

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 February 2010

Public Authority: The Ministry of Justice
(In relation to the Office of Judicial Complaints)

Address: 10th Floor
The Tower
102 Petty France
London
SW1H 9AJ

Summary

The complainant requested the details of all complaints about a named judge, including their nature, details and results of investigations carried out. The public authority applied section 40(5) and neither confirmed nor denied whether information was held in respect to this request. It did this because it felt that confirming or denying whether information would be held would expose personal data of the named individual and this would have been unfair. The Commissioner has considered this case and has determined that the public authority's position is correct. However, he did find a breach of section 17(1)(b). He requires no remedial steps to be taken in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background details about the public authority

2. The Constitutional Reform Act 2005 (the CRA) gave the Lord Chancellor and the Lord Chief Justice joint responsibility for a new system for considering and determining complaints about the personal conduct of all judicial office holders in England and Wales and some judicial office holders who sit in Tribunals in Scotland and Northern Ireland.

3. The Office of Judicial Complaints was formed as a result of this legislation. It is not a forum to challenge legal decisions, but focuses only on judicial misconduct. An example of such misconduct may be inappropriate or discriminatory language.
4. The Office of Judicial Complaints is an associate office of the Ministry of Justice. Its status, governance and operational objectives are set out in a Memorandum of Understanding between the Ministry of Justice, the Directorate of Judicial Offices for England and Wales and the Office of Judicial Complaints¹. It is jointly responsible to the Lord Chancellor and Lord Chief Justice.
5. The Ministry of Justice has informed the Commissioner that it regards the Office of Judicial Complaints as being within its remit when considering FOIA matters. The public authority that this Decision Notice is served on is therefore the Ministry of Justice. This approach has been endorsed in obiter dicta in paragraph 72 of the Information Tribunal decision in *Guardian News & Media Limited v The Information Commissioner and the Ministry of Justice* [EA/2008/0084] (*Guardian News*). For the sake of clarity, the Office of Judicial Complaints will be referred to as the public authority who considered this request in this notice.
6. The Judicial Appointments and Conduct Ombudsman oversees the Office of Judicial Complaints. The Ombudsman's role is to ensure that the correct procedure has been followed and it is not a forum to get the decision reconsidered.

The Request

7. On 10 August 2009 the complainant requested the following information from the public authority in accordance with section 1(1) of the Act:

'Under the terms of the Freedom of Information Act, I would be grateful if you could provide me with details of all complaints made against [Individual redacted], who sits at [Court redacted], in the past 5 years. Please include the nature of the complaint and details and results of any investigation carried out.'
8. On 2 September 2009 the public authority issued a response. It explained that it was unable to confirm or deny whether any such complaints have been received because the exclusion found in section 40(5) applied in this case. It explained that to reveal whether or not information was held would be personal information and the release of it would be unfair. It also explained that section 139 of the Constitutional Reform Act also established a duty of confidentiality on those who have responsibilities in relation to the conduct and discipline of judicial office holders. It explained its internal review procedure and provided the Commissioner's details.

¹ This can be found here. http://www.judicialcomplaints.gov.uk/docs/Memorandum_of_Understanding.pdf

9. On 14 September 2009 the complainant made a request for an internal review. He explained that he was very disappointed by the public authority's approach and that he believed the information should be disclosed. He stated that it was important that judges paid from the public purse are subject to public scrutiny. In particular it is important as their actions can have considerable effect on people's lives. He explained that he had reason to believe that such information existed.
10. On 22 October 2009 the public authority communicated the results of its internal review. It upheld its position and offered no further arguments.

The Investigation

Scope of the case

11. On 24 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to prioritise the case as his court case was coming up.
12. On 17 December 2009 the Commissioner explained that the scope of this investigation would be:
 - To determine whether the public authority has applied section 40(5) correctly in this case [the exclusion to confirm or deny that information is held as to do so would disclose personal data which is exempt from disclosure], or whether the public authority should confirm or deny to the public whether this information is held.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner is unable to consider whether or not information can be provided privately under disclosure and separate legal advice should be sought about this matter. The complainant has indicated verbally that he understands that this is so.

