

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 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 Designated Circuit Judge and deputy High Court Judge appointments. The Commissioner has considered the Judicial Appointments Commission's refusal to disclose the numerical information within the scope of parts (1) and (2) of the request.
2. The Commissioner's decision is that the Judicial Appointments Commission was entitled to withhold the information by virtue of section 40(2) (personal information) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 7 March 2021, the complainant wrote to the Judicial Appointments Commission (JAC) and made a multi-part request for information in the following terms:

“(1) The positions for the Designated Circuit Judge [DCJ] for Birmingham and Winchester were initially advertised in September 2019 (SCJDCJ:177). Please provide information about the number of individuals who applied for the position in that selection exercise and the number of individuals who were interviewed for it.

(2) The selection exercise in paragraph (2) above, had to be re-advertised in June 2020. Subsequently, an appointment was made to the DCJ position in Birmingham. Please provide information about the number of individuals who applied for the position in that later selection exercise and the number of individuals who were interviewed for it.

(3) The DCJ position in Winchester has not been filled. Who is currently undertaking the functions of DCJ in that and the other courts to which that position relates?

(4) Has the person who is currently acting as DCJ in Winchester been "promoted" to that position, whether by having his remuneration package increased to that of a senior Circuit Judge or otherwise?

(5) When does the JAC intend to run a new selection exercise for the position in paragraph (1), above?

(6) Where a temporary appointment of a judge is made to a particular position, such as DCJ, pending the vacancy being filled by an open competition:

(a) Please specify how the temporary appointment is made, specifically stating: (i) whether it involves the completion of a formal application. If so, please provide a copy of the draft application; (ii) whether it is made subject to an Expression of Interest Exercise; and (iii) who makes the recommendation for appointment;

(b) If the person who is appointed to the temporary position does not have authorisation to sit in the High Court under s 9 of the Senior Courts Act 1981, is he granted authorisation to sit in the High Court as a matter course? If not, what criteria are taken into account in granting them that authorisation?

(c) Is the authorisation granted temporary or permanent, i.e., does that person cease to be authorised to sit in the High Court if the vacancy is filled by another person?

(7) In respect of the period from 1 January 2016 to the date of this request, please specify the number of deputy High Court Judges who have been appointed under s 9 of the Senior Courts Act 1981 otherwise than by way of open competition or being selected pursuant to an Expression of Interest exercise. For the avoidance of doubt, information is not sought about selection exercises where the appointments will involve authorisation being granted to the

applicant to sit in the High Court as a requirement of appointment, such as the appointment of a senior Circuit Judge”.

5. The JAC responded on 26 March 2021. It denied holding information in scope of questions 3, 4, 5, 6(a) and 7 of the request. It provided the complainant with a link to where information relating to questions 6(b) and (c) can be found. It refused to provide the remaining requested information, information in scope of questions 1 and 2, citing the following exemptions as its basis for doing so
 - section 22 (information intended for future publication)
 - section 41 (information provided in confidence)
 - section 44 (prohibitions on disclosure).
6. The complainant requested an internal review on 29 March 2021 as he was dissatisfied with its responses to questions 1, 2, 6 and 7.
7. Following an internal review the JAC wrote to the complainant on 23 April 2021. It upheld its original position, clarifying that the JAC does not hold information in scope of questions 6 and 7 over and above that in the guidance already provided to him.

Scope of the case

8. Following earlier correspondence, the complainant provided the Commissioner with the relevant information on 18 July 2022 to complain about the way his request for information had been handled.
9. As is his practice, the Commissioner wrote to both parties setting out the scope of his complaint. In light of the correspondence received from the complainant, he told him that his investigation would look at whether the JAC is entitled to rely on exemptions as a basis for refusing to provide the withheld information in scope of questions 1 and 2.
10. The Commissioner asked the complainant to contact him, within a specified timeframe, if there were other matters that he considered should also be addressed.
11. In the circumstances, the Commissioner progressed his investigation on the basis set out in his correspondence.

