Public Guardian (the "OPG"). According to the COP's website<sup>1</sup>:

*"The Court of Protection makes decisions and appoints deputies to act on behalf of people who are unable to make decisions about their personal health, finance or welfare".*

According to the OPG's website<sup>2</sup> it:

*"... supports the Public Guardian in the registration of Enduring Powers of Attorney (EPA) and Lasting Powers of Attorney (LPA), and the supervision of deputies appointed by the Court of Protection.*

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<sup>1</sup> <https://www.gov.uk/court-of-protection>

<sup>2</sup> <http://www.justice.gov.uk/about/opg>

*It also helps attorneys and deputies to carry out their duties, and protects people who lack the mental capacity to make decisions for themselves.*

*It works closely with other organisations to ensure that any allegations of abuse are fully investigated and acted on.*

*The OPG also has responsibility for mental capacity policy, and provides guidance to public, legal and health professionals”.*

3. The complainant makes direct reference to an article which was published in 'The Times' newspaper on 4 January 2010 about the COP (the article is available online after payment of a subscription<sup>3</sup>). Within the article there are comments from Judge Lush indicating that abuse of the mentally vulnerable was increasing and he is cited as saying this occurs in 10 to 15% of all cases. He made reference to a particular case, which forms part (11) of this request.
4. The request concerns Enduring Powers of Attorney ("EPAs"). A guide about these can be found on the OPG website<sup>4</sup>. They are described as follows:

*"An Enduring Power of Attorney is a document appointing a person (an 'Attorney') to manage the property and financial affairs of another person (the 'Donor').*

*If the Donor becomes unable to make financial decisions, the EPA must be registered before it can be used or, if it is already in use, before it can continue to be used”.*

The guidance also explains that:

*"New EPAs can no longer be created, however if a person has an EPA made before October 2007, either registered or unregistered, it can still continue to be used.*

*LPAs (lasting powers of attorney) have now replaced EPAs, which only allowed people to appoint Attorneys to make decisions about property and financial matters on their behalf. The new LPAs give more protection and extra options”.*

5. The OPG is an agency of the Ministry of Justice. The Ministry of Justice is therefore the appropriate public authority in this case.

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<sup>3</sup> <http://www.thetimes.co.uk/tto/law/article2215372.ece>

<sup>4</sup> <http://www.justice.gov.uk/downloads/forms/opg/epa101.pdf>

## Request and response

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6. On 7 February 2011 the complainant faxed a request to the public authority; the full wording is appended to this decision notice. He did not receive a response and wrote to the Information Commissioner on 19 August 2011 to complain about this.
7. The Information Commissioner contacted the public authority which advised that it had no record of the request being received; however, the complainant was able to produce a print out from his fax machine indicating that the request was successfully transmitted. The Information Commissioner passed a copy of the request to the public authority and asked for it to send a response.
8. On 7 October 2011 the public authority sent its response. It provided some information but advised that further information was exempt by virtue of section 40(2).
9. On 27 February 2012 the complainant asked for an internal review in respect of parts (10) to (13) of his request.
10. An internal review was sent on 9 May 2012. Further information was provided. The public authority also advised that to respond to parts (11) to (13) of the request would exceed the appropriate limit.

## Scope of the case

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11. On 18 May 2012 the complainant again contacted the Information Commissioner to complain about the way his request for information had been handled.
12. In an attempt to informally resolve this case there has been much further correspondence. However, the complainant remains dissatisfied with the responses given by the public authority. The two remaining parts of his request which he would still like to have considered are parts (10) and (11), which have been extracted from the full request as follows:

*"10) In respect of the reference in the article in The Times denigrating attorneys by reference to abuse amounting to 10% - 15% of all cases please specify which are 'all cases' i.e. total application to COP or a limited category.*

*11) In respect of the case referred to by Judge Lush of a son charging mileage please specify how much the claim was and the value of the total assets of the mentally vulnerable*

*mother. Was the son a registered attorney? Was a hearing held? Did the Judge appoint a 'litigation friend' from the OS office or other profession".*

13. In respect of part (10) of the request the public authority is now stating that it does not hold this information. In respect of part (11) the public authority has advised that the relevant file has been destroyed. The complainant does not accept the reasoning provided and would like these issues considered.