Chronology

14. On 2 December 2009 the Commissioner wrote to the public authority to explain that he had received this complaint and asked to be provided with further arguments about why the public authority had taken its position.
15. On 17 December 2009 the Commissioner wrote to the complainant. He set the scope of his investigation and explained his preliminary verdict in this matter in light of the request for the case to be considered promptly. He asked whether, given his previous decisions in respect to this sort of information and the Information Tribunal's decision in *Guardian News*, he would wish for this case to continue. This Information Tribunal decision will also be considered in detail within the analysis section of this Notice and can be found at the following link:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i316/Guardian%20News%20&%20Media%20v%20IC%20&%20MoJ%20\(EA-2008-0084\)%20Decision%2010-06-09%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i316/Guardian%20News%20&%20Media%20v%20IC%20&%20MoJ%20(EA-2008-0084)%20Decision%2010-06-09%20(w).pdf)

16. On 31 December 2009 the public authority provided the Commissioner with further arguments about why it had taken the position that it had done in this case.
17. On 7 January 2009 the complainant telephoned the Commissioner. He explained that he understood the scope of the case and was disappointed with the preliminary verdict. He provided additional arguments about why he believed the information should be disclosed and asked for the Commissioner to formalise his verdict by issuing a Decision Notice. The Commissioner explained that he would do so.

Analysis

Overview and relevant background of the Judicial Disciplinary Process

18. The Commissioner believes that it is important to understand the contents of the judicial oath when considering this case. The judicial oath provides the starting point and is worded as follows:

"I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will."

It states that the judge is primarily accountable to the law he/she administers.

19. It is also important to understand the relevant Terms and Conditions of employment for Judiciary. These are standard conditions and within those conditions is a section entitled 'Judicial Conduct'. It explains that when it comes to criminal conduct a judge must report this at once to the Lord Chancellor and relevant Lord Chief Justice. Any offences that are grave, involve violence to persons, dishonesty or moral turpitude are likely to be regarded as judicial misbehaviour and lead to loss of office.
20. It also contains detailed sections about the expectation upon the judiciary for their personal conduct. In particular it explains that all office holders should maintain proper standards of courtesy and consideration. Offensive behaviour (such as sexual, racial or religious discrimination) is not acceptable and could be regarded as misbehaviour after a single instance. It also sets a requirement to inform the Lord Chancellor and Chief Justice where there are matters that relate to conduct which may affect a judge's position or reflect poorly on the standing of the judiciary as a whole. It explains that the public both deserves and expects the highest standards of conduct, but is careful to explain that the Lord Chancellor and Chief Justice will not use their powers without careful deliberation and serious cause.

21. It explains that the judges should expect that the disciplinary functions are conducted in the manner specified by the Judicial Discipline (Prescribed Procedures) Regulations 2006 which will be considered below.
22. It is also useful to understand the Guide to Judicial Conduct². It is designed to be a valuable tool to enable ethical problems to be dealt with and dovetails with the Terms and Conditions of employment. It is a guide published by the Judges' Council following extensive consultation with the judiciary. It explains that it is an evolving document whose purpose is to offer assistance to judges on particular issues, set up principles and ensure the maintenance of judicial independence.
23. Page 20 of the Guide states that behaviour that is merely unfortunate if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others. It is therefore true that the judiciary ought to work to a higher standard of conduct than is the normal standard.
24. It goes on to state the behaviour expected of a judge in court. It states the need to uphold the status of judicial office, the commitment made in the judicial oath and the importance in maintaining confidence of litigants in particular and the public in general. The judge should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. The judge should ensure that no one in court is exposed to any display of bias or prejudice on grounds, said in the *Bangalore* principle entitled "equality", to include but not to be limited to "race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes". There should be no bias or prejudice on those grounds, which are described in the principles as "irrelevant grounds".
25. It also details a large number of situations that would be unacceptable and explains that it is for the judge to ensure that he or she does not place himself in this kind of situation. It does not contain any reference to the disciplinary process itself.
26. As the terms of employment refer to the disciplinary process, it is therefore necessary to understand how the 2006 Regulations and the Office of Judicial Complaints operate to understand what would be expected by the judiciary in relation to disciplinary information.
27. The issue of judicial misconduct and how it is to be investigated is considered by the following piece of legislation – the Constitutional Reform Act 2005 (the CRA). This legislation represents Parliament's view of whether and to what extent individual members of the judiciary are to be reprimanded and the publication of any information in respect to them. The relevant part of this Act is found in part four: sections 108 to 119. Section 115 allows the Lord Chief Justice in agreement with the Lord Chancellor to set up procedures to investigate the receipt of complaints about judicial conduct. This has been done and the current procedures can be found in the Judicial Discipline (Prescribed Procedures)

