

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2024

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

Decision (including any steps ordered)

1. The complainant has requested to know the salary of a named judge and detailed information about any periods of absence they have had. The Ministry of Justice ('MoJ') refused the request, citing section 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that the MoJ was entitled to apply section 40(2) to refuse the request.
3. The Commissioner does not require further steps as a result of this decision.

Request and response

4. On 29 November 2023, the complainant wrote to the MoJ and requested information in the following terms:

"I write to make an FOI request regarding the appointment of District Judge [personal data redacted]. See the following [link redacted]:

Q1. I would like to know this judge's annual salary as a district judge.

Q2. I would like to know all dates that this judge has not been on duty, namely at work during her contracted obligation. I would like these dates of absence further broken by category of absence from work, such as annual leave, sick leave or any other leave of absence

from her duties as presiding over court cases allocated to her as a district judge. The scope of my enquiry is from the 28th of November 2022 until the 28th of November 2023 or over her first year as a District Judge at [location redacted].”

5. The MoJ responded on 14 December 2023. It refused to disclose the requested information, citing section 40(2) of FOIA.
6. Following an internal review, the MoJ revised its position. It applied section 21 (Information accessible to the applicant by other means) to refuse point (1), and it shared a link to information in the public domain about judges’ salaries¹. It maintained the application of section 40(2) to refuse point (2) of the request.

Scope of the case

7. The complainant contacted the Commissioner on 23 January 2024 to complain about the way his request for information had been handled.
8. During the Commissioner’s investigation, the MoJ said that the link it had shared in respect of point (1) provided an overview of full time salaries, but it did not take account of any variables which might apply to the salaries of particular judges (for example, where they worked part time). It said it considered the precise salary and working arrangements of individual judges to be their personal data, and it reverted to its original position, that the information was exempt under section 40(2) of FOIA.
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to change the exemption on which it is relying, either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims
10. The analysis below considers whether the MoJ was entitled to apply section 40(2) of FOIA to refuse both points of the request. The Commissioner has not found it necessary to view the withheld information. He has reached his decision based on an understanding of

¹<https://assets.publishing.service.gov.uk/media/65129fffb23dad0012e70608/judicial-salaries-2023-2024.pdf>

the types of information that have been requested (ie precise salary, and dates and reasons for absence from work).

Reasons for decision

Section 40(2) – Personal information

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)². 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').
13. 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.
14. 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?

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

“any information relating to an identified or identifiable living individual”.

16. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA

17. 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.
18. The complainant has requested salary and absence details for a named individual. The individual is clearly identifiable from their name and information about their salary and absences is information which relates to them. The withheld information therefore meets the definition of personal data at section 3(2) of the DPA.
19. 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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”.

22. In the case of an 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.
23. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

24. Special category data is given special status in the UK GDPR. Article 9 defines ‘special category data’ as being personal data which reveals a number of things about an individual, amongst them, data concerning their health.
25. The Commissioner has not viewed the withheld information but to the extent that any of it is about sickness absence, he is satisfied that it is special category data. This is because information about sickness absence is personal data concerning the data subject’s health.
26. Special category data is particularly sensitive and 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.
27. 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.

28. The Commissioner has seen no evidence or indication that the individual concerned has 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. The MoJ has been quite clear that disclosure of the requested information would not be within the individual's expectations.
29. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. To the extent that any of the withheld information is special category data, processing it in response to this request would breach principle (a) and so this information is exempt from disclosure under section 40(2) of FOIA.
30. To the extent that some, or all, of the withheld information is not special category data, the Commissioner has gone on to consider whether disclosure would be lawful. 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

31. 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 child”³.

³ 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) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read

32. 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.
33. 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

34. In considering any legitimate interests 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 interests 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 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.
35. The complainant has not stated why he requires the information but he has indicated that he believes a district judge should not have an expectation of privacy with regard to such information.
36. The Commissioner recognises the legitimate interest in transparency surrounding judges' pay. He also accepts there is a legitimate interest, in knowing how the availability of judges may impact the general day to day workings of the courts and justice system.

as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Is disclosure necessary?

37. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. The Commissioner considers that the legitimate interest in knowing about judges' salaries is already satisfied by the information in the public domain, which the complainant has been referred to. This lists the full-time salary for district judges. He considers that disclosure of the specific salary in this case is not necessary to satisfy that interest. It is information about the data subject's personal income and working arrangements and its disclosure would be disproportionately intrusive in view of the information that is already available.
39. As regards the request for information about absences, the MoJ told the complainant:

"The MOJ is not satisfied that the intrusive disclosure under FOIA, is necessary in the context of this specific case. There already exists court procedural rules, and mechanisms, via which members of public can contact the court for information about their court case, or to access any information they are entitled to access, without the necessity of disclosing staff personal data under the FOIA."
40. The Commissioner appreciates that there is a legitimate interest in knowing about judges' availability, as this can affect how quickly court cases can be scheduled and heard. However, he does not consider that this interest extends to knowing the very specific information the complainant has requested about the dates, and reasons for, the absence of a named judge. That level of information is not necessary to satisfy the general interest in knowing the availability of judges.
41. Additionally, the Commissioner considers that disclosing when the named individual was in attendance or absent from work extends into their private and personal life and it might reveal why they are away from work. It is not proportionate to disclose this level of personal information and detail into the public domain when there is little apparent benefit which would flow from its disclosure.
42. It is not apparent to the Commissioner why the availability of a particular judge needs to be independently scrutinised by the complainant or whether the information within the scope of the request would provide sufficient information from which to form a view as to whether the justice system is functioning effectively. However, the Commissioner is satisfied in this case that there are less intrusive means

of understanding the availability of judges, such as requesting disclosure of the overall absence rates of judges, without requesting the information on an individual basis.

43. Therefore, in the particular circumstances of this case, the Commissioner does not consider that disclosure under FOIA is **necessary** to meet the legitimate interests identified at paragraph 36 and therefore he has not gone on to conduct the balancing test.
44. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
45. The Commissioner's decision is that the MoJ was entitled to withhold the requested information under section 40(2), by way of section 40(3A)(a) of FOIA.

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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