

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2014

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

Decision (including any steps ordered)

1. The complainant has requested a response made by a judge to a complaint about him.
2. The Commissioner's decision is that the Ministry of Justice has applied sections 44 (statutory prohibitions) and 40(2) (personal information) appropriately. However, the Ministry of Justice has breached section 17(1).
3. The Commissioner does not require the Ministry of Justice to take any steps.

Request and response

4. On 10 May 2013, the complainant wrote to the Office for Judicial Complaints (OJC), now known as the Judicial Conduct Investigations Office (JCIO), which is part of the Ministry of Justice (the MoJ). The JCIO supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. It investigates complaints about a judicial office-holder's conduct.
5. The complainant requested information in the following terms:
"I would like to see Mr D J Pattinson's response to the complaint, if I may."

6. The MoJ responded on 18 June 2013. It stated that it was not going to disclose the information and applied sections 44 (prohibition on disclosure) and 40(2) (personal data).
7. Following an internal review the MoJ wrote to the complainant on 12 July 2013. It stated that it was upholding the decision to apply sections 44 and 40(2) to the requested information.

Background

8. The complainant made one of 48 complaints received by the MoJ about comments made by a judge during a court hearing brought by the RSPCA. The comments were about the cost of bringing the case and whether it was appropriate use of RSPCA funds and they received widespread media coverage.
9. As part of its investigation, the MoJ allows the person under investigation to provide a response to accusations made.

Scope of the case

10. The complainant contacted the Commissioner on 17 July 2013 to complain about the way her request for information had been handled. The complainant explained that she had submitted a request to the MoJ; the request in question was undated and there was no other paperwork with it.
11. The complainant also supplied relevant documentation relating to a request she made to the MoJ on 10 May 2013. The Commissioner explained to the complainant that, as she had supplied the relevant documentation regarding her request of 10 May 2013, he would be able to consider the way the MoJ had handled this request.
12. The complainant stated that she considered that her request should have been dealt with under the Environmental Information Regulations 2004 (EIR), as it was about comments made by the judge in a case concerning illegal fox hunting. The complainant explained that she considered that the relevant regulations of the EIR were 2(a) elements of the environment (specifically biological diversity) and 2 (c) measures.
13. The Commissioner notes that the request is for the judge's response to complaints about him regarding comments he made about the cost to the RSPCA in bringing the case. The Commissioner does not consider this is environmental information as it does not relate to the state of the

elements or any measure affecting or likely to affect the elements or factors under regulations 2(a) or (b), or is a measure under 2(c) of the EIR.

14. The Commissioner will therefore consider whether the MoJ applied sections 44 and 40(2) appropriately to the request of 10 May 2013. He will also consider the length of time taken by the MoJ to deal with the request.
15. The Commissioner also notes that there is a paragraph 20 in the response, which has not been considered by the MoJ. He considers this should be considered under section 40(2) as it is information provided by the judge about himself.

Reasons for decision

16. The MoJ explained that it was applying section 44(1)(a) to paragraphs 1-5 and 10-16 of the withheld information by virtue of section 139 of the Constitutional Reform Act 2005 (CRA), which provides a statutory bar on disclosure. It also explained that it was applying section 40(2) to paragraphs 6-9 and 17-19 of the withheld information.

Section 44(1)(a)

17. Section 44 (1)(a) of FOIA provides that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment."

18. Section 44 is an absolute exemption and is therefore not subject to a public interest test.
19. The MoJ explained that in this case, section 139 of the CRA prohibits disclosure of the requested information, subject to certain circumstances or "gateways".
20. Section 139 establishes a duty of confidentiality on those who have responsibilities in relation to matters of conduct and discipline involving judicial office holders, where information is provided for the purposes of a relevant provision of the CRA. The Commissioner is satisfied that the information in question was provided by the judge as part of the investigation being carried out by the JCIO as part of its investigation into complaints about him.

21. Under section 139(3), information is confidential if it relates to an identified or identifiable individual (a "subject") – in this case, the information relates to the judge in question.
22. Section 139(4) sets out gateways under which a public authority may disclose confidential information, despite the general prohibition on the release of information under section 139, if:
 - "(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));
 - (b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;*
 - (c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c. 54) or a decision whether to exercise them;*
 - (d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;*
 - (e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description."*
23. The Commissioner notes that the gateways to disclosure under the CRA do not impose a duty on the MoJ to disclose information. Therefore, the Commissioner considers that the MoJ is not under a duty to consider whether a gateway applies. However, the Commissioner considered that the gateway under section 139(a) might apply.
24. The Commissioner asked the MoJ whether it had asked for the judge's consent to disclose the information withheld under section 44. The MoJ explained that it had not sought the judge's consent as he had not received any disciplinary sanction for his choice of wording during the trial. It also pointed out that the outcome of its investigation was published on its website.¹
25. The Commissioner considered the MoJ's explanation about not asking the judge for his consent to disclosure and the fact that the outcome of the investigation is already in the public domain. He is satisfied that

¹ <http://judicialconduct.judiciary.gov.uk/disciplinary-statements-2013.htm>

none of the conditions for disclosure in section 139 apply in this case. The Commissioner is therefore satisfied that the requested information is exempt from disclosure under section 44(1)(a) by virtue of section 139 CRA.

