

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2022

Public Authority: Judicial Appointments Commission
Address: 5th Floor 70 Petty France
London
SW1H 9EX

Decision (including any steps ordered)

1. The complainant requested information relating to judicial appointments and candidate scoring.
2. The Judicial Appointments Commission (JAC) provided some information within the scope of the request but refused to provide the remainder, citing section 22 (information intended for future publication), section 36(2)(c) (prejudice to effective conduct of public affairs) and section 40 (personal information) of FOIA .
3. The Commissioner has investigated its application of sections 36(2)(c) and 40(2) of FOIA to the information withheld by virtue of those exemptions.
4. The Commissioner's decision is that the JAC was entitled to withhold the information on the basis of sections 36(2)(c) and 40(2) of FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 1 March 2021, the complainant wrote to the JAC making a multi-part request for information, about six senior Circuit Judge appointments, in the following terms:

"I refer to the information contained on your website concerning how recommendations are made for judicial appointment. Your

website does not provide specific information about the scoring framework for each selection exercise.

(1) Please provide the following information in respect of the six senior Circuit Judge appointments which were made for the Business and Property Courts in Birmingham, the Northern and North Eastern circuits (selection exercise number JAC: 00002):

(a) the number of applicants who were interviewed for those positions;

(b) the scoring framework for the selection exercise in respect of those positions;

(c) the score of each applicant who was interviewed, by reference [to] a designation which does not identify them by name or otherwise, for example "Applicant A", "Applicant B", etc;

(d) how each of the applicants scored against each selection criterion, specifying the points scored by each of them against each such criterion;

(e) the total scores that each of them attained.

(f) the applicants who were appointed (by reference to the above designations, i.e., Applicant "A", "Applicant B", etc). The names of those who were appointed are known to me (having been publicised on the Judiciary website). However, I simply wish to know how they scored (without wanting to know the courts to which they were appointed to avoid identification), as compared to those who were not selected for appointment.

(2) Has any recommendation for selection been made in the period from 1 January 2016 to the date of this request (1 March 2021) which the "Appropriate Authority" has rejected? If so, please provide details".

7. The JAC responded on 25 March 2021. It provided information in scope of question (2) of the request, but refused to provide the remaining requested information, citing the following exemptions as its basis for doing so:

- section 22 (information intended for future publication),
- section 36(2)(c) (prejudice to effective conduct of public affairs) and
- section 40 (personal information).

8. Following an internal review the JAC wrote to the complainant on 23 April 2021. It upheld its original position, additionally arguing that disclosure of the requested information in question 1(a) of the request may allow identification of individuals. It also clarified its response to question (2).

Scope of the case

9. The complainant contacted the Commissioner on 29 September 2021 to complain about the way his request for information had been handled.
10. As is his practice, the Commissioner wrote to the complainant setting out the scope of his investigation namely:
 - to clarify to what extent the JAC handled any part of the request for information as a subject access request;
 - to determine whether the JAC is entitled to rely on sections 36 and 40(2) of FOIA as a basis for refusing to provide the withheld information.
11. As well as providing the Commissioner with a copy of the withheld information, during the course of his investigation, in order to provide context to the request, the JAC provided the Commissioner with background information about the selection process for judicial appointments.
12. The analysis below considers the JAC's application of sections 40 and 36 to the withheld information. The Commissioner considers that the information withheld by virtue of section 36 comprises situational questions and information on how the situational questions could be answered which falls within the scope of 1(b).
13. The Commissioner has addressed the question of whether the JAC handled any part of the request for information as a subject access request in 'Other matters' below.

Reasons for decision

Section 40 personal information

14. Section 40(2) of 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(3A)(3B) or 40(4A) is satisfied.

15. The JAC considers that this section applies to information within the scope of questions 1(a), 1(c), 1(d), 1(e) and 1(f) of the request.
16. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles.
17. The Commissioner considered a similar request for information, from the same complainant, in case reference IC-181735-D3P8. The decision notice in that case was issued on 14 September 2022.
18. The request for information in that case was for information relating to the number of individuals who applied for the position, in respect of various selection exercises, and the number of individuals who were interviewed.
19. The Commissioner's decision in that case was that the JAC was entitled to withhold the information by virtue of section 40(2).
20. The withheld information in this case comprises information relating to the number of candidates and the personal scoring information of those candidates.
21. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between this case and IC-181735-D3P8 is such that he is able to reach the same decision without the need for further analysis.
22. The decision notice in case reference IC-181735-D3P8 is attached for reference.

Section 36 prejudice to effective conduct of public affairs

23. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
24. In this case the Commissioner is considering the JAC's application of the exemption at section 36(2)(c) to the scoring framework (question 1(b)).
25. Section 36(2)(c) states:

"Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

26. In his guidance on section 36¹, the Commissioner references the decision in *McIntyre v Information Commissioner and MoD* (EA/2007/0068) and states:

"The Information Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption".

The qualified person's opinion

27. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.

28. In his guidance², the Commissioner explains:

"Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised qualified person for that public authority. A list of qualified people is given in the Act, and others may have been designated".

29. With regard to the process of seeking the opinion in this case, the JAC explained that it consulted the qualified person, namely JAC Chief Executive, Dr Richard Jarvis, on 22 March 2021. The opinion, with regard to engaging the exemption contained at section 36(2)(c) of FOIA, was given on the same day, 22 March 2021.

30. The Commissioner is satisfied that it was appropriate for the JAC to regard its Chief Executive as the qualified person for the purposes of section 36.

31. The JAC provided the Commissioner with a copy of the submission to the qualified person and with evidence of the qualified person's opinion.

