

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2015

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

Decision (including any steps ordered)

1. The complainant requested details of tribunal cases where any of the parties were represented by a named barrister. The Ministry of Justice (the 'MOJ') refused to provide the information applying section 40(5)(b)(i) of FOIA, the neither confirm nor deny provision for personal information.
2. The Commissioner finds that the MOJ wrongly relied on section 40(5) because it would not be unfair to confirm whether the named barrister, if he exists, was involved with any cases.
3. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request
4. The public authority must take these steps within 35 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.

Background

5. The Bar Standards Board regulates barristers. Part of its regulatory responsibilities includes publishing and maintaining a register of barristers¹. The Register is an online database which displays details of all barristers who are authorised to practise in England and Wales and who have a current practising certificate. The register displays the dates for which a barrister's practising certificate is valid.
6. The register includes information about barristers' practising status, their practising address, the reserved legal activities they are authorised to undertake and whether they have been the subject of any disciplinary findings which are published on the Bar Standards Board's website in accordance with its current policy.
7. The party named in the request is not currently listed on the register.
8. The Commissioner understands that the Tribunal cases relevant to this request would be financial/tax related hearings.

Request and response

9. On 12 August 2014 the complainant wrote to the MOJ and requested information in the following terms:

"I am hoping you may be able to assist me in some research I am doing into cases heard by the tribunal.

Specifically I am looking for judgements/decisions where any of the parties were represented by the barrister [name redacted] during the last two years."

10. The MOJ responded on 17 September 2014. It refused to provide the information on the basis that it would contravene section 40(2), personal information, of FOIA, because it believed the release of information that is the personal information of another person, would breach the first data protection principle as set out in the Data Protection Act 1998.

¹ <https://www.barstandardsboard.org.uk/regulatory-requirements/the-barristers'-register/>

11. In addition the MOJ explained that, following the end of a case, the details become part of the Tribunal record and are therefore protected by the rules of the Tribunal and other legislation governing access to information. It confirmed that only decisions which are published on the website are in the public domain.
12. The complainant requested an internal review in which he disputed that only decisions on the website are in the public domain; his view being that all of the Tribunal's decisions from April 2013 are available on that website.
13. Following its internal review the MOJ wrote to the complainant on 29 October 2014. It stated that rather than relying on section 40(2) to withhold the requested information, it should have neither confirmed nor denied whether the information was held and instead relied on section 40(5) of FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 3 December 2014 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider his view that he emphatically disagrees that disclosures required as part of court proceedings are only to a limited audience and that those involved would have no expectation that their personal data would be disclosed.
15. The Commissioner has commented on this and other aspects of the complainant's complaint in the 'Other matters' section of this notice.
16. The Commissioner has considered whether the MOJ properly relied on section 40(5) in refusing the request.

Reasons for decision

Section 40(5) - personal information

17. This exemption has only been applied to the barrister named in the request. The Commissioner has therefore assumed that the MOJ is relying on section 40(5)(b)(i) of FOIA.
18. In considering whether the exemption contained within section 40(5)(b)(i) has been properly applied to this request the Commissioner has taken into account that FOIA is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the

public at large. If the information were to be disclosed it would, in principle, be available to any member of the public.

19. A confirmation or denial in the circumstances of this case would reveal to the public information which is not currently in the public domain, namely as to whether the MOJ holds any judgements where the named individual acted as a barrister at the time of the request or during the preceding two years.
20. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - a. the duty to inform the applicant whether or not requested information is held and, if so,
 - b. the duty to communicate that information to the applicant.
21. Section 40(5)(b)(i) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests third party personal data, there is an exemption from the duty to confirm or deny under FOIA.
22. Section 40(5)(b)(i) states that the duty to confirm or deny does not arise in relation to information which is, if held, third party personal data and thus exempt from disclosure on the basis of section 40(2) of FOIA.
23. The consequence of these sections 40(2) and 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be third party personal data, then it can rely on section 40(5)(b)(i) to refuse to confirm or deny whether or not it holds the requested information.
24. It is important to note that sections 40(2) and 40(5)(b)(i) are class-based exemptions. This means there is no need to demonstrate that disclosure (or confirmation) under FOIA would breach an individual's rights under the Data Protection Act 1998 (the 'DPA') when engaging these exemptions.
25. Section 40(2) of FOIA states that information is exempt if it is the personal data of any person other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. There are, therefore, two steps to considering whether this exemption is engaged.

- a. Does the information constitute the personal data of any individual aside from the requester?
 - b. Would disclosure of that personal data be in breach of any of the data protection principles?
26. As to whether the information is the personal data of an individual aside from the requester, the definition of personal data is given in the DPA. This states that for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
 27. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus. The information, if held, would clearly identify the named party and therefore be their personal data.
 28. Having questioned the MOJ, the Commissioner understands that if a representative is not acting as a barrister, then s/he may have been acting as a non-legal advocate, or a McKenzie friend. The MOJ also confirmed that there is no reason why a representative cannot attend to advise as an expert in the field of the tribunal topic.
 29. In response to the Commissioner's questions about the Bar Standards Board and the register of all current barristers, the MOJ explained that even if an individual is not registered currently it does not mean that he was not registered previously and is now no longer practising.
 30. Notwithstanding the arguments put forward by the MOJ in support of its application of section 40(5)(b)(i), the Commissioner does not consider that there is anything unfair in confirming whether the named barrister, if he exists, was involved with any cases. He considers that barristers would expect to be named in the Bar Standards Board register, which is information in the public domain.
 31. The Commissioner therefore finds that the MOJ wrongly relied on section 40(5)(b)(i) and now requires the MOJ to issue a fresh response as set out in paragraph 3 of this notice.

Other matters

32. Since he has found that the MOJ incorrectly relied on section 40(5)(b)(i) in this case and has ordered the MOJ to provide a fresh response, the Commissioner has not considered whether the MOJ has complied with its section 16 requirements to provide the complainant with advice and assistance when responding to the request.

33. Additionally, the MOJ stated that disclosures required as part of court proceedings are, in practise, only disclosures to a limited audience. It said that the fact that the representative's name will have been given in 'open court' cannot be relied on to assume that future disclosure under FOIA is fair, and further, that there is an expectation of those involved that their personal data will only be used for that purpose; they would not reasonably expect that it may be subsequently released unless it is part of a tribunal decision which is deemed to be of 'general interest'. The Commissioner supports this view.

Right of appeal

34. 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

35. 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.
36. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF