

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2018

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

Decision (including any steps ordered)

1. The complainant made a two part request for information concerning a named Judge in relation to misconduct cases he had heard and any disciplinary action taken against him. Revising its initial position, following an internal review, the Ministry of Justice (the 'MOJ'), advised that section 40(2), personal information applied to part (1) of the request. For part (2), the MOJ would 'neither confirm nor deny' ('NCND') holding any information citing section 40(5). In addition, during the course of the Commissioner's investigation, the MOJ cited section 44(1)(a), statutory prohibitions to disclosure, for part (2) of the request.
2. The Commissioner's decision is that the requested information in part (1) of the request constitutes personal data and that the MOJ was entitled to rely on section 40(2). For part (2) of the request, the Commissioner finds that the MOJ correctly cited section 40(5)(b)(i).
3. In relying on section 44(1)(a) which it had not mentioned at or before the internal review, the MOJ has also breached section 17(1) of FOIA.
4. The Commissioner does not require the MOJ to take any steps as a result of this notice.

Background

5. During the course of her investigation, the Commissioner made some enquiries with the MOJ in relation to this case. As a result, she is able to confirm that there have been 385 misconduct cases heard nationally during the ten year period specified in the request.
6. The Commissioner has checked the list of Circuit Judges¹ and is satisfied that the named Judge meets the criterion as a Judge on the Western Circuit.
7. HMCTS records its data by Region. The appropriate Region in this case is the South West Region. This Region has heard 28 such cases in the time period specified. The request refers to 'misconduct cases'. The MOJ's Judicial Secretariat confirmed that no "*specialised ticket*" is required to hear these types of cases, so as long as the named Judge has been an appointed Circuit Judge, he would have been able to hear these types of cases.
8. The Commissioner viewed the withheld information in respect of part (1) of the request.

Request and response

9. On 16 November 2017 the complainant wrote to the MOJ, and requested information in the following terms:
 - "1. (a) Please provide the number of cases of misconduct in public office that Judge [name redacted] has presided over in the last 10 years and (b) how many of these cases were dismissed prior to being put before a Jury?²
 2. Please confirm if Judge [name redacted] has had any disciplinary action taken against him and what did this relate to?"
10. The MOJ responded on 1 December 2017 and refused to provide the information requested in part (1) citing section 12(1) of FOIA, the cost

¹ <http://www.thelawpages.com/court-judges/>

² (a) and (b) inserted into the request by the Commissioner to aid the layout of her analysis

of compliance. It explained that the data was not held on its computerised system and that it would have to undertake a manual search of its records, which would exceed the cost limit. In accordance with section 16 of FOIA, the MOJ offered advice and assistance as to how the complainant might refine this part of his request with a view to bringing it within the cost limit.

11. The MOJ also said it did not hold the information requested in part (2), advising that Her Majesty's Courts and Tribunals Service ('HMCTS') which falls under the remit of the MOJ, has no authority to take disciplinary action against members of the judiciary.
12. On 5 December 2017, the complainant requested an internal review; the MOJ provided the outcome on 3 January 2018, revising its position. It now said that the requisite data is, in fact, held on a computer and could be extracted in order to respond to part (1) of the request. However, it said that it could not disclose this information by virtue of section 40(2) of FOIA, the exemption for personal information. It explained that as the number of such cases falls between one and five, to provide the exact figure would risk identification of the individual(s) concerned.
13. For part (2), the MOJ also revised its position, stating that it should have considered it was responding on behalf of the MOJ rather than solely HMCTS. Accordingly, it now refused to confirm or deny whether it held the requested information, citing section 40(5) of FOIA, the 'NCND' provision for personal information. However, outside the scope of FOIA, it provided the complainant with a weblink to judiciary disciplinary statements issued by the Judicial Conduct Investigations Office. The Commissioner has commented on this under the 'Other matters' section of this notice.
14. In addition, the MOJ stated:

"After further investigation the Judicial Complaints Investigation Office, who are a ALB [Arms Length Body] of the Ministry of Justice and are responsible for investigating any complaints received regarding the Judiciary, have explained that if a requester asks for complaint information about a specific judge, they would neither confirm nor deny whether they hold the information because any other response would release confidential information, which is prohibited by section 139 of the Constitutional Reform Act, which implies that section 44 1(a) also applies. Therefore we are now amending our response to include Section 44 1(a)."

Scope of the case

15. The complainant contacted the Commissioner on 2 February 2018 to complain about the way his request for information had been handled.
16. The Commissioner has considered whether the MOJ has properly relied on the exemptions it has cited to either withhold the requested information or NCND whether it is held.