32. From the evidence he has seen, the Commissioner is satisfied that the JAC obtained the opinion of the qualified person.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

Was the opinion reasonable?

33. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
- whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
34. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.
35. The Commissioner is mindful that the JAC considers section 36(2)(c) applies in this case.
36. With respect to the nature of the prejudice in regard to section 36(2)(c), the Commissioner states, in his guidance³:
- “Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure”.
37. The Commissioner would emphasise that section 36(2)(c) is concerned with the effects of making the information public. In this case, the issue is whether disclosure of the withheld information would otherwise, or

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

would be likely otherwise to, prejudice the effective conduct of public affairs.

38. Explaining why it considered that section 36(2)(c) applies in this case, the JAC told the complainant that there was a good likelihood that the requested information will be used in future judicial appointment exercises. It argued that disclosure of the information would not allow that to happen.
39. By way of further explanation, the JAC told the complainant:

“For this particular exercise there were two parts to the selection day process, situational questions and a competency-based interview. The situational questions are designed in advance and could be used for future exercises. A guide was made available to panel members, which incorporated a scoring framework. As this contained information on how the situational questions could be answered, [it was appropriate to apply section 36]”.
40. The Commissioner has been provided with a copy of the submission provided to the qualified person. Mindful that the opinion was given on the same day that it was sought, the JAC explained to the Commissioner that, in the circumstances, the qualified person was already fully aware of the request for information and familiar with the requested material.
41. The Commissioner is satisfied that the submission clearly related to the request that was made by the complainant. He is also satisfied that it explained why an opinion was being sought, provided relevant background information and arguments as to why disclosure would otherwise, or would be likely otherwise, to prejudice the effective conduct of public affairs.
42. In respect of section 36(2)(c), the caselaw on this particular limb of the exemption states that, in order to “otherwise prejudice the effective conduct of public affairs”, the qualified person must identify some form of prejudice that would not be covered by any other exemption.
43. In this case the Commissioner acknowledges that the prejudice envisaged in the submission to the qualified person is with respect to future selection exercises.
44. In his guidance on section 36, the Commissioner states:

“It is important to remember that the qualified person’s opinion is about whether the prejudice or inhibition would or would be likely to occur. These are two different things. ‘Would prejudice’ means that it is more likely than not (ie a more than 50% chance) that prejudice would occur. ‘Would be likely’ is a lower standard; it means that the chance of prejudice must still be significant and

weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur ...

The choice between would and would be likely is important because it affects the balance of factors in the public interest test”.

45. In this case, rather than use the terminology of FOIA, (ie that disclosure would otherwise prejudice, or would be likely otherwise to prejudice), the qualified person considered that disclosure ‘could prejudice’ future selection exercises.
46. Having reviewed the withheld information the Commissioner is satisfied that it was reasonable to argue that disclosure in this case would be likely otherwise to prejudice the effective conduct of public affairs, namely the selection process for judicial appointments. He therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would be likely otherwise to prejudice the effective conduct of public affairs by virtue of section 36(2)(c).

The public interest test

47. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
48. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
49. In this case, he has carried the lower level of prejudice through to the public interest test.

Public interest arguments in favour of disclosing the requested information

50. The JAC acknowledged the general public interest in transparency.

Public interest arguments in favour of maintaining the exemption

51. In favour of maintaining the exemption, the JAC told the Commissioner that, if the requested information was disclosed:

“... there is a substantial risk any appointment would not be on merit”.
52. It also explained that disclosure of the information would make it unusable in any future exercise. It told the Commissioner that, in those circumstances:

“The JAC would be required to create a new scenario and scoring framework. The creation of which would involve input from a senior member of the judiciary, involving substantial resource input to do so (both monetary and time). This would not be an effective usage of public money and would also reduce judicial availability within the court system”.

53. Referencing media coverage of backlogs in courts, it argued that the prudent use of judicial resource “is particularly important at present”.

54. It further explained:

“The ability to re-use scenarios such as this, either in whole or part helps the JAC reduce its demands on judicial availability. It is therefore considered the public interest is not served by sharing marking guides, scoring frameworks, or indeed any part of the candidate selection process which could usefully be reused”.

Balance of the public interest

55. When considering complaints regarding the application of the exemption at section 36(2)(c), where the Commissioner finds that the qualified person’s opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that while the Commissioner accepts that a reasonable opinion that disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs, has been expressed, he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.

56. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the JAC.

57. He has also taken into account that disclosure under FOIA is disclosure to the world at large.

58. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.

59. With regard to the factors in favour of maintaining the exemption, the Commissioner acknowledges that the JAC is an independent commission that selects candidates for judicial office. He has also taken into account the arguments regarding the public interest in avoiding disruption to

future selection exercises and to judicial availability within the court system.

60. He accepts that the disclosure of this particular information has the potential to cause detriment to future judicial appointment exercises.
61. In the circumstances of this case, the Commissioner takes the view that avoiding the need for new situational scenarios, which would need to be created by a drafting judge who would, in turn be prevented from working on judicial casework while doing so, outweighs the public interest in openness and transparency.
62. It follows that the JAC was entitled to rely on section 36(2)(c) of FOIA to refuse to disclose the requested information within the scope of part 1(b) of the request.

Other matters

63. In the Commissioner's view, it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the right of access provisions of the Data Protection Act (DPA).
64. From the evidence he has seen, the Commissioner is satisfied that the JAC provided a separate response to the complainant in accordance with those rights.

Right of appeal

65. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

66. 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.
67. 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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