## **Reasons for decision**

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### **Section 1 – general right of access**

14. This section states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to him.
15. The Information Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.
16. In deciding where the balance lies, the Information Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held, as well as any arguments or evidence that information is held put forward by the complainant.
17. At the Information Commissioner's suggestion, the public authority provided a further explanation to the complainant during the course of his investigation.
18. In respect of part (10) of the request it advised him as follows:

*"It is not clear from the article in the Times what category of cases the Senior Judge was referring to when he was reported as saying that abuse occurs in 10 to 15% of all cases. Senior Judge Lush has held a longstanding personal view that abuse occurs in 10 to 15% of Enduring Powers of Attorney (EPAs). Since 1986, 263,504 EPAs have been registered, but this figure does not include applications where the application to register failed, cases where registration has been cancelled due to the death of the donor, or the revocation of the EPA. It also does not include*

*cases where the records have been destroyed in accordance with the records retention policy. In addition, since October 2007 there have been over 2,000 court applications relating to EPAs, both registered and unregistered.*

*Neither the Office of the Public Guardian or the Court of Protection holds information of unregistered EPAs. The comments from Senior Judge Lush were based on his experiences as a Judge, dealing with cases involving both registered and unregistered EPAs, rather than anything that is recorded or written down. We therefore do not hold any recorded statistical information of this nature”.*

19. In respect of part (11) it advised him as follows:

*“When your request was received in September 2011, there was no recorded information in the scope of the Freedom of Information Act (FOIA) which would have answered your questions. We held no information on which specific cases Judge Lush was referring to, or what material he referenced to make his comments in the article. His comments were based on his personal experience and his personal knowledge only. This information was not recorded anywhere in a written format. The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. It does not place a duty upon public authorities to answer a question unless recorded information exists. The FOIA duty is to only provide the recorded information held...*

*However, in order to assist your search for information, we have undertaken some additional research to provide you with some information outside the scope of FOIA.*

*We have spoken to Judge Lush and he was able to confirm the two cases he referred to from memory. Judge Lush advised that in respect of question 11 he was referring to an EPA file for a client named [name removed]...*

*The file for [name removed] is no longer held by the Office of the Public Guardian. After a thorough search it was confirmed that it had been destroyed alongside our data retention policy”.*

20. For clarity the Information Commissioner will consider each question in turn.

*Part (10) - cases referred to in the newspaper article*

21. Having read the newspaper article it is clear that the information being sought by the complainant relates to comments made by Judge Lush in an interview. The public authority has spoken to Judge Lush as a result of this information request and there is no denial that the interview took place. The Information Commissioner therefore accepts the public authority's stance that these comments are based on the views and experience of Judge Lush.

22. The public authority has gone on to explain that Judge Lush's comments cover both registered and unregistered EPAs and that they hold no details of the latter category because, as the name suggests, they are not 'registered'. It has also spoke to Judge Lush about the article and has told the Information Commissioner as follows:

*"He explains that the statement is purely anecdotal and it is not possible to calculate accurately the level of abuse. It also depends on how you define abuse. He defines it as any unethical conduct, which is by definition wider than commonly accepted definitions of abuse".*

It went on to stress that the statement is: *"... anecdotal based on the judges personal opinion and his wide experience and knowledge".*

23. The complainant accepts that the public authority will not hold unregistered EPAs; however, what he does not accept is that the comments made by Judge Lush include both registered and unregistered EPAs. He has said to the Information Commissioner:

*"I cannot – nor should you – believe that the 10%-15% meant both registered and unregistered EPAs the latter obviously are not recorded by the OPG and could have been used by the attorney and then torn up by the attorney / donor.*

*Judge Lush's comments cannot cover both registered & unregistered EPAs when there is no record. The OPG is intentionally misleading you and the public both the reference to the article "Taking Liberties" this being in 1998 i.e. 14 years ago it obviously has been backed up by some current information (not EPAs) if in 2012 it can be averred that abuse is on the increase.*

*The OPG are clearly trying to hide information and using 'mandarin' spin to achieve this".*

24. The public authority has explained to the Information Commissioner that:

*"Although unregistered EPAs do not fall within the court's general jurisdiction and are not in the public domain, the court does in some cases revoke an unregistered EPA when appointing a deputy (receiver) ... The circumstances in which this can happen are likely to be that someone, for example a local authority, is concerned about the activities of an unregistered attorney and applies to be deputy, which gives the court the opportunity to revoke the still unregistered EPA.*

