

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2015

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

Decision (including any steps ordered)

1. The complainant requested details about the number of medical members of the Mental Health Review Tribunal who had applied to extend their appointment.
2. The Ministry of Justice (MoJ) provided exact figures where the numbers exceeded five but refused to provide figures less than five on the basis that individuals could be identified and section 40(2) was therefore engaged. The Commissioner's decision is that MoJ has correctly applied section 40(2) to withhold figures less than five.
3. He requires no steps to be taken as a result of this decision.

Background

4. An individual admitted ('detained') as a patient in a psychiatric hospital ('sectioned') who wants to be discharged can apply to the Mental Health Review Tribunal (MHRT)¹.

¹ <https://www.gov.uk/mental-health-tribunal/overview>

5. There are approximately one thousand fee paid judicial office holders who sit in the mental health jurisdiction of which about one third are judges, one third are medical members and one third are specialist lay members.
6. The retirement age for judicial office holders, set out on The Memorandum on Conditions of Appointment and Terms of Service, is the day on which they reach 70. However, where the Lord Chief Justice, Senior President or other appropriate person considers it in the public interest, they may, with the concurrence of the Lord Chancellor, extend or re-extend the service for up to one year at a time until the age of 75.

Request and response

7. On 22 August 2014 the complainant wrote to MoJ and requested information in the following terms:

"I would like to have the following information under the freedom of information act. Public bodies have to be open & transparent about their appointments and reappointments.

 1. *How many MHRT medical members applied for extensions & how many were granted this past 12 months. A break down by gender, ethnicity, age, length of service*
 2. *How many were declined and again a similar breakdown to above*
 3. *In particular this batch in which I was declined – how many were granted/declined and a similar breakdown".*
8. MoJ responded on 17 September 2014. MoJ confirmed it held the requested information but refused to provide it citing section 40(2) of FOIA (personal information). MoJ explained that, if released, the information could lead to identification of the individuals concerned.
9. The complainant accepted that, in the circumstances, point (3) of the request could not be complied with in accordance with section 40(2). However, she disputed MoJ's refusal to disclose information within the scope of points (1) and (2) of the request.
10. Following an internal review MoJ wrote to the complainant on 17 November 2014. MoJ revised its position with respect to one aspect of the request: it disclosed the number of MHRT medical member applications for extension in the 12 month period covered by the request, broken down by gender.

11. MoJ maintained its original position in respect of the remainder of the requested information.

Scope of the case

12. The complainant provided the Commissioner with the relevant documentation on 6 December 2014 to complain about the way her request for information had been handled.
13. The complainant told the Commissioner that she accepted that information relating to point (3) of the request risked identification as it may have been less than five. However, she disputed that information relevant to points (1) and (2) could not be provided.
14. The complainant made submissions in relation to her interest in this information being disclosed, including asking the Commissioner to comment on how FOIA relates to other legislation.
15. However, under section 50 of FOIA, the Commissioner's role is simply to decide whether, in any specified request, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA.
16. The Commissioner is satisfied that the complainant is not requesting their own information in this case. In any event, had that been the case, such a request would have been properly addressed as a subject access request under the Data Protection Act (DPA).
17. The complainant told the Commissioner that she considered the response to her request was unacceptable:

"as Public Bodies have to be open and transparent in their processes and procedures".
18. While the Commissioner accepts that the complainant may have specific personal reasons for wanting access to the requested information he has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. He must therefore consider the wider public interest issues and the fairness to the data subjects involved when deciding whether or not the information requested is suitable for disclosure.
19. In light of the above, the Commissioner considers the scope of his investigation to be whether MoJ was entitled to apply section 40(2) to the third party information it withheld that falls within the scope of points (1) and (2) of the request.

20. That information comprises the number of MHRT medical member applications for extension granted and declined, broken down by ethnicity, age and length of service.

Reasons for decision

Section 40 personal information

21. MoJ has argued that section 40(2) applies as providing any information where the figures are less than five could lead to the identification of individuals.
22. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

Is the information personal data?

23. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
24. Section 1 of the DPA defines personal data as:

"...data which relate 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 is 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."

25. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. In this case, MoJ told the complainant that, in circumstances where a request is made for information and the total figure amounts to five people or fewer, it must consider whether this could lead to the identification of individuals and whether disclosure of the information would be in breach of its statutory obligations under the DPA.

27. In correspondence with the Commissioner during the course of his investigation, MoJ confirmed:

"All the withheld information was redacted under Section 40(2) of the FOIA, since we are satisfied that medical members who applied for an extension can be identified from the data".

28. The Commissioner has considered the information and the number of individuals involved and has concluded that if MoJ were to disclose the exact number in each category, particularly if the numbers for any were one, it could be possible to identify the individuals concerned.
29. The Commissioner considers that the chances of any member of the public being able to cross-reference this information to identify specific individuals is not high but given the low numbers involved there is a risk that specific individuals could be identified by a person with knowledge of MHRT matters. For example, it is possible that a MHRT member who applied for extension, or other MHRT applicants may potentially use any information disclosed to identify other individuals' rejection status, length of service and age. Therefore, on the balance of probabilities, the Commissioner accepts the information is personal data.

Is the information sensitive personal data?

30. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

"(a) the racial or ethnic origin of the data subject".

31. With respect to that part of the complainant's request relating to a breakdown by ethnicity of the medical members who applied for an extension, MoJ said:

"We consider the ethnicity of a subject to be sensitive personal information as defined in Section 2(a) of the DPA".

32. Having viewed the withheld information, the Commissioner is satisfied that it includes details of ethnic origin - information that satisfies the definition of sensitive personal data under section 2(a).

Would disclosure breach one of the data protection principles?

33. Having accepted that the information comprises the personal data, and in some cases the sensitive personal data, of a third party, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

34. MoJ told the complainant that it considered release of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

35. The first principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

"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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

36. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

37. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

38. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.

39. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Reasonable expectations

Possible consequences of disclosure

40. In order to reach a view on whether the disclosure of this information would be fair, the Commissioner has placed specific emphasis on the nature of the information itself. The requested information, if disclosed, would reveal information about individuals who applied to extend their appointment as a medical member of the MHRT and the outcome of that application. The Commissioner does not accept that releasing this information would be fair and considers it may cause distress to the individuals involved.
41. Nor does he consider that a schedule 3 condition of the DPA is met to allow the fair processing of the sensitive personal data within the scope of the request.
42. The individuals who could be identified are, or were, MHRT members who would not have any expectation of this information being disclosed. These individuals would not have expected that information about their age, length of service or ethnicity would be disclosed to a third party as a result of an application to extend their membership of the Tribunal. The Commissioner considers there is likely to be an implied level of confidentiality in the process to request to extend such an appointment and therefore there would be no expectation of disclosure.
43. The Commissioner recognises that there is a legitimate public interest in the release of information which increases transparency and accountability about the way in which public authorities operate, particularly with respect to judicial office holders. In that respect he notes that MoJ has disclosed the total number of members applying for extension, broken down by gender.
44. The Commissioner does not consider that disclosure of the information broken down any further so as to potentially identify individuals would provide greater understanding and it would prejudice the rights and freedoms of those individuals. The Commissioner therefore accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information.
45. The Commissioner has concluded that disclosure of this information would be unfair and in breach of the first data protection principle. As such section 40(2) is engaged and the further information relating to the exact figures should be withheld.

Right of appeal

46. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

47. 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.
48. 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

Rachael Cragg
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