

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2018

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

Decision (including any steps ordered)

1. The complainant made a request for an Office of Judicial Complaints ('OJC') investigation statement in relation to a named Judge. The Ministry of Justice (the 'MOJ') would neither confirm nor deny ('NCND') whether it held the requested information, citing the NCND provisions in sections 44(2) – prohibitions on disclosure - and 40(5) – personal information - of the FOIA.
2. The Commissioner's decision is that the MOJ has correctly applied section 44 on the basis that disclosure of the information requested was prohibited by section 139 of the Constitutional Reform Act 2005. As she has found this exemption to be engaged, she has not found it necessary to consider the MOJ's reliance on section 40(5). However, as the MOJ failed to issue its refusal notice within the requisite 20 working day time limit, it has breached section 17(1) of the FOIA.
3. The Commissioner does not require the MOJ to take any steps as a result of this notice.

Request and response

4. On 27 March 2018, the complainant wrote to the MOJ and requested information in the following terms:

"There may be some misunderstanding on your part regarding my enquiry. My enquiry followed my having seen a publication by the Office Of Judicial complaints (OJC) on the internet "First Tier Tribunal Judge [name redacted], Immigration & Asylum Chamber

-OJC Investigation Statement ...-1813". This was released on 22 March 2013 at approx 9.13am. I reproduce it to avoid any doubt as to its release into the public domain. As the full details were no longer apparent, I enquired of you - the JCIO having assumed the responsibilities of the OJC on 1 October 2013. Your publication policy states: "A press statement will normally be placed on the Judicial Conduct Investigation Office's website in cases where a formal disciplinary sanction has been imposed upon a judicial office holder (including magistrates) following a finding of misconduct." Therefore, I infer that Judge [name redacted] had received a formal disciplinary sanction following a finding of misconduct. The only details I seek are in relation to the press release issued by the OJC on 22.3.13. This was made apparent in the public domain. I am not seeking any "confidential information." As regards your reference to s.139 of the Constitutional Reform Act 2005 (CRA) this is an incorrect [sic] reference but, in any event, does not apply because of s.139(7) CRA that states " This section does not prevent the disclosure of information which is already, or has previously been, available to the public..." I believe the correct section of the CRA is s.132, since it relates to "judicial appointments and discipline." The enquiry here is one in respect of "judicial discipline." Similarly, s.132 (7) is an exception to confidentiality namely: 'This section does not prevent the disclosure of information which is already, or has previously been, available to the public...' Please would you provide me with a copy of the full press-OJC Investigation Statement -1813, 22 March 2013, by return."

5. The MOJ responded on 30 May 2018. It refused to confirm or deny whether the requested information was held, citing the NCND provisions in sections 44(2) – prohibitions on disclosure - and 40(5) – personal information - of the FOIA. It advised that as these exemptions are absolute it is not required to conduct a public interest test.
6. The MOJ also explained that although disciplinary statements for judges are publicly available via the Judicial Conduct Investigations Office (the 'JCIO'¹), this is only for a time limited period. The MOJ said that once the joint decision has been taken to remove such statements from the JCIO website by the Lord Chief Justice and Lord Chancellor in line with

¹ <https://judicialconduct.judiciary.gov.uk/disciplinary-statements/2018/>

the requisite policy², the disciplinary statements, although held, are no longer in the public domain and are “confidential”.

7. The complainant requested an internal review on 29 June 2018, setting out various arguments which, in her view, warranted disclosure of the information, if held. As part of her appeal grounds, she contended that neither the JCIO’s publication policy nor the CRA 2005 specify that such statements, once removed from the website, are confidential.
8. The MOJ provided its internal review on 25 July 2018. It maintained its original position but highlighted the following amendment:

“I am satisfied that the response was correct to neither confirm nor deny whether the MOJ holds the information requested under sections 44(2) and 40(5) of the FOIA. If the requested information were held, I consider that it would be exempt from disclosure under the sections of the FOIA cited, even if the requested information had at one point been available in the public domain before the date of your request. Regarding section 40(5), rather than refer to the Data Protection Act 1998, the response should have referred to Article 5(1) of the General Data Protection Regulation and section 34(1) of the Data Protection Act 2018.”