*The cases of abuse leading to criminal convictions which are commonly reported in the press, and which the Senior Judge and many others will have read, involve unregistered as well as registered EPAs".*

25. As explained above, in cases such as this the Information Commissioner will base his decision on the balance of probabilities. It is known that Judge Lush's comments were made in response to questions at an interview so, in the Information Commissioner's view, it is likely that they were comments based on the Judge's own opinion as opposed to hard facts having been gathered beforehand.
26. The complainant does not accept that the comments were made in respect of both registered and unregistered EPAs; conversely, the public authority has advised that the comments did cover both types of EPA. The Information Commissioner has no actual evidence to back either opinion as there is nothing within the article which can support or refute this position.
27. On such occasions the Information Commissioner has to balance what he considers to be the most likely scenario. On this occasion, he concurs with the public authority as he considers it most likely that Judge Lush has made comments based on his views of all the cases he has considered and his own professional opinion. As such, there would be no further information recorded which could meet the complainant's request. Whereas some limited information may be held in respect of those EPAs which are registered, Judge Lush's comments are, by his own admission, purely anecdotal. The Information Commissioner therefore concludes that, on the balance of probability, no information is held.
28. The Information Commissioner also notes that, in view of the number of files held, even if he erred in making this decision, it is highly probable that to go through over a quarter of a million files to try to ascertain this information would, in any event, exceed the appropriate limit.

*Part (11) - the case of a son charging mileage*

29. The public authority has advised the Information Commissioner that it has spoken to Judge Lush about his reference to this case as it was not possible to tell which was being referred to from the article. It was informed accordingly and went on to explain that the file had since been destroyed. The complainant did not agree and argued to the Information Commissioner:

*"I [also] find it peculiar that someone can still remember a 'destroyed' case 12 years ago from out of thousands handled each year. I also find it peculiar that a judge in 2012 claiming above is on the increase refers back to a case 11 years ago as an example. I must ask you not to believe the OPG and ask them to provide the case file or confirm over a statement of truth that it has been destroyed. In that case since someone can recollect the name and date involved and the COP judge published it that someone should provide details of the case which concerns – as the judge avers – that abuse occurred because a son claimed mileage to visit his mother 3 times a week".*

30. The public authority asked Judge Lush about his comments and he advised the public authority that this part of the request concerned a named client. Whilst the complainant may not accept that this is the case, the Information Commissioner notes that the case in the newspaper article referred to a "son charging mileage" and the complainant's request also referred to this specific case. Whilst the complainant might not agree with Judge Lush referring to such an aged case as evidence to support his view, this is not something that the Information Commissioner can consider. Judge Lush has clearly referred to a case and has, when asked, been able to say which particular case that was. The age of the case that Judge Lush chose to use as an example is not something that the Information Commissioner can comment on.
31. The complainant also does not accept that the associated file has been destroyed. As well as providing a further explanation to the complainant, as cited above, the public authority provided a more detailed explanation to the Information Commissioner about the searches it had undertaken for the file. It confirmed that it had undertaken electronic searches which had revealed that the file was a paper-based one. It went on to explain:

*"The case number was cross referenced with archive records to identify in which boxes the file could be located. These files were recalled from TNT archiving, but the file was not contained in*



*them. It is highly likely that this file has been destroyed in accordance with OPG's data retention policy. The Office of the Public Guardian usually holds files for seven years after the death of the client. The client to whom the file belongs, [name removed], died on 10/09/2001 so the file would have been destroyed some years ago. I can therefore confirm that this information is not held by the department".*

32. The public authority also provided the Information Commissioner with a copy of its retention policy which clearly indicates that the file would have been destroyed.
33. Although the complainant does not accept that the file can have been destroyed, particularly because Judge Lush had used it as an example, the Information Commissioner has to base his view on the balance of probability. The public authority has shown that it had an electronic record to indicate where the file would be held. It has then gone on to look for the file in that location and it is no longer there. This is clearly what would be expected if it was destroyed in line with the retention policy. The Information Commissioner therefore accepts that, on balance, it is most likely that the file has been destroyed.