² This can be located at http://www.judiciary.gov.uk/docs/judges_council/published_guide0606.pdf

Regulations 2006 (SI 2006/676), as amended by the Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008 (SI 2008/2098). These two pieces of secondary legislation explain how the Office of Judicial Complaints functions and how it operates.

28. Before the Constitutional Reform Act was enacted the Lord Chancellor and the Lord Chief Justice had discretion to publicise disciplinary information where they believed that it was consistent with the requirements of public interest in a case. They would be likely to publicise cases through making a joint public statement in order to address any loss of public confidence in the judiciary. Each case was dealt with on its own merits. It is necessary to understand the process before and after the legislation because the time period of the request embraces a short period before the Act came into force.
29. The Commissioner believes it is useful to explain in detail how the Judicial Discipline (Prescribed Procedures) Regulations 2006 (SI 2006/676) now operate. Regulation 3 sets up the Office of Judicial Complaints. It also explains that it may make enquiries and that the subject of those enquiries should respond in twenty working days. Regulation 4 sets a twelve month time limit about making a complaint, although it can be made up to twelve months after a continuing state of affairs ceases. This time limit is discretionary. Regulation 11 holds that the complaint must be made in writing (unless the public authority feels it reasonable for it not to be). These Regulations are important as, if the public authority does hold information, it would be held in written form and may be subject to the Act.
30. Regulation 14 provides a number of discretionary grounds where the public authority can discontinue its investigation, but it must have first allowed the complainant to have had the chance to provide adequate particulars of complaint. Regulation 15 also provides that the Lord Chief Justice or Lord Chancellor has discretion to override the public authority's decision to discontinue the investigation, where it believes that the conduct is sufficiently serious to warrant further investigation.
31. Regulation 16 provides that once a case has been accepted it must be passed to a nominated judge. These judges have been nominated by the Lord Chief Justice and must be of at least the same judicial rank as the subject of the complaint. Regulation 18 explains that it is for the nominated judge to come to a preliminary decision and advise the Lord Chief Justice and Lord Chancellor what that decision is. This may involve dismissing the complaint, ensuring a full investigation is carried out or upholding the complaint. Regulation 19 explains that the Lord Chief Justice or the Lord Chancellor can then decide to appoint an investigating judge. This individual must be a higher judicial rank than the subject of the complaint. They must be given terms of reference and conduct the investigatory process. They have discretion over that process but must hear from both sides. Evidence is provided and a report drafted. The report is checked for accuracy and is passed to the Lord Chief Justice and Lord Chancellor.
32. The Lord Chief Justice and Lord Chancellor then consider the report and have various options about how to proceed, ranging from dismissing the complaint to taking other disciplinary action either formally or informally. There is also the

possibility that the case will be reconsidered by a review panel that consists of one judge of higher rank, one of the same rank and two lay members. This is the panel that is convened when disciplinary action is proposed. It conducts a full merits review of the original decision. It sends its report to the Lord Chief Justice and Lord Chancellor, as well as to the subject of the complaint. The Lord Chief Justice and Lord Chancellor then will make a final decision.

33. The important Regulation in this case concerning information disclosure is Regulation 40. Regulations 40(1) and 40(2) explain what information should be disclosed to the complainant. They state that it is the duty of the Lord Chancellor and Lord Chief Justice to inform the complainant whether the complaint was upheld or not and what disciplinary action has been taken. The manner and terms in which this is communicated is up to the Lord Chancellor and the Lord Chief Justice.