Scope of the case

9. The complainant contacted the Commissioner on 4 August 2018 to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider the delay with the response to her request.
10. The Commissioner has also considered whether the MOJ is entitled to rely on the specified NCND provisions to refuse this request.

Reasons for decision

Section 44 - prohibitions on disclosure

11. Section 44 of the FOIA provides that:
-

² <https://judicialconduct.judiciary.gov.uk/disciplinary-statements/publication-policy/>

*"(1) 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,
(b) is incompatible with any Community obligation, or
(c) would constitute or be punishable as a contempt of court."*

12. Section 44(2) of the FOIA provides that:

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)".

13. Section 44 is a class based exemption which means if the information conforms to the class described in this section, the exemption is engaged. In this case, the MOJ considers that the confirmation or denial that would have to be given falls within paragraph (a) of section 44, subsection (1).

14. It told the complainant:

"We are not obliged to confirm or deny whether we hold the information you have requested under section 44(2) of the FOIA, because such disclosure is prohibited under another enactment.

In this instance, section 139 of the Constitutional Reform Act 2005 ('CRA')³ 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 under, or for the purposes of, a relevant provision of the Act. Information which is obtained for the purposes of a function under Part 4 of the CRA⁴ is confidential by virtue of section 139 of that Act.

The confirmation or denial of whether the MOJ holds the information you have requested would release information that would be in contravention of the CRA and, as such, section 44(2) of the FOIA is engaged.

The fact that section 44(2) of the FOIA has been cited should not be taken as an indication that the information you have

³ <http://www.legislation.gov.uk/ukpga/2005/4/contents>

⁴ <https://www.legislation.gov.uk/ukpga/2005/4/section/139>

requested is or is not held by the department. This is an absolute exemption and does not require a public interest test."

15. During the course of the Commissioner's investigation, in support of its citing of section 44(2) of the FOIA, the MOJ maintained that section 139 of the CRA prohibits it from confirming or denying whether it holds the requested information. It referenced the relevant parts of section 139 are as set out below:

"139 Confidentiality

(1) A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority.

...

(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision."

16. The MOJ explained that the JCIO is therefore prevented from disclosing information about conduct cases unless agreed by the Lord Chief Justice and the Lord Chancellor.
17. As an operating policy, the Lord Chief Justice and the Lord Chancellor have an agreed publication policy for disciplinary statements, also referred to as investigation statements. This can be found in the 'publication policy' (see footnote 2), detailed on the JCIO's website which provides as follows:

"A statement will normally be published when a disciplinary sanction has been issued to a judicial office holder following a finding of misconduct.

Statements about sanctions below removal from office will be deleted after one year.

Statements about removal from office will be deleted after five years.

The Lord Chief Justice and Lord Chancellor may decide jointly to: issue press statements in any case; decline to issue a statement, or delete statements, based on the individual circumstances of a case."