Reasons for decision

12. During the course of the Commissioner's investigation, the JAC confirmed its application of section 41 to the withheld information in scope of part (1) of the request, namely the number of individuals who applied in the initial selection exercise and the number who were interviewed for it.
13. With regard to the information in scope of part (2) of the request, namely the number of individuals who applied in the later selection exercise and the number who were interviewed for it, the JAC told the Commissioner:

"... at the time [the complainant] submitted his request there would certainly have been the intention to include the requested details in these official statistics. However, [the complainant] was also advised that the information might be published in such a way that provided an appropriate level of anonymity to candidates... Ultimately, the information was published in an aggregated form, so retrospectively Section 22 would not now apply. However, we would have considered the information to be exempt under Section 41 for the reasons stated above in part 1 of the request".
14. The Commissioner acknowledges the position put forward by the JAC with regard to the information in scope of parts (1) and (2) of the request.
15. In general, the Commissioner does not consider that his role is to assume arguments on behalf of a public authority or to introduce exemptions that might be more relevant to the disputed information.
16. However, due to his dual role as regulator of both FOIA and the Data Protection Act 2018, the DPA, the Commissioner has a duty to protect personal data where necessary.
17. Having considered the wording of parts (1) and (2) of the request and viewed the withheld numerical information, the Commissioner has exercised his discretion to consider an exemption that was not relied upon by the JAC, namely section 40 (personal information).

Section 40 personal information

18. 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.

19. 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 UK General Data Protection Regulation ('UK GDPR').
20. 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 of FOIA cannot apply.
21. 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 information personal data?

22. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. The disputed information in this case comprises the number of individuals who applied for the positions specified in the request and the number of individuals who were interviewed.
27. The Commissioner accepts that the JAC, albeit with regard to section 41, variously referred to 'the low numbers of candidates' and 'a risk of identification'. It also told the complainant:

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

"... due to the small numbers involved there is a risk that disclosure may allow identification of individuals".

28. The Commissioner understands that the judicial positions specified in the request are located within a specific geographical judicial area. In its submission to the Commissioner, the JAC told him:

"... it was a concern that as a senior position with a low number of candidates, there would be a significant risk that supplying the requested information would disclose personal information of the other candidates".

29. The Commissioner acknowledges that the JAC considers that, with such small numbers for these senior positions, there is a strong possibility a candidate would be identified. However, while the fact that low numbers are involved provides a starting point to protecting information, decisions about withholding information need to be made on a case by case basis, considering all relevant circumstances.

30. 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, because an individual is capable of being identified from apparently anonymised information.

31. He accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

32. 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.

33. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information relates to the number of individuals who applied, and were interviewed, for a senior judicial position within a specific geographical judicial area. He is satisfied that the information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

34. He has reached that conclusion on the basis that the focus of the information is the individuals who applied and were interviewed and that such information is clearly linked to them.
35. In the circumstances of this case, the Commissioner is further satisfied that the individuals 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 with knowledge of the recruitment process, of the judicial role concerned and of the skills and experience required for the position.
36. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
37. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

39. 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 lawful, fair and transparent.
40. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

41. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
42. 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.

43. In considering the application of Article 6(1)(f) of the UK 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;

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

44. 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

45. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

46. With regard to accountability and transparency, the JAC told the complainant that statistics relating to the exercise have been published. It accepted however, that due to the exercise being classed as small, the results are combined "so as to ensure we provide due need for candidate anonymity".
47. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of public authorities. He also understands that the requester may have a personal interest in the requested information.

Is disclosure necessary?

48. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
49. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

50. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
51. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and

- the reasonable expectations of the individual.
52. In the Commissioner's view, a key issue 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 an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
 53. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 54. In its submission, to the Commissioner, the JAC explained that it advises candidates that it sometimes needs to share personal information with other organisations. It provided the Commissioner with details of the organisations candidates are advised about, and the reason why. For example, the judiciary (for statutory consultation) and HMRC (for tax and financial information).
 55. It also confirmed that it does not advise candidates their information will be shared with other candidates.
 56. It also told the Commissioner that, where personal information is shared:

"we comply with all aspects of data protection laws".
 57. Regarding its decision not to disclose the requested information, the JAC told the Commissioner that candidates may apply for more than one position at any one time. It also explained that a candidate may ultimately decide to reject a position following recommendation by the JAC.
 58. With regard to the withheld information in this case, it told the Commissioner:

"Candidates need to be assured the JAC will not disclose information which could lead to identification or cause distress".
 59. The Commissioner has seen no evidence that the individuals concerned have consented to disclosure of their personal data. He also accepts that the individuals in question would have no realistic expectation that their personal data would be disclosed in response to an FOI request.
 60. While the legitimate interests are not trivial, nor are they compelling. Further, there is no suggestion that the withheld information will add to the overall transparency and accountability of the JAC.

61. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
62. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

63. The Commissioner has therefore decided that the JAC was entitled to withhold the information under section 40(2), by way of section 40(3A) (a).

Other matters

64. While the Commissioner has not made a determination on whether or not the JAC holds information within the scope of the request that relates to the requester himself, he considers that any personal information relating to the requester that was held would be exempt from disclosure under FOIA.
65. 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 DPA.

Right of appeal

66. 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

67. 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.

68. 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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