

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 September 2022

**Public Authority:** Judicial Appointments Commission  
**Address:** 5<sup>th</sup> Floor 70 Petty France  
London  
SW1H 9EX

#### **Decision (including any steps ordered)**

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1. The complainant requested information about the way in which candidates are selected for appointment.
2. The Judicial Appointments Commission (JAC) provided a substantive response, however it applied exemptions to withhold some of the information within the scope of the request.
3. The Commissioner has investigated and found that the JAC was entitled to withhold the information on the basis of sections 40 (personal information), 44 (prohibitions on disclosure) and 21 (information accessible to applicant by other means) of FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 7 March 2021 the complainant wrote to the Judicial Appointments Commission (JAC) and made a multi-part request for information. Of relevance to this decision notice, parts (1), (2) and (6) were made in the following terms:

"1. Please specify how many members of sift and interview panels in the selection exercises referred to in paragraph (2), below in the period from 1 January 2019 to the date of this request have comprised individuals from an African, Caribbean, and Asian

("ACA") or LGBTQ background, specifying whether that individual was a judicial or lay panel member or an official (or commissioner) of the JAC.

2. Please provide information about how many individuals from a ACA or LGBTQ background in respect of the period from 1 January 2019 to the date of this request:

a. applied to be appointed to any of the positions specified in respect of the following selection exercises:

i. Senior Circuit Judges;

ii. Deputy High Court Judges, i.e., judges authorised to sit in the High Court under section 9(1) and 9(4) of the Senior Courts Act 1981; and

iii. High Court Judges.

b. were appointed to the above positions.

The JAC website states that if a person is not satisfied with the way in which his application is handled, he may lodge a complaint with the JAC.

[...]

6. Please provide information in respect of the period from 1 January 2018 to the date of this request about how many complaints were made by unsuccessful candidates to the JAC against the substantive decision of a sift or interview panel (as opposed to decisions in relation to administrative matters made by the staff at the JAC) in respect of all selection exercises held by the JAC and how many complaints were upheld, specifying:

a. the selection exercises in each case;

b. the nature of the complaint made; and

c. the details of the outcome in each case".

6. The JAC responded on 26 March 2021. It provided some information within the scope of the request, denied holding some of the requested information and refused to provide the remainder, citing the following exemptions as its basis for doing so:

- section 41 (information provided in confidence)
- section 44 (prohibitions on disclosure)

- section 21 (information accessible to applicant by other means)
7. The complainant was dissatisfied with the application of exemptions to the information in scope of parts (1), (2) and (6) and requested an internal review of the JAC's handling of those parts of the request.
  8. Following an internal review the JAC wrote to the complainant on 23 April 2021, upholding its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 29 September 2021 to complain about the way his request for information had been handled. He disputed:
  - the application of section 41 to the information within the scope of part (1) of the request;
  - the application of section 44 of FOIA, by virtue of Section 139 of the Constitutional Reform Act (CRA) 2005, in respect of part (2)(a) of the request;
  - the application of section 21 to the information in scope of part (6) of the request.
10. During the course of the Commissioner's investigation, the JAC provided the Commissioner with a copy of the withheld information.
11. The JAC also provided the following explanation in relation to the withheld information:
  - Lay panel members are not JAC employees and provide diversity data on a voluntary basis
  - For the candidate diversity information, candidates are not required to disclose their diversity information when applying and may choose not to do so
12. In its submission, as well as confirming its application of section 41 to the information in scope of part (1) of the request, the JAC acknowledged that section 40(2) could also be engaged, "as the request also relates to information which is clearly personal data". Similarly, with respect to the information in scope of part (2)(a) of the request, it considered that section 40(2) applies in addition to section 44.
13. The Commissioner has first considered the JAC's application of section 40(2) to the requested information in scope of part (1) of the request. If

he finds section 40(2) is not engaged, he will consider its application of section 41 to that information.