18. The MOJ has explained that the disciplinary statement (the text of which is agreed by the Lord Chief Justice and the Lord Chancellor) includes the judicial office holder's full name and judicial title, a general statement about the conduct and the disciplinary sanction given and, thus, contains personal information. It also said that the rationale for deleting the disciplinary statement from the JCIO's website, after a certain period has lapsed, is in fairness to the data protection rights of the judicial office holder.
19. The MOJ said that once a disciplinary statement is deleted from the JCIO website in accordance with the publication policy, the information that was contained in it reverts to being confidential. It stated that disclosing any information contained in the disciplinary statement would be prohibited under section 139(1) of the CRA, unless specifically agreed otherwise by the Lord Chief Justice and the Lord Chancellor.
20. From this, the Commissioner understands that once a disciplinary statement has expired and is removed from the JCIO's website, it then requires the joint agreement of the Lord Chief Justice and the Lord Chancellor (under section 139(1) of the CRA) to be further disclosed and for confirmation or denial of its existence.
21. The Commissioner has also considered the complainant's arguments in favour of disclosure. She is mindful of the complainant's view that the requested information, if held, may previously have been in the public domain and that it is therefore, no longer "confidential" and should be disclosed.
22. The Commissioner is satisfied that when a disciplinary sanction has been issued to a judicial office holder following a finding of misconduct, an investigation statement will normally be published. She accepts that judicial disciplinary matters are placed in the public domain via the JCIO website, with the joint agreement of the Lord Chief Justice and the Lord Chancellor in line with its publication policy (see footnote 2). Once the requisite time period has expired (one or five years), and again with the joint agreement of the requisite personnel, the disciplinary statements are removed from the JCIO's website.
23. The Commissioner has published guidance on information in the public domain⁵. There is no simple rule about the effect of information in the public domain. In essence, the correct approach will always be to look at the effect the disclosure would have in light of the information already in

⁵ <https://ico.org.uk/media/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

the public domain. This will vary from case to case, depending on the exact content and context of the information.

24. Relevant information in the public domain might include the requested information itself, or some other information on the same subject, or similar information on a similar subject. Each will have a different effect.
25. A public authority might consider that the existence of relevant information in the public domain means the information should not or need not be disclosed. On the other hand, a requester could argue that this means it can and should be disclosed. The fact that relevant information can be found in the public domain does not automatically support either side.
26. Before considering the effect of any information already in the public domain, the first step is to decide whether that information was actually 'in the public domain' at the time of the request. This is a question of degree, and will depend on the circumstances.
27. For these purposes, information is in the public domain if it is realistically accessible to a member of the general public at the time of the request.
28. In particular, information is not necessarily in the public domain just because it is known to the requester. The question is still whether a hypothetical interested member of the public could access the information.
29. If a member of the public can no longer access the information at the time of the request, the FOI or EIR disclosure would, in practice, be revealing 'new' information over and above what is currently public knowledge.
30. The guidance states that public authorities should always consider the quality and content of the information in the public domain and compare it carefully with the withheld information to determine its relevance in the particular circumstances of the case.
31. In the case under consideration here, the Commissioner is mindful that the complainant could not locate the actual requested information at the time of the request.
32. From her own internet searches the Commissioner has determined that the quality and reliability of any potentially relevant information in the public domain on this subject is poor, that it does not appear to come from an official source and has not been placed there by the MOJ.
33. From the evidence available to her, the Commissioner is satisfied that the MOJ did not consent to, nor was it responsible for, any prior

disclosure of information which may or may not have been made on the subject, and therefore it was entitled to maintain a NCND response in its own right.

34. If any statement was published by the JCIO on its website, and subsequently removed in line with its policy on such matters, then this is not something the Commissioner can challenge as it does not fall within her remit. In the Commissioner's view, the statutory bar required in section 44(1)(a) appears to be in play and the necessary consent to publish details, if it did exist, is no longer in effect.
35. In the case under consideration here, the Commissioner finds that for the MOJ to confirm or deny whether it held the requested information would itself reveal information that, if it existed, would be considered exempt from disclosure on the basis of section 44(1)(a).
36. Accordingly, the MOJ was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA - by virtue of section 139 of the CRA - to refuse to confirm or deny whether the information requested was held.
37. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in section 44 then it is exempt from disclosure. There is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.
38. Having reached that conclusion, it has not been deemed necessary for the Commissioner to consider whether section 40(5) would also apply.

Section 17(1) – time for refusal of a request

39. Section 17(1) of the FOIA states:

*"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

40. The effect of section 17(1) is that if a public authority wishes to refuse any part of a request then it must inform the requester of this within 20 working days.
41. The Commissioner finds the MOJ breached section 17(1) by failing to issue its refusal notice within 20 working days of receipt of the request. However, as the response has been issued no steps are required.

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF