

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2024

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

Decision (including any steps ordered)

1. The complainant has requested information about changes to the selection criteria for a circuit judge recruitment exercise. The Judicial Appointments Commission ("the JAC") provided some information in response to the request but said the information described in part (A) of the request was exempt under section 36(2)(c) (Prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the JAC has not demonstrated that section 36(2)(c) is engaged. He also finds that by failing to comply with the request within the statutory time for compliance, the JAC breached sections 1(1) and 10(1) of FOIA.
3. The Commissioner requires the JAC to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested in part (A) of the request, with all personal data redacted under section 40(2) (Personal information) of FOIA.
4. The JAC must take these steps within 30 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.

Request and response

5. On 15 December 2023, the complainant wrote to the JAC and requested information in the following terms:

"JAC00153 Specialist Circuit Judge

I refer to the above selection exercise, which no longer appears on your website under 'closed for application'.

An additional criterion was required for this position, as follows:

'Candidates must be able to demonstrate substantial knowledge and experience of Chancery law and procedure, with some experience in commercial law, work undertaken by the Circuit Commercial Court and of the Technology and Construction Court. It is expected that candidates' evidence of knowledge and experience of Chancery law and procedure will be within the last 7 years.

As part of your online application you will be required to submit, in 400 words or less, a statement to demonstrate that you have the relevant knowledge and experience as set out above'.

Please provide the following information:

- (A) all the information (including inter-departmental communication, notes, memoranda and the like) setting out the reasons for the imposition of this additional criterion. If no such documentation exists, please provide the reasons why the decision was made and who made the final decision about the imposition of the additional criterion.
 - (B) If the decision in (A) was made by a judicial holder or holders or by the Ministry of Justice or other body, please specify where I may obtain that information.
 - (C) Whether this criterion has ever been imposed in any selection exercises for specialist CJ posts in the last 5 years and, if so, please provide details of those selection exercises."
6. The JAC responded to the request on 26 January 2024. It refused part (A), citing section 36(2)(c) of FOIA. For part (B), it said that final

approval for the application of additional selection criteria lies with the judiciary and the Lord Chancellor. For part (C), it confirmed that this additional selection criterion had not been applied in recruitment exercises for specialist circuit judges in the last five years.

7. The complainant requested an internal review of parts (A) and (B) on 29 January 2024.
8. The JAC provided the internal review on 27 February 2024. It maintained its application of section 36(2)(c) to part (A). It provided a contact email address for the Ministry of Justice for part (B).

Scope of the case

9. The complainant contacted the Commissioner on 2 March 2024 to complain about the way his request for information had been handled. He disagreed with the application of section 36(2)(c) to part (A) of the request and he was unhappy with the delay in responding.
10. The analysis below considers the JAC's application of section 36(2)(c) to part (A) of the request. The Commissioner has also considered the delay in responding under sections 1 and 10 of FOIA.

Reasons for decision

11. The withheld information consists of email exchanges discussing and deliberating over the selection criteria for the specialist circuit judge recruitment exercise referred to in the request. It includes reasons why additional selection criteria were deemed necessary.
12. The JAC cited section 36(2)(c) to withhold the information.

Section 36 - Prejudice to the effective conduct of public affairs

13. Sections 36(2)(b) and (c) of FOIA state:

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

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice, or

- (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
14. 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’. If the Commissioner decides that the opinion is an unreasonable one, he may find that section 36 has been applied inappropriately.
 15. The JAC confirmed that its Chief Executive is the qualified person for the purposes of section 36 and the Commissioner is satisfied that they are appropriately authorised under section 36(5)(o)(iii) of FOIA. The qualified person’s opinion was given on 26 January 2024, prior to the JAC responding to the request.
 16. The Commissioner was provided with a copy of the submission to the qualified person and their opinion.

Was the opinion reasonable?

17. When determining whether the exemption is correctly engaged, the Commissioner must decide whether the qualified person’s opinion was a reasonable one. In doing so, the Commissioner will consider relevant factors. His primary consideration will be 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.
18. The Commissioner employs the plain meaning of the word reasonable - “in accordance with reason; not irrational or absurd”. If it is an opinion that a reasonable person could hold, then it is reasonable.
19. With regard to the nature of the prejudice to which section 36(2)(c) relates, the Commissioner’s guidance on section 36¹ explains:

“Prejudice to the effective conduct of public affairs could refer to an adverse effect on your ability to offer an effective public service or to meet your wider objectives or purpose, but the effect does not have

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

to be on your authority; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.”

20. However, 'otherwise prejudice' indicates that the prejudice must be separate and distinct from that relevant to sections 36(2)(b)(i) and (ii). Those sections are concerned with protecting the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation (the reason being that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making).

21. In its submission to the qualified person (and in its arguments to the Commissioner) the JAC's arguments for applying section 36(2)(c) were as follows:

“The requested documents here relate to management, delivery and operational functions of the JAC and are informed by advice given and received by JAC officials, colleagues from the Judicial Office/judiciary, the MoJ and HMCTS. If we were to disclose the requested papers here, it is our view that these parties might be:

- less likely to offer unwelcome advice or less willing to offer any advice or opinion
- have an inhibiting effect in the future
- make any discussion on the issue distorted or restrained
- result in potential pressure being brought to bear on JAC officials, and
- make it less likely that this type of information would be recorded if it were to be subsequently disclosed.

We believe these risks make it inappropriate for the information requested to be disclosed. Ultimately, disclosure of this information could, for the reasons stated above, make the planning and launching of selection exercises less effective. Thus causing an adverse effect on the JAC's ability to offer an effective public service or to meet our wider objectives and purpose”

22. The Commissioner considers that the above arguments relate specifically to the impact of disclosure on the ability of staff (and others) to express themselves openly, honestly and completely, or to explore

extreme options when providing advice or giving their views as part of the process of deliberation.

23. As set out in paragraph 20, these are not matters which fall within the remit of section 36(2)(c) of FOIA. They may fall within the scope of sections 36(2)(b)(i) and (ii) (although, having viewed the withheld information, the Commissioner cannot see that it contains anything of such sensitivity that, if disclosed, would be likely to result in such an effect) but the qualified person was specifically asked about, and gave, his opinion on the engagement of section 36(2)(c). At no point has the JAC argued (to the qualified person, the complainant or to the Commissioner) that sections 36(2)(b)(i) and/or (ii) of FOIA are also engaged.
24. The Commissioner does not consider that the JAC has demonstrated any prejudice that is separate or distinct from that relevant to sections 36(2)(b)(i) and (ii). Therefore, the Commissioner's decision is that the qualified person has failed to express a reasonable opinion in relation to the engagement of section 36(2)(c) of FOIA. That being the case, the JAC was not entitled to rely on that exemption to withhold the requested information.
25. The JAC must now take the action specified in paragraph 3.

Procedural matters

Section 1 – General right of access

Section 10 - Time for compliance

26. Section 1(1)(a) of FOIA states that a person who asks for information is entitled to be informed whether the information is held. If it is held, section 1(1)(b) states that the person is entitled to have that information communicated to them.
27. Section 10(1) of FOIA states that on receipt of a request for information, a public authority should respond within 20 working days.
28. In this case, the JAC took 27 working days to respond to the request. It said that this was due to the need to consult with stakeholders regarding the request, some of whom were not available over the Christmas break. It said it kept in touch with the complainant regarding the delay.

29. By failing to respond to the request within the statutory time for compliance, the JAC breached sections 1(1)(a) and (b), and 10(1) of FOIA.
30. The Commissioner has made a record of these breaches for monitoring purposes.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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