Reasons for decision

Parts 1 (a) and (b) of request – section 40(2) personal information

17. The MOJ has cited section 40(2) in relation to both strands in part (1) of the request (ie the number of cases of misconduct in public office presided over in the last ten years by the named Judge and how many of those cases were dismissed prior to being put before a jury).
18. The MOJ relied on section 40(2) on the basis that the requested information is the personal data of those individuals involved in misconduct cases during the specified ten year period.

Is the requested information personal data?

19. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act ('the 'DPA') 1998 which is the relevant Act in this case. If it is not personal data, then section 40 cannot apply.
20. The definition of 'personal data' is given in section 1(1) of the DPA which states:

"personal data' means data which relate to a living individual who can be identified:

(a) from those data, or

(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

21. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. 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.
22. The MOJ said that, due to the low number of such cases presided over by the named Judge, it considers that the requested information in part (1), alongside other data which may be available or become available to the requester or to any other member of the public, could potentially lead to the identification of individuals involved in the misconduct cases and should, therefore, be treated as 'sensitive personal data'.
23. Under the DPA 1998 sensitive personal data is defined as personal data as personal data that consists of information about the following:
 - an individual's mental or physical health,
 - their political opinions,
 - their sex life,
 - their racial or ethnic origin, their religious beliefs,
 - whether they are a member of a trade union,
 - the commission or alleged commission of an offence by them, or any proceedings for any offence they have committed or are alleged to have committed.
24. In the case under consideration here, there have been 28 cases in the South West Region over the specified ten year period. In relation to 1(a) the Commissioner does not agree that disclosing how many of those 28 cases were heard by the named Judge will lead to any individual (who was the subject of such proceedings) being identified; there are no dates requested, just a number, and the MOJ has not explained how any information in the public domain could assist in ascertaining who the cases relate to. She therefore does not find that the information requested under 1(a) constitutes the personal data, or sensitive personal data, of those individuals.
25. However, the Commissioner does consider that the requested information is the personal data of the Judge. He is named in the request and disclosure of the information requested under 1(a) would show something about the types of cases the Judge is involved with and his experience.
26. In relation to 1(b), the MOJ considers that disclosure of how many of the named Judge's cases were dismissed prior to being put before a jury would be the sensitive personal data of those individual(s) concerned. However, as mentioned above, the time frame under consideration is ten years and the Commissioner is not persuaded that it would be possible to identify a third party from disclosure of the number of cases.

This would only be possible by considering the figure alongside information which is already in the public domain; the Commissioner has been unable to locate any such information and the MOJ has not provided any detailed reasoning about how this could be done.

27. However, as with the analysis for 1(a) of the request, the Commissioner's view is that this information is the personal data of the named Judge in that it reveals something about the types of cases he has presided over and any actions he has undertaken.
28. Having established that the information in both 1(a) and (b) constitutes the personal data of the Judge (and does not meet the definition of being his 'sensitive' personal data), the next step for the Commissioner is to consider whether it would be fair to disclose that information.
29. When considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interest in the public having access to the information; and
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
30. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the information in question. She will also take into account the fact that disclosure under FOIA is as stated effectively an unlimited disclosure to the public at large, without conditions.
31. Regardless of the reasonable expectations of the data subject and the fact that damage or distress may result from disclosure, it may still be fair to disclose information when there is a more compelling legitimate public interest to do so. With that in mind, the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
32. The Commissioner must highlight that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Taking into account the importance of protecting personal data of individuals, the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in disclosure must outweigh the public

interest in protecting the rights and freedoms of data subjects if disclosure is to be considered fair.

33. The interest in disclosure must be a public interest, not the private interest of an individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

Reasonable expectations

34. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an individual in their professional role or to their private life, and in the case of employees, the individual's seniority or whether they are in a public-facing role.
35. In the present case, the withheld information relates to a senior member of the judiciary in terms of the number of misconduct cases he has heard over the last ten years and how many of those were dismissed before being put before a jury. The requested information is not sensitive and relates to his professional life.
36. Given the role of a Judge, the Commissioner considers that he would have a reasonable expectation that information about the types of cases he has presided over may be released into the public domain.

Consequences of disclosure

37. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individual in question.
38. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the information in question. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
39. The Commissioner considers it can be difficult to quantify what damage and distress may be caused but, in any event, it is only necessary to show that there is a possibility of this happening. The Commissioner does not believe that the named individual would be distressed by the disclosure of how many misconduct cases he has presided over in ten years, nor how many of those have been dismissed before being put before a jury, as she considers that a Judge would not have a reasonable expectation of privacy as covered above.