34. Regulations 40(3) and 40(4) explain when information will be disclosed to the public. They are worded as follows:

' (3) The Lord Chancellor and the Lord Chief Justice may disclose information about disciplinary proceedings or the taking of disciplinary action against identified or identifiable judicial office holders to anyone to whom they agree it is necessary to give such information.

(4) The Lord Chancellor and the Lord Chief Justice may agree to the public disclosure of information about disciplinary action where they agree that the maintenance of public confidence in the judiciary requires that such information be disclosed.'

35. From this legislation it is clear that the discretion about whether or not disciplinary information is disclosed to the public is placed upon the Lord Chancellor and Lord Chief Justice. The Commissioner endorses the Information Tribunal's comments in paragraph 9 of *Guardian News* which explained that for the purposes of considering publicity of such cases the current legislation has crystallized how action was taken previously.

36. In addition to the Regulations there is also a statutory bar that is relevant when considering expectations in this case. This is found in section 139 of the CRA and this section is relevant as it applies to all information gathered for the purposes of part 4 of that Act (which includes judicial complaints). The relevant legislation states the following:

(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").

(4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—

(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));

(b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;

(c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c. 54) or a decision whether to exercise them;

(d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;

(e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.

(5) An opinion or other information given by one identified or identifiable individual (A) about another (B)—

(a) is information that relates to both;

(b) must not be disclosed to B without A's consent.

(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision.

(7) This section does not prevent the disclosure of information which is already, or has previously been, available to the public from other sources.

(8) A contravention of this section in respect of any information is actionable, subject to the defences and other incidents applying to actions for breach of statutory duty.

(9) But it is actionable only at the suit of a person who is a subject of the information. '

37. It follows that this section of the statute both defines the information, if held, as being confidential and provides a statutory bar, which prevents confidential information, if held, from being disclosed unless special conditions apply (none of which are relevant in this case).

Exclusion

Section 40(5)(b)(i) (exclusion from the duty to confirm or deny)

38. The information was requested by the complainant in the belief (and it is irrelevant whether this was right or wrong) that the judge in question had been the subject of complaints from the public about their conduct. In confirming whether or not information is held in relation to this request the public authority would have been exposing to the public whether or not the judge in question had been the subject of complaints from the public about his conduct. The public authority has informed the Commissioner that this is the reason that it chose to rely on section

40(5) in this case. Its position therefore is that it is excluded by virtue of the provisions of section 40(5)(b)(i) from the duty imposed on it by the provisions of section 1(1)(a).

39. Section 40(5)(b)(i) provides that a public authority is not required to confirm or deny whether it holds information if the confirmation or denial itself would reveal third party personal information and contravene a data protection principle.
40. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request. This has been confirmed by the Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) which stated that, “*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*” (paragraph 52): http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf.
41. Generally, the provisions of subsections 1 to 4 of section 40 exempt ‘personal data’ from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty to confirm or deny holding the information imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles, or section 10 of the DPA, or would do so if the exemptions in section 33A(1) of that Act were disregarded.
42. Therefore, in order for section 40(5)(b)(i) to be correctly applied the public authority must establish the following two elements:
 - (1) that confirming whether or not information is held by the public authority would reveal the personal data of a data subject as defined by section 1(1) of the DPA;
 - (2) that to confirm whether or not information is held would contravene one of the data protection principles.

Would confirming or denying whether information is held reveal personal data of the data subject?

43. The Commissioner has considered whether to confirm or deny whether the judge was the subject of complaints from the public about their conduct would be the named judge’s personal data.
44. Personal data is defined by section 1(1) of the DPA. This states that –

“personal data” means data which relate to a living individual who can be identified –

*(a) from those data, or
(b) from those data and 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 intentions of the data controller or any other person in respect of the individual”.

45. The public authority informed the Commissioner that through confirming or denying that the information requested was held it would reveal to the public whether the named judge was or was not the subject of complaints from the public about their conduct. This would be the personal information of the named judge. The Commissioner agrees with the public authority that whether someone was the subject of complaints from the public about their conduct would fall under the definition of personal data in the DPA.
46. The Commissioner also recognises that it may be possible that the information, if held, would be sensitive personal data of the named judge as defined by section 2(g) and (h) of the DPA:

‘In this Act “sensitive personal data” means personal data consisting of information as to—

....