## **Section 10 – time for compliance**

34. Section 10(1) of the FOIA states:

*"..a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

35. The complainant faxed his request to the public authority on 7 February 2011. The public authority advised the Information Commissioner that it did not receive this fax. However, the Information Commissioner has been provided with a printout from the complainant's fax machine which clearly evidences that he sent a five-page fax to two telephone numbers. One of these numbers is listed in the OPG's business plan for 2010/11 as being the fax number for international enquiries (he did not use the main number that was given for national enquiries); it is unclear whose the other number is.
36. The complainant chased a response via the Information Commissioner on 19 August 2011. On 12 September 2011 the Information Commissioner passed the complainant's information request to the public authority as it advised that it had no record of having received it. It responded to the complainant on 7 October 2011.
37. The Information Commissioner notes that the public authority states that it did not receive the request. However, it is his view that the

complainant has clearly sent the request to a fax number that is listed in a business plan, albeit that it is not the main fax number. The fax is showing as successfully delivered on the printout that the complainant has provided as evidence. As such, it is the Information Commissioner's opinion that the public authority failed to respond within 20 working days and therefore breached the FOIA.

## **Other matters**

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38. Although they do not form part of this decision notice the Information Commissioner wishes to highlight the following matters.

### *Internal review*

39. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', the Information Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Information Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
40. The complainant asked for an internal review on 7 November 2011. He chased a response on 27 February 2012. The public authority responded on 9 May 2012, advising that it had no record of receiving his fax of 7 November 2012, although it had in fact received the latter.
41. The Information Commissioner does not consider this case to be 'exceptional', so is concerned that it took over 20 working days for an internal review to be completed. The delay has been logged by his enforcement section for monitoring purposes.

## Right of appeal

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42. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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 .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Full wording of original request**

*"I enclose a copy of an article in the Times 4/1/10. Under your duty to the public, transparency of government and FOIA (and not solely under FOIA) please provide information below. If the answer has to be in two parts to deal with the FOIA separately I have sent a copy direct to KILO (to avoid delay of two months !!!)*

*The Court of Appeal on 7/2/11 stated "the cardinal importance of open justice demonstrated by article 6 [ECHR] had long been a feature of the common law".*

- 1) Which minister or elected MP is in charge of the department / ministry under which the COP / OPG come. (Please answer promptly without waiting to collect other information)?*
- 2) How many complaints have been made in 2010 against
  - (a) the COP*
  - (b) the OPG?**
- 3) In what categories have you recorded the complaints and how many are there in each category for COP and OPG?*
- 4) With regard to the COP review of its rules
  - (a) has this been completed and if so please let me have a copy*
  - (b) if not completed when is completion expected; how many meetings have been held; and who are the members of the review body?*
  - (c) is there anyone on the review body representing attorneys granted an EPA / LPA by a donor?*
  - (d) how many cases have been opened up to the media?**
- 5) In how many cases of EPA / LPA Registration
  - (a) has the attorney appointed by the donor been confirmed and registered?*
  - (b) has registration been refused?*
  - (c) the Court appointed an attorney and how many are lawyers (of which how many the official solicitor); from the financial profession; from the medical profession; others?**
- 6) How many of the cases of EPAs in each year since Oct 07 are concerning
  - (a) wills*
  - (b) gifts*
  - (c) settlements (in what legal meaning)?**
- 7) In how many cases involving hearings in item 6 did the Court appoint a 'litigation friend' involving
  - (a) a lawyer (?OS)**

- (b) financial profession*
- (c) medical profession?*

- 8) In how many cases involving a hearing and decision has the judge provided a section on "the law relating to the making of gifts by attorneys" and was this section virtually the same in all these cases?*
- 9) Since Oct 07 how many cases have gone to appeal and how many upheld / dismissed?*
- 10) In respect of the reference in the article in The Times denigrating attorneys by reference to abuse amounting to 10% - 15% of all case please specify which are "all cases" i.e. total application to COP or a limited category.*
- 11) In respect of the case referred to by Judge Lush of a son charging mileage please specify how much the claim was and the value of the total assets of the mentally vulnerable mother. Was the son a registered attorney? Was a hearing held? Did the Judge appoint a 'litigation friend' from the OS office or other profession.*
- 12) In respect of those who "run off with millions" did a registered attorney submit an application for gifts or what were the circumstances of the case?*
- 13) In the cases of (11) and (12) please provide as much information as possible whilst maintaining anonymity of the persons involved".*