Legitimate public interest in disclosure

40. The Commissioner must also consider whether there is a wider legitimate public interest in the disclosure of the requested information. The question here is whether there is a legitimate public interest in disclosure of such significance that this outweighs the factors covered above.
41. In this case, a legitimate public interest is not obvious and it is unclear what motives the requester may have for wanting disclosure of the requested information. However, she accepts that there is a legitimate interest in knowing the experience of a Judge in dealing with a particular type of case and that there may be some value in disclosure of this type of information to the general public so that anyone attending court is aware of his experience in dealing with particular areas of expertise.
42. The Commissioner therefore concludes that disclosure would be fair.

Is there a Schedule 2 condition for disclosure?

43. If the Commissioner determines that disclosure would be fair, she must next consider whether it would satisfy a Schedule 2 condition.
44. If a Schedule 2 condition is not met, the information must not be disclosed.
45. The only relevant conditions in Schedule 2 are:
 - the data subject has consented to the disclosure; or
 - there is a legitimate interest in disclosure to the public or the requester and disclosure into the public domain is necessary to meet that interest and it does not cause unwarranted harm to the data subject's interests. The key consideration here is whether the disclosure is necessary.
46. Condition 1 in Schedule 2 is that "*the data subject has given his consent to the processing*".
47. Given the variety of FOIA requests and the fact that each one must be considered according to the circumstances of the case, it is unlikely that a public authority will be able to seek a data subject's consent to disclosure in advance of receiving a FOIA request. If a public authority is seeking to rely on this condition it is more likely to be the case that it will have to ask for consent after it has received the FOIA request.
48. In this case, it is obvious that the MOJ has not approached the Judge to seek his consent as it did not consider whether or not the request was his personal data, rather this has been introduced by the Commissioner herself.

49. However, within the evidence which the complainant provided to the Commissioner as part of his complaint, he has included some correspondence which he personally had with the Judge where he put this part of the request directly to him; the Judge declined to answer it. The Commissioner therefore infers that the Judge would not consent to disclosure under the FOIA. Furthermore, in such circumstances the Commissioner would not expect the MOJ to seek consent, albeit it is able to do so if it so wished.
50. Condition 6 requires that: *"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
51. This means that condition 6 is a three-part test:
- there must be a legitimate interest in disclosure to the public or the requester;
 - a disclosure into the public domain must be necessary to meet that legitimate interest; and
 - the disclosure must not cause unwarranted harm to the interests of the individual.
52. The first and third parts of the test have already been considered above and the conclusion is that disclosure would be fair, ie the legitimate interests in disclosure and those of the individual concerned in carrying out the balancing exercise have been considered, as has the unwarranted harm test when considering the possible consequences of disclosure on the individual.
53. This leaves only the second part of the test. The principal issue here is consideration as to whether it is **necessary** to disclose the requested information into the public domain in order to meet the identified legitimate interests.
54. As mentioned in paragraph 41 above, the Commissioner accepts that there is some legitimate interest in knowing the experience of a Judge in dealing with a particular type of case and that there may be some value in disclosure of this type of information to the general public. Albeit that no arguments have been provided by either party, she accepts that it may be of genuine public interest for someone attending court to be aware of a Judge's experience in a particular type of hearing. However, it is further noted that in a ten year period the MOJ has advised that there have only been 28 such cases heard in the whole of the South West Region, ie an average of less than three a year, so, the number of

cases that this Judge has heard will reveal very little about his experience as the number of cases under consideration is so small.

55. Whilst the complainant himself may have personal reasons for requiring this information, which seem to centre on a case in which he has shown a particular interest, the Commissioner must consider the necessary legitimate interest in disclosure of the Judge's personal data in order to meet a schedule 2 condition. Taking the limited information of which she is aware into account she cannot find that there is a **necessity** for such a disclosure and she therefore concludes there no schedule 2 condition is met. Disclosure of the requested information would therefore be in breach of the first data protection principle and section 40(2) is properly engaged.

Part two of request – section 40(5)(b)(i) NCND personal information

Section 40(5) personal information

56. The MOJ has cited section 40(5) of FOIA for part (2) of the request which concerns whether there have been any disciplinary proceedings in respect of the named Judge. This section provides an exemption from the section 1(1)(a) duty to confirm or deny whether requested information is held where to do so would involve the disclosure of personal data, or sensitive personal data, and that disclosure would be in breach of any of the data protection principles.
57. Consideration of this exemption involves two stages. First, confirmation or denial as to whether the requested information is held must involve the disclosure of personal data, or sensitive personal data. Secondly, that disclosure must be in breach of at least one of the data protection principles.