14. The Commissioner has next considered whether the JAC was entitled to rely on section 44(1)(a) to refuse to provide the information requested at part (2)(a) of the request. If he finds section 44 is not engaged, he will consider its application of section 40(2) to that information.
15. He has then considered its application of section 21 to the information in scope of part (6) of the request.

## **Reasons for decision**

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### **Section 40 personal information**

16. 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.
17. In this case the relevant condition is contained in section 40(3A)(a). 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').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
19. 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?**

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

“any information relating to an identified or identifiable living 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.
22. 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.

23. 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.
24. The Commissioner accepts that there are circumstances where, while an individual cannot be directly identified from the information, it may still be possible to identify them.
25. Part (1) of the request in this case relates to the ethnicity and sexual orientation of the lay panel members of sift and interview panels in the selection exercises specified in the request.
26. The JAC told the Commissioner:

“[The lay panel members] provide diversity data voluntarily, with the understanding the JAC only use the information for statistical & research purposes in line with our equality and diversity commitments and will not disclose it to third-parties, particularly candidates”.
27. The Commissioner is satisfied that information relating to the ethnicity and sexual orientation of the lay panel members undoubtedly relates to them.
28. The second part of the test is whether the withheld information identifies any individual.
29. The Commissioner acknowledges that the JAC told the complainant, albeit in regard to section 41:

“The small number of exercises within the scope of your request mean there is a risk disclosure may allow identification of individuals”.
30. It also told him that the names of the panel members would have been sent to candidates to assess whether there is any conflict of interest.
31. 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.
32. 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.

33. 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.
34. In summary, the test is whether the withheld information can identify an individual with a degree of certainty when it is combined with any additional information which is reasonably likely to be accessed and used to aid identification.
35. The withheld information comprises the number of lay panel members who satisfy the criteria specified in the request.
36. In the circumstances of this case, the Commissioner 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.
37. He has reached that conclusion on the basis that the focus of the information is the lay panel members and that information about their ethnicity and sexual orientation is clearly linked to them.
38. 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 interview process.
39. In its submission to the Commissioner, the JAC explained that lay panel members are engaged by the JAC on a fee-paid basis:

"to undertake our selection activity (the assessment of candidates, e.g. sifting or interviewing)".
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

42. 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”.

43. 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.
44. 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.
45. Information relating to special category data is given special status in the UK GDPR.
46. Article 9 of the UK GDPR defines ‘special category’ as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.
47. Having considered the wording of the request, the Commissioner finds that the requested information includes special category data. He has reached this conclusion on the basis that the request clearly seeks information about ethnicity and sexual orientation.
48. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
49. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
50. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
51. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
52. In light of that decision, the Commissioner has not considered the JAC’s application of section 41 to the same information.

#### **Section 44 prohibitions on disclosure**

53. Section 44 of FOIA states that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment.”

54. Section 44 is a class based exemption which means if the requested information falls within the class of information described in section 44(1)(a), the exemption is engaged. As section 44(1)(a) is also an absolute exemption, it is not subject to any public interest considerations.

55. In this case, the JAC considers section 44 applies to the information requested at part 2(a) of the request.

**Is disclosure prohibited by or under any enactment?**

56. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument).

57. In this case, the JAC considers that section 44(1)(a) is engaged, in that disclosure of the withheld information is prohibited by section 139 of the Constitutional Reform Act (CRA) 2005.

58. In its submission to the Commissioner, the JAC explained:

“Section 139 of Constitutional Reform Act 2005 refers to confidentiality and advises a person who obtains confidential information (e.g. a JAC member of staff with candidate information) must not disclose it except with lawful authority.... The information requested by [the complainant] related to the ethnicity and sexuality of the candidates in question, and this was information provided to the JAC in confidence when the candidates in question applied”.

59. The JAC told the Commissioner that candidates are not required to disclose their diversity information when applying and may choose not to do so.

60. It argued that there was a risk that individual candidates could be identified due to the numbers involved.

61. The complainant disputes that he is seeking confidential information. He told the JAC:



"No confidential information in the sense set out in that provision is sought by me. The information sought is about the ethnicity of candidates who applied in the various selection exercises".

