

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2015

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

Decision (including any steps ordered)

1. The complainant requested information about a named district judge. The Ministry of Justice (the 'MOJ') refused to confirm or deny whether it held the requested information, citing sections 32(3), court records, section 40(5), personal information and 44(2), prohibitions on disclosure.
2. The Commissioner's decision is that the MOJ has properly relied on section 40(5) to refuse this request. As he has found section 40(5) to be engaged, he has not considered the MOJ's reliance on the other exemptions. He does not require the public authority to take any steps to ensure compliance with the legislation.

Background

3. The complainant submitted her request to the Judicial Conduct and Investigations Office (the 'JCIO') which falls under the MOJ's remit. The MOJ explained that the JCIO is responsible for investigating complaints into judicial conduct. Its work is highly sensitive and is governed by section 139 of the Constitutional Reform Act 2005 ('CRA'). Part 4 of the CRA relates to the functions of the investigation of judicial conduct and discipline.
4. The MOJ advised that information on judicial conduct is strictly controlled, and that investigations are detailed and complainants are notified of the outcome of the investigation into their complaints. The MOJ said that these investigation letters have been subject to a number of FOIA requests. Where the Lord Chancellor and Lord Chief Justice

agree that a Judicial Office holder's conduct requires sanctions or disciplinary action, these are then published on the Judicial Office website by way of a press notice. In all other instances the outcomes of judicial conduct investigations are confidential by virtue of the CRA.

5. The complainant submitted a further request on this subject on 5 August 2015, which is the subject of decision notice *FS50597828* and raised these questions again as part of her internal review submission in that case.
6. Although the MOJ cited section 32(2) in its response and internal review outcome, it has confirmed to the Commissioner that it had intended to rely on the 'neither confirm nor deny' provision in section 32(3) of FOIA.

Request and response

7. On 15 June 2015 the complainant wrote to the MOJ and requested information in the following terms:

"Please could you clarify whether DJ [name redacted] is in fact being investigated by the JCIO.

How many complaints have been raised and brought to the attention of the JCIO about him since 2008 to date.

How many were related to the Mental Capacity Act and how many were related to something else, please categorise.

How many of those were upheld, upheld in part, not upheld."

8. The MOJ responded on 6 July 2015. It refused to confirm or deny whether the requested information was held, citing sections 32(3), 40(5) and 44(2) of FOIA.
9. Following an internal review the MOJ wrote to the complainant on 3 August 2015. It maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 11 August 2015 to complain about the way her request for information had been handled.
11. The Commissioner has considered whether the MOJ was entitled to rely on the 'neither confirm nor deny' provision in sections 32, 40 and 44 in relation to this request.

Reasons for decision

Section 40(5) neither confirm nor deny in relation to personal information

12. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
- (a) the duty to inform the applicant whether or not requested information is held and, if so,
 - (b) the duty to communicate that information to the applicant.
13. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').
14. In this case, the MOJ has not specified which limb of section 40(5) applies; however, as the request is for information about a named individual other than the complainant, the Commissioner considers section 40(5)(b)(i) applies.
15. The MOJ argued that confirming whether or not it holds the requested information would breach the data protection rights of the individual named in the request, as it would reveal under FOIA whether he had been subject to an investigation into his conduct. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
16. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

17. The definition of personal data is given in section 1(1) of the DPA:
- "personal data' means data which relate to a living individual who can be identified:*
- (a) from those data, or*

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

18. Following its internal review the MOJ told the complainant:

“I conclude that section 40(5) was therefore applied correctly to your request as confirmation on whether this type of information is held or not about a specific individual would itself be a release of information about an individual and therefore the JCIO would be in breach of the Data Protection Principle that information must be processed fairly and lawfully.”

19. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual.

20. The Commissioner considers that to comply with section 1(1)(a) of the FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the named individual, which in turn would constitute disclosure of information that would relate to him.

21. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

Would confirmation or denial breach one of the data protection principles?

22. In the case under consideration here, the MOJ told the Commissioner:

“The Department contends that, confirmation that the information is, or is not held would be in breach of principles 1 and 2 of the DPA as it would be actively placing information about Judge [name redacted] conduct in the public domain.”

23. When considering the first principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.

24. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.

25. When considering this it is important to note that when a request is received under the FOIA, a public authority must consider the request as if it has been received from any member of the public; it is not able to

take into account any private or personal reasons which the requester may have for requesting the information. Nor can the Council take into account any prior knowledge that the requestor has about the issues that lie behind the request. Further to this, disclosures under the FOIA are intended to be global in nature and so the Council must consider a disclosure to the whole world rather than to a specific requester.

Reasonable expectations

26. The MOJ stated that an expectation of confidentiality would be paramount given the regulations set out in the CRA. The JCIO's correspondence clearly sets out to a member of the Judiciary how their personal data would be processed in the course of an investigation. It said there is no expectation that personal data collected in the course of an investigation would be published except for the exceptional process by which disciplinary measures are published (see 'Background' section of this notice).
27. In those instances, disclosure of personal data on the JCIO webpage would be carefully managed and the Judicial Office holder would be informed in advance. The MOJ said that disclosure under the FOIA would breach the fairness principles on the basis that the only anticipated disclosure a Judicial Office holder would have would be under the sanctions process.
28. In this case, the MOJ also argued that disclosure of information by confirmation that the information is held would also breach the lawfulness principle as the requested information is covered by the CRA and a statutory bar which would engage section 44(2).
29. The Commissioner is satisfied that the data subject would reasonably expect that his personal data, if held, would not be disclosed.

Consequences of disclosure

30. Although the MOJ did not submit any specific arguments in relation to the consequences of disclosure, the Commissioner considers that such a disclosure would cause the named individual unwarranted distress, particularly as the information, if held, would reveal that the named judge had been investigated following a complaint of misconduct (even though he was found to be 'not guilty', given that no sanctions appear in his name on the JCIO website).

General principles of accountability, transparency and legitimate public interest in disclosure

31. The Commissioner appreciates that there is a general public interest in accountability and transparency, and that the public is entitled to be

informed about Judicial Office holders who are found guilty of misconduct. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held. Further, in this case, the process of managing Judicial Office holders' conduct is governed by the CRA. If sanctions are issued against a Judicial Office holder they will be published on the JCIO website, which meets the public interest in judges who are found to be guilty of misconduct.

32. The Commissioner is aware that the complainant may have a personal interest in the request. However, with respect to the legitimate interest in disclosure, the interest must be a public interest, not the private interests of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

Conclusion

33. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
34. With due regard to the reasonable expectations of the data subject, and the potential impact on him if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
35. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. He considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MOJ was therefore not obliged to confirm or deny whether it held the information requested by the complainant.
36. The MOJ also argued that disclosure of the requested information would breach principle two of the DPA. However, as the Commissioner is satisfied that the first principle would be breached he has not found it necessary to consider this further.
37. As the Commissioner has found section 40(5)(b)(i) is engaged, he has not needed to consider the MOJ's reliance on sections 32(3) or 44(2).

Right of appeal

38. 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

39. 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.
40. 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
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