Is the information personal data?

58. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual.
59. As the complainant has requested information specifically about a named individual, by its nature the request identifies that individual and that information, if held, would constitute their personal data. Confirmation or denial as to whether or not the named Judge has been subject to complaints of the type referred to in his request would reveal something of a personal nature about him and would therefore constitute his personal data.
60. The Commissioner does not agree with the MOJ's view that the information requested in part (2) constitutes sensitive personal data as disciplinary matters are not listed in the sensitive personal data

definitions at section (2) of the DPA; nor does she agree that the personal data is that of anyone other than the named Judge.

Would disclosure contravene the first data protection principle?

61. The MOJ advised that it believed confirmation or denial would breach the first data protection principle.
62. When considering the first principle the Commissioner will generally look to balance the reasonable expectation of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
63. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
64. When considering whether disclosure of personal information is fair the Commissioner takes into account the factors set out in paragraph 29.
65. When considering the consequences of disclosure on a data subject, or confirmation or denial as in this case, the Commissioner will take into account the nature of the information in question. She must follow the process set out in paragraphs 37 to 40.
66. The MOJ said it believes that the individual involved will have a strong and clear understanding that information relating to whether or not he has been the subject of disciplinary action would be treated as private and sensitive and only disclosed as required within the course of, and in relation to, those disciplinary proceedings.
67. The MOJ has considered that disclosure of this information would promote openness and transparency around the conduct of the judiciary. However, the data requested is specific to an individual Judge and does not relate to the judiciary in general.
68. It considers that its obligation to protect and process personal data fairly and in accordance with the rights of a data subject under the DPA, outweighs any argument in support of confirming or denying whether any information is held in this instance.
69. Furthermore, the MOJ has explained that members of the judiciary are not employees of the MOJ and are constitutionally independent. Disciplinary action against members of the judiciary would not fall within the ambit of HMCTS, but would instead lie with the Judicial Conduct Investigations Office ('JCIO') and the Lord Chancellor's office.
70. In this case, the MOJ has explained that the JCIO places disciplinary statements relating to the judiciary on its website which the public can

view³. These are only available to be viewed for a limited amount of time. If a Judge is removed from service then the statement is removed after five years and if they receive a sanction the information will be removed after one year.

71. The Commissioner is satisfied that any necessary legitimate interests would be met by the placing of disciplinary matters on the JCIO website as currently happens. She does not consider that there is any further legitimate interest in confirming or denying whether the named Judge has been the subject of any disciplinary proceedings which, if they ever did exist, would have been subject to the process above and either still be available to view or have since been removed.
72. In the light of the nature of the information requested and the reasonable expectations of the data subject, the Commissioner is satisfied that confirming or denying whether it holds information could potentially cause unnecessary and unjustified distress to the data subject. Therefore, she considers that these arguments outweigh any legitimate interest in disclosure and she has concluded that confirmation or denial in this case would breach the first data protection principle.

Conclusion

73. In conclusion, having fully considered the particular circumstances of this case, the Commissioner considers the exemption provided in section 40(5)(b)(i) is engaged and therefore the duty to confirm or deny does not arise.
74. As the Commissioner has found section 40(5)(b)(i) is engaged in relation to part (2) of the request, albeit in respect of the named Judge rather than any third other party, she has not found it necessary to consider the application of section 44(1)(a), other than in respect of the MOJ's late reliance on this exemption as set out below.

Breach of section 17 for late reliance on section 44(1)(a)

75. Section 1(1) of FOIA states:

"(1) Any person making a request for information to a public authority is entitled –

³ <https://judicialconduct.judiciary.gov.uk/disciplinary-statements/2018/>

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him."*

76. Section 17(1) of FOIA states:

*"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

77. Breaches of section 17 will also be found if the public authority seeks to rely on another exemption during the investigation which it had not mentioned at or before internal review.

78. In this case, the MOJ relied on section 44(1)(a) during the course of the Commissioner's investigation thereby breaching section 17(1).

Other matters

79. In paragraph 13, following its internal review, the MOJ gave the complainant a weblink to the judiciary disciplinary statements issued by the Judicial Conduct Investigations Office. It is unclear why this was provided 'outside' the FOIA as it was a link to something which was clearly already in the public domain. The Commissioner considers that the MOJ should have instead offered the complainant advice and assistance in accordance with section 16 of FOIA and provided the weblink under FOIA.

Right of appeal

80. 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

81. 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.

82. 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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