*(g) the commission or alleged commission by him of any offence, or
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.’*

Would confirming or denying whether information is held contravene any of the data protection principles?

47. The Commissioner must then go on to look at whether confirming or denying whether information was held would contravene any of the data protection principles of the Act. The Commissioner notes in considering whether the exclusion applies, he must consider what information is in the public domain as opposed to what information the particular applicant may be aware of. The Commissioner has checked what is available in the public domain and as of the date of this notice there is no information that confirms or denies whether the named judge was or was not the subject of complaints from the public about their conduct. The public authority has also informed the Commissioner that it does not believe that any information is in the public domain.
48. In this case the public authority has furnished the Commissioner with detailed arguments about the first data protection principle. The Commissioner agrees with the public authority that the relevant principle in this case is the first data protection principle.

49. The first data protection principle has two main components and, in cases involving sensitive personal data, there is an additional component. These are as follows:

- a requirement to process all personal data fairly and lawfully;
- a requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
- an additional requirement to satisfy at least one DPA Schedule 3 condition [as supplemented by the provisions of The Data Processing (Processing of Sensitive Personal Data) Order 2000, SI 2000/417] for processing sensitive personal data (where applicable).

50. Both (or, where applicable, all three) requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would confirming whether confirming or denying whether information is held be fair to the data subject in this case?

51. The Commissioner believes that a wide fairness analysis is appropriate in this case. The important factors that require consideration are:

- *What are the reasonable expectations of the individual in relation to the handling of their personal data?*

Including:

- *What was that person told about what would happen to their personal data?*
 - *How the fact that the individuals are public sector employees influences their expectations;*
 - *The seniority of those individuals and the accompanying expectations of the public about individuals in that role.*
- *Is any duty of confidentiality owed to that person?*
 - *Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual; and*
 - *Legitimate interests of the public in knowing the withheld information and understanding what disciplinary action has been contemplated. In particular the legitimate interests of the public in obtaining transparency in this area.*

52. The public authority argued that confirming or denying whether a particular judge was the subject of complaints from the public about their conduct would be unfair and would not satisfy the first component. It informed the Commissioner that this was its general policy and it would never routinely confirm or deny whether an individual was the subject of complaints from the public about their conduct as to do so would be contrary to their expectations that such information would remain private.

53. It explained that there is no reference within the individual judge's terms and conditions of appointment that all complaints will be publicised. In fact as explained above in paragraphs 18 to 35 above, the expectations are that this information will only be disclosed where the misconduct is sufficiently serious to warrant it. It explained that their expectations are conditioned by the knowledge of how the judicial complaints process functions as noted above. In particular disclosure of information would not accord with Regulations 40(3) and 40(4) of the Judicial Discipline (Prescribed Procedures) Regulations 2006, which are clear that information will only be disclosed to the public where it is necessary for the maintenance of public confidence in the judiciary and this would mean that it was likely that the accusation was proven and sufficiently serious. The disclosure of all information about complaints, if held, irrespective of their veracity and severity would not accord with the reasonable expectations of the named judge and would therefore be unfair.
54. The complainant argued that the named individual was a public employee and was senior in rank. It follows that this person would expect that more information was disclosed about them than someone of less senior rank. The Commissioner accepts that the named individual has a senior role and is also paid from the public purse. A judicial post is by its nature a role which requires an individual to make a decision that affects another individual's legal position. The Commissioner also notes that section five of the Memorandum on Conditions of Appointment and Terms of Services specifically states that judges must accept a level of public scrutiny higher than that normally experienced by the average citizen. The Commissioner generally expects senior individuals to expect further information to be disclosed about them than their more junior colleagues. This is because further responsibility induces additional needs for transparency. The Commissioner believes that this factor suggests that confirming or denying whether information is held may not be unfair in this case.
55. In addition it is important to consider whether this information, if held, relates to the individual's personal or public life. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- 'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'*
56. In this case the information could, if held, relate to both. The Commissioner recognises that where a person's personal life can impact on their suitability to undertake a particular role then it is likely that the individuals would be aware that their conduct in their personal life would be open to scrutiny. However, it is unlikely that they would expect this scrutiny to be made public.

