

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2022

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 appointment of court officers at a specific Crown Court in Exeter, and in particular relating to a named individual. The Ministry of Justice (MoJ) provided some information but refused to provide the requested information for questions 1 and 2 citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) of FOIA for the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 1 October 2021, the complainant wrote to the MoJ and requested information in the following terms:

"I wish to know the following information regarding the appointment of court officers for the purpose of "the appropriate authority" to determine costs applications for costs from Central Funds from Defendants in the Crown Court under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986 at Exeter Crown Court.

1. Has (name redacted), Case Progression Officer, Exeter Criminal Team at the Crown Court at Exeter been appointed by the Lord Chancellor or any of his predecessors as "the appropriate authority" to determine costs applications for costs from Central Funds from Defendants in the Crown Court at Exeter under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986?

2. Has (name redacted), Case Progression Officer, Exeter Criminal Team at the Crown Court at Exeter been appointed by any official at the Crown Court at Exeter as "the appropriate authority" to determine costs applications for costs from Central Funds from Defendants in the Crown Court at Exeter under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986?

3. Has HHJ Johnson, the Recorder of Exeter at the Crown Court at Exeter been appointed by the Lord Chancellor or any of his predecessors as "the appropriate authority" to determine costs applications for costs from Central Funds from Defendants in the Crown Court at Exeter under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986 or to give any directions in relation to the determination of such costs?

4. Has HHJ Rose, at the Crown Court at Exeter been appointed by the Lord Chancellor or any of his predecessors as "the appropriate authority" to determine costs applications for costs from Central Funds from Defendants in the Crown Court at Exeter under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986 or to give any directions in relation to the determination of such costs?"

5. On 27 October 2021, the MoJ responded and provided information for questions 3 and 4 but refused the request for information in questions 1

and 2 citing section 40(2) of FOIA to do so and provided a link to further information under section 16 of FOIA, advice and assistance.

6. On 19 November 2021, at internal review, the MoJ upheld its reliance on section 40(2) of FOIA to refuse to provide the specific requested information for questions 1 and 2, as it argued this would clearly identify individual members of staff who were not at a senior level.

Scope of the case

7. The complainant contacted the Commissioner on 26 November 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the MoJ has correctly applied section 40(2) of FOIA to the withheld information.

Reasons for decision

Section 1 – general right of access

9. Section 1(1) of FOIA states any person making a request is entitled to be told whether the information they have asked for is held and, if so, to have that information communicated to them, subject to the application of any exemptions that are appropriate.

Section 40(2) – personal information

10. Section 40(2) 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(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
13. 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 DP principles.

Is the withheld information personal data?

14. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
17. The complainant has provided a name of an individual they believe to be the staff member responsible for the administration of costs for the court in question, therefore, they clearly believe the named individual to be the responsible person in question.
18. The Commissioner considers that an individual can be indirectly or directly identifiable when information held by a public authority can be combined with other information either previously disclosed to an individual or in the public domain to identify the individual.
19. The public authority has confirmed that "the FOIA deems senior staff names to be disclosable; as the member of staff you refer to is not a senior member of staff, I am therefore satisfied that section 40(2) was correctly applied in accordance with the principles set out in Article 5(1) of the General Data Protection Regulation (GDPR) and section 34(1) of the Data Protection Act 2018." The Commissioner shares the view that non-senior or lower-level staff members details, are in general, not disclosable in a scenario such as in this case.
20. The Commissioner considers that a named individual under consideration in this case, clearly constitutes personal data.

21. The Commissioner also accepts that the specifically requested information about a named individual constitutes their personal data.
22. The Commissioner is mindful that the issue to be considered is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
23. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
24. In the circumstances of this case, the Commissioner accepts that the requested information, if disclosed, would clearly relate to the post holder, and that accordingly that information also constitutes their personal data.
25. He has reached that conclusion on the basis that the focus of the information is that of the named individual. The Commissioner is satisfied that the wording of the request, which specifically names a member of staff, makes it clear that the information requested could only relate to that member of staff. In the circumstances of this case, he is satisfied that the information about the role is clearly linked to an individual.
26. The Commissioner is further satisfied that the individual concerned would be reasonably likely to be identifiable from a combination of the requested information and other information, which is likely to be in, or come into, the possession of others, such as those dealing with the court and proceedings.
27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to, and identifies, members of staff. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA
28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.'

31. In the case of an 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 lawful, fair, and transparent.

32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child².'

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information.

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question.

² Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

36. In considering any legitimate interest(s) in disclosing the withheld information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. The Commissioner acknowledges that the complainant put forward their arguments in support of disclosure:

"I do not accept that this is covered by the exemption under section 40(2) FOIA, as the information sought is regarding authorisation by the Lord Chancellor regarding the court official concerned.

Alternatively, I would contend that as the court officer is quite highly placed at the court concerned, the criteria for disclosure of data of important public officials provided by the Information Commissioner would be applicable in this particular case.

The official concerned either has authorisation from the Lord Chancellor to determine costs applications for costs from Central Funds from Defendants in the Crown Court under regulation 5(2)(c) of the Costs in Criminal Cases Regulations 1986 at Exeter Crown Court or not as the case may be.

If it is correct that such authorisation has been given, then (redacted) is an authorised person for this function, and as such it would also be in the public interest for this information to be disclosed."

39. The Commissioner considers that there is a legitimate interest in knowing how the MoJ has delegated the responsibility for the determining officers to act on its behalf. The public authority has disclosed this information. There is also a legitimate interest in knowing the general policies and procedures the public authority has in place to ensure it is compliant with relevant legislation around the specific issue

raised here. However, the Commissioner does not consider that there is a pressing social need to interfere with the privacy rights of individuals in order to disclose the withheld information.

40. He considers that there is a generic legitimate interest in how the MoJ has adhered to its responsibility to appoint an appropriate person to the role, namely transparency.

Is disclosure necessary?

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
42. In its submission, the MoJ told the Commissioner that: As the request was with reference to a specific named individual, and not a general enquiry, it was considered as relating to that individual.
43. The Commissioner does not consider that there is pressing social need to interfere with the privacy rights of members of staff in order to satisfy the legitimate interest in obtaining the specific information requested. Disclosing the withheld information is not the least restrictive means of satisfying this legitimate interest. The public authority has struck the right balance in the circumstances of this case by supplying links to published information regarding this issue.
44. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large. Therefore, the effect of complying with this request would be that the staff member's personal details were effectively being publicly disclosed and would be accessible to anyone, for any purpose.
45. The Commissioner has therefore concluded that disclosing details with relation to an individual member of staff would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the withheld information would therefore breach the first data protection principle and thus is exempt from disclosure on the basis of section 40(2) of FOIA.
46. As the Commissioner has concluded that the necessity test has not been met, he has not gone on to consider the balancing test in this case.
47. The Commissioner has therefore decided that the MoJ was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

48. 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@justice.gov.uk

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

49. 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.
50. 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

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