### **The Commissioner's view**

62. The Commissioner acknowledges the following, taken from the CRA:

"139 Confidentiality

(1) A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority.

...

(3) Information is confidential if it relates to an identified or identifiable individual (a "subject").

63. Section 139(2)(b) specifies that Part 4 of the CRA is a relevant provision. The Commissioner accepts that Part 4 of the CRA is entitled 'Judicial appointments and discipline'.

64. The Commissioner has also considered the explanatory notes that accompany the legislation which state:

"Section 139 is a general confidentiality provision which applies to the selection and appointment of Justices of the Supreme Court under sections 26 to 31 in Part 3 of the Act and to the selection, appointment and discipline of judicial office holders under Part 4 and under any regulations and rules made under Part 4. All information which relates to an identified or identifiable individual is confidential and can be disclosed only with lawful authority. Disclosure without lawful authority is made subject to a civil action for breach of statutory duty".

65. Section 139(3) of the CRA specifies that "confidential information" is information which relates to an identified or identifiable individual. The Commissioner must therefore consider whether the withheld information is capable of identifying an individual or individuals.

66. The withheld information in this case relates to candidate diversity information.

67. The Commissioner considers that the arguments above in relation to personal data, including the motivated intruder test, are relevant to the question of whether section 139(3) is satisfied

68. Having considered the matter, and having viewed the withheld candidate diversity information, the Commissioner is satisfied that the information is capable of identifying an individual or individuals.
69. He is also satisfied that, where information was provided, it was provided to the JAC in confidence.
70. The Commissioner therefore considers that the withheld information is confidential information for the purposes of section 139 of the CRA.
71. The Commissioner accepts that section 139 of the CRA permits disclosure of confidential information only in limited and specified circumstances. Those circumstances are defined in section 139 of the CRA, in what the Commissioner considers to be precise terms.
72. From the evidence he has seen in this case, none of the limited and specific circumstances prescribed in the CRA which enable confidential information to be lawfully disclosed, are met.
73. Therefore, the Commissioner finds that the disclosure of the withheld information is prohibited by section 139 of the CRA.
74. The Commissioner recognises that FOIA does not override other laws that prevent disclosure. It follows that the JAC was entitled to apply section 44(1)(a) of FOIA to refuse part 2(a) of the request.
75. In light of that decision, the Commissioner has not considered the JAC's application of section 40(2) to the same information.

## **Section 21 – information reasonably accessible**

76. Section 21(1) of FOIA provides:

“(i) information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information”.

77. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.
78. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.

79. Information is only reasonably accessible to the applicant if the public authority:
- knows that the applicant has already found the information; or
  - is able to provide the applicant with precise directions to the information so that it can be found without difficulty.
80. When applying section 21 of FOIA in this context, the key point is that the authority must be able to provide directions to the information.
81. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*, states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant.
82. In its submission to the Commissioner, the JAC told him:
- "[The complainant's] original request does not appear to specify any particular selection exercise, or group of exercises, and was therefore considered to be a request for information regarding all complaints received. This information is routinely published in our annual reports and our response to [the complainant] explained this and provided a link to where this information could be found".
83. It also said:
- "...in these reports information on the exercises and the number of complaints received are provided along with a descriptor of the type of complaint made, also included were details of the outcome. The specific details of individual complaint [sic] cannot be published as this would risk identification of candidates"..
84. The Commissioner followed the link provided to the complainant to establish what information was available in the JAC annual reports.
85. The Commissioner acknowledges that the complainant disputes that the information he is seeking is available in the annual reports as, in his view, they do not contain information by reference to the specific selection exercises specified in his request.
86. Mindful of the actual wording of part (6) of the request, and of the general terms in which it is expressed, and having reviewed the information available, the Commissioner is satisfied that it answers part (6) of the request, and that it is reasonably accessible. Therefore, the Commissioner finds that the JAC is entitled to cite section 21(1) in response to that part of the request.

## Right of appeal

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87. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

88. 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.

89. 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 .....**

**Laura Tomkinson**  
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