57. The Commissioner notes that the Information Tribunal has considered the above issue in *Waugh v Information Commissioner and Doncaster College* EA/2008/0038. The Tribunal had to deal with a refusal to provide information concerning the dismissal of the Principal of Doncaster College and upheld that refusal. In paragraph 40, the Tribunal emphasised that there is “*a recognised expectation that the internal disciplinary matter of an individual will be private*”. Taking into account the arguments in the above three paragraphs, the Commissioner believes that this factor also suggests that confirming or denying whether information is held may be unfair.
58. The Commissioner also notes that the Annual Report of the Office of Judicial Complaints³ provides a level of transparency and accountability. It provides a numerical breakdown of the nature of disciplinary proceedings taken against the judicial role that is held. The categories are fairly broad in order to ensure anonymity. The Commissioner notes that the level of detail has remained consistent and therefore it remains reasonable that a member of the judiciary would expect this amount of transparency, but not any additional details, if held, to be disclosed to the public. In paragraph 57 of *Guardian News*, the Tribunal explained that in its view the procedures regarding when and how disclosure should be made as to the fact and content of any reprimands is in no way deficient. The Commissioner endorses this view. The fact that the system has been endorsed by the Tribunal, which found that disclosure of any information would be unfair through the undermining of the system and the judiciary’s expectations also suggests that confirming or denying whether information is held may be unfair.
59. The public authority also argued that the statutory bar mentioned in paragraphs 36 and 37, ensures that this information, if held, will be regarded as confidential and that there is a duty of confidence owed to the judge that any information held would only be disclosed in line with Regulations 40(3) and 40(4). It therefore stated that it believed that the disclosure of this information, if held, would comprise an actionable breach of confidence and this is a strong reason why confirming or denying whether information is held will be unfair.
60. When considering unnecessary or unjustified damage or distress, the public authority explained that in its view, it may be entirely disproportionate to publicise other complaints, should they exist, because it could undermine the judges in future cases. This was because it believed that there may be the possibility of the judge’s position becoming untenable if for instance a minor previous indiscretion were in the public domain and resulted in them being discredited in the eyes of the litigant when the Justice Minister and Lord Chief Justice had previously reached the decision that such minor indiscretion would not impact on their ability to maintain their position in judicial office. It also stated that it was aware of the possibility also for individuals to exploit a previous sanction by attempting to antagonise a judge so as to bring on a repetition of the previous misconduct and thereby intentionally causing a disruption to proceedings. The Commissioner is satisfied the possibility of this damage is real and that this is a strong reason why confirming or denying whether information is held may be unfair.

³ For example http://www.judicialcomplaints.gov.uk/docs/OJC_Annual_Report-07-08.pdf (at pages 18 and 19)

61. Given that any information released under the Act is released to the public, the Commissioner is also satisfied that there is a real possibility of press coverage with public reaction being disproportionate in the circumstances. He believes that the context is likely to exacerbate any unnecessary and unjustified damage or distress in this case.
62. It is also necessary to consider the legitimate interests of the public in knowing this information. The Commissioner understands that transparency and accountability are important wherever possible and that given the impact that judge's decisions have that it is to be expected that they exhibit better behaviour than the average individual. The information may also, if held, offer public benefit and enable clarity in justice. It will also guarantee that individual judges will attempt to avoid even accusations of wrong doing and open up the system to public scrutiny. However, against this the public also have a legitimate interest in having an effective judicial system that deals with all complaints in a proportionate and fair manner.
63. The Commissioner accepts that public confidence in the judiciary requires that the public be satisfied of the independence and integrity and competence of the members of the judiciary who are called to sit in judgement on a very wide range of issues involving matters including credibility of evidence and moral and social questions. The Commissioner agrees that there is a legitimate public interest in it being possible for the Lord Chancellor and