

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to the Gender Recognition Panel (GRP) including the list of names of the people who sit, or have sat, on that Panel.
2. The Ministry of Justice (MoJ) confirmed it holds some of the requested information but refused to provide it citing sections 32(1)(c) (court records) and 40(2) (personal information) of the FOIA.
3. The Commissioner has investigated the MoJ's application of section 40(2). His decision is that the MoJ correctly applied section 40(2) to the majority of the information withheld by virtue of that exemption. However, a small part of the withheld information is not exempt under section 40(2).
4. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose a small part of the withheld information that is set out in the Confidential Annex to this Notice.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. Under the laws of the United Kingdom, individuals are considered by the State to be of the gender – either male or female – that is registered on their birth certificates. The Gender Recognition Act 2004 enables transsexual people to apply to the Gender Recognition Panel to receive a Gender Recognition Certificate (GRC).
7. The Gender Recognition Panel (GRP or Panel) considers all applications for a GRC. The Panel is made up of legal and medical members who assess whether the legal and medical criteria for legal recognition are met.¹

Request and response

8. On 12 September 2015, the complainant made the following request for information under the FOIA:

"Please can you provide us with the decision notices on the approximately 200 Gender Recognition Certificate applications that have been declined since April 2005 up to the present. If the cost of retrieving all of the notices would exceed the allowed cost, please provide as many as possible starting with the most recent.

....

In addition to the above request, we would like to make the following separate requests:

2) Please provide a copy of any and all training materials and other guidance for Gender Recognition Panel members on how to assess applications. There is no need to include President's Guidance No 1.

3) Please provide the minutes of any meetings (such as staff briefings) that have been held for Gender Recognition Panel members and/or admin staff. This doesn't include user group meetings.

4) Please provide a list of persons who sit or have sat on the

¹ <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t455-eng-2016.04.01.pdf>

Gender Recognition Panel; the date they joined the GRP; where applicable the date they left the GRP; whether they are legal or medical members; whether they are or have been the president, deputy president or senior medical member (or similar); and their corresponding identification codes (eg grplm1001, grpmm1002)".

9. The MoJ responded on 10 November 2015. It denied holding some of the requested information – the information within the scope of parts (2) and (3) of the request - but confirmed it held the remainder. However, it refused to provide that information citing the following exemptions as its basis for doing so:
 - section 32(1)(c) court records
 - section 40(2) personal information.
10. The complainant requested an internal review of MoJ's handling of part (4) of the request. MoJ sent the complainant the outcome of its internal review on 28 January 2016. It upheld its original position: that section 40(2) of the FOIA applies to the information within the scope of that part of the request.

Scope of the case

11. The complainant contacted the Commissioner on 28 January 2016 to complain about the way her request for information had been handled. She disputes the MoJ's application of section 40(2) to the information in the scope of part (4) of the request.
12. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the information withheld by virtue of that exemption. That information relates to members who sit on, or have sat on, the GRP.
13. For the purposes of this decision notice, the Commissioner will refer to those members who had retired from, or left, the panel, at the time of the request as 'previous panel members'. Similarly, he will refer to those that remained on the panel at the time of the request as 'current panel members'.

Reasons for decision

Section 40 personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.

15. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

18. Section 1 of the DPA defines personal data as:

" ...data which relate to a living individual who can be identified

a) from these 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."

19. 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.
20. Having viewed the withheld information, the Commissioner is satisfied that most, but not all of the withheld information, comprises personal data.
21. In respect of the information that does not comprise personal data, the Commissioner finds that section 40(2) does not apply. He orders disclosure of that information. Details of the information to be disclosed are contained in a confidential annex to this decision notice which will be provided to the MoJ only.

22. The Commissioner agrees that, given the nature of the information, the remaining information withheld by virtue of section 40(2) constitutes information that falls within the definition of 'personal data'. In other words, he is satisfied that it relates to living individuals who may be identified from that data and that it constitutes their personal data.
23. He has reached that conclusion on the basis that the focus of the information is the panel members and that the information is clearly linked to those individuals because it comprises their names and relates to their membership of the GRP including whether they are legal or medical members.
24. With respect to that information, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
25. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.
26. The Commissioner agrees that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

27. The first data protection principle 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."

28. 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 one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

29. 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.
30. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the data subject(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(s) concerned); and
- the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

31. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to the employee in their professional role or to them as individuals and the purpose for which they provided their personal data.