Section 40(2)

26. Section 40(2) of the FOIA provides:

"Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

27. Section 40(2) of FOIA is an absolute exemption which is therefore not subject to a public interest test. It relates to the personal information of anybody other than the requester. Information is exempt information if disclosure of information falling within the definition of personal data would breach any of the data protection principles. Personal data is defined by the Data Protection Act 1998 (DPA) section 1(1) as:

"data which relates to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

28. The Commissioner will now consider whether the withheld information under section 40(2) is the personal data of a third party.

Is the requested information personal data?

29. The two main elements of personal data as defined in section 1(1) of the DPA are that the information must relate to a living individual and that the individual must be identifiable. Information will relate to a living individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.

30. In this case, the information consists of the judge's response to complaints about him. The Commissioner notes that the withheld information also refers to other individuals. However, given that the information has been provided by the judge in response to complaints made about him, the Commissioner is satisfied that he is the main focus of the response and that the information is his personal information in its entirety, as set out in section 1(1) of the DPA.

Will disclosure breach one of the data protection principles?

31. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the DPA. The MoJ explained that it considered that disclosure would breach the fair processing principle. This is the first data protection principle which provides:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met."

Would it be fair to disclose the requested information?

32. Regarding fairness, the Commissioner recognises the importance of considering whether the data subject has consented to disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain. The Commissioner will also consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

33. In his guidance '*Personal information (section 40 and regulation 13)*' the Commissioner notes that with regard to consent, data subjects must give their consent freely to the specific disclosure, with the understanding that their personal data will be disclosed to the requester and to the world at large.
34. The Commissioner asked the MoJ whether it had asked the judge concerned whether he would consent to disclosure of his personal information. The MoJ explained that it had not sought the judge's consent as the judge had not received any disciplinary sanction for his choice of wording during the trial. It also pointed out that the outcome of its investigation was published on its website.

Has the data subject actively put some or all of the requested information into the public domain?

35. Where the data subject themselves have put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
36. In this case the Commissioner has not seen any evidence to suggest that the judge has actively placed his response to the complaints against him into the public domain.

Reasonable expectations

37. When considering compliance with the first data protection principle, the Commissioner considers that it is necessary to consider what the reasonable expectations of the judge would be in relation to how his information would be used and to whom it may be disclosed.
38. The MoJ explained that the judge would hold a reasonable expectation that it would hold the information he provided in confidence. The judge provided the information as part of an investigation into complaints about comments he made during a trial. The MoJ also pointed out that the outcome of the investigation was published on its website.
39. Taking the above into account, the Commissioner is satisfied that the judge in question would have a reasonable expectation that his response would not be released into the public domain. The Commissioner will now consider whether disclosure would cause any unnecessary damage or distress to the data subject.
40. The Commissioner notes that disclosure under the FOIA is disclosure to the world at large. The Commissioner also notes that, as part of its investigation into complaints about the judiciary, a person under investigation has the right to respond to complaints made. Furthermore, the Commissioner notes that the outcome of the investigation is available on the MoJ's website. The Commissioner therefore considers that disclosure of the judge's response would be an unwarranted intrusion into a confidential issue.
41. Taking the above into account, the Commissioner is satisfied that disclosure in this case would cause distress to the judge.

Balancing the rights and freedoms of the data subject with legitimate interests

42. Despite the reasonable expectations of individuals and that damage or distress could result from disclosure, it may still be fair to disclose personal data if it can be argued that there is a compelling public interest in disclosure, that is, if there are any legitimate interests in disclosure.

43. Legitimate interests can include interests such as accountability and transparency as well as specific interests. When balancing legitimate interests with the rights of the data subject, the Commissioner's view is that a proportionate approach should be taken. The Commissioner notes that there were no sanctions against the judge in this case. He also notes that the MoJ has published the outcome of the investigation into the comments made by the judge, on its website.
44. The Commissioner therefore considers that even if the complainant's interest in wanting the judge's response to complaints made about him was legitimate, this private interest does not equate to a legitimate public interest. He further considers that, as the outcome of the MoJ's investigation is published on its website, any public interest has already been met.

Conclusion

45. As the Commissioner has concluded that it would be unfair to the judge in question to disclose his response and that to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.

Section 17

46. Section 17(1) of the FOIA states that if a public authority is going to apply exemptions it must do so within the time limit in section 10(1) ie 20 working days after receipt of a request. In order for the MoJ to have complied with this, it should have responded to the complainant by 7 June 2013. The Commissioner notes that the MoJ did not respond until 18 June 2013 and has therefore breached section 17(1).

Right of appeal

47. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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