32. MoJ told the complainant:

"Since the inception of the Gender Recognition Panel and at the point of your request, panel members have been identified by unique identification numbers on decision notices issued by the GRP....Full names of the panel members were not disclosed on decision notices.....".

33. MoJ told the complainant that it considered that the use of unique identification numbers would give an expectation to the panel members that there would be a degree of confidentiality in relation to disclosure of their personal details.

34. Similarly, in correspondence with the Commissioner, MoJ told him that when the panel was set up in 2005:

" ... the panel operated by way of numbers to identify the different legal members (GRPLM1001 onwards) and medical members (GRPMM1001 onwards)".

35. Regarding its policy of disclosing the names of panel members, the MoJ confirmed that when they were appointed in 2005:

"...members were told that their names would not be disclosed. This was in line with the then policy guidance".

36. The Commissioner's guidance '*Requests for personal data about public authority employees*² states:

"... where an authority has a policy on the disclosure of personal information and has publicised this to its staff, this will also affect their expectations but the policy alone cannot determine whether the disclosure would be fair in any particular case".

37. The MoJ advised the complainant that:

"With effect from 4 January 2016 the President [of the Gender Recognition Panel] has directed legal members and medical members of the GRP shall include their name and where appropriate their title on all decision notices instead of their unique identification numbers. This direction applies to all decisions made by a panel of the GRP on or after the 4 January 2016 and does not have any effect upon the decision of the GRP made before the 4 January 2016".

38. In correspondence with the Commissioner the MoJ confirmed that the direction was not retrospective.
39. The Commissioner is satisfied that, at the time of the request, the panel members would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

Consequences of disclosure

40. As to the consequences of disclosure upon the data subjects, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
41. The Commissioner considers that disclosure in this case has the potential to cause damage and distress, particularly as he has found that disclosure of the information would not have been within the reasonable expectations of the panel members.

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

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

The legitimate public interest

42. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public.
43. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant the interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

44. Arguing in favour of disclosure, the complainant told the MoJ:

"The Panel are members of the judiciary and are making significant decisions about people's legal gender. We believe that this should carry a very high level of accountability".

45. With respect to the work of the Panel and its relevance to the public interest in disclosure in this case, the complainant told the MoJ:

"Their work involves interpreting the sometimes vague requirements of the Gender Recognition Act 2004 and as such they are setting some of the criteria for gender recognition in the UK. This means there is significant public interest in who is making these decisions....

Furthermore, those who make applications for gender recognition have a significant interest in knowing the identity of those who are making decisions about their legal gender, as without this information neither the independence nor the impartiality of the panel is guaranteed, since the panel could be made up of people with anti-transgender views or even people who are related to or otherwise known by the applicant".

46. When assessing fairness, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject, including their right to privacy.
47. The Commissioner acknowledges that the information at issue is of particular interest to the complainant. However he has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subjects and support further disclosure.

Conclusion - the previous panel members

48. Dealing first with the previous panel members, the Commissioner is satisfied that those individuals would have no reasonable expectation that the information in question would be disclosed to the world at large and that the loss of privacy could cause unwarranted distress. He is also satisfied that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subjects as a result of disclosure of the requested information.
49. Therefore, disclosure would be unfair and would breach the first data protection principle.
50. As the Commissioner is satisfied that disclosure would breach the first data protection principle he upholds the MoJ's application of the exemption provided by section 40(2) of the FOIA.
51. As the Commissioner has concluded that the disclosure of this information would be unfair, and therefore be in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Conclusion - the current panel members

52. Dealing next with the current members, the Commissioner acknowledges that, from 4 January 2016, members of the GRP are directed to include their name and where appropriate their title on all decision notices instead of their unique identification numbers. The Commissioner accepts that those details fall within the scope of the requested information in this case.
53. However, the Commissioner is satisfied that, at the time of the request, the current panel members would have a reasonable expectation that the requested information would not be placed in the public domain by disclosure under the FOIA.
54. He is also satisfied that the loss of privacy could cause unwarranted distress and that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subjects as a result of disclosure.
55. Taking all of the above into account, the Commissioner is satisfied that it would be unfair to the current panel members to release the requested information under the FOIA.

56. The Commissioner is therefore satisfied that the MoJ was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).
57. As the Commissioner has concluded that the disclosure of this information would be unfair, and therefore be in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

58. 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

59. 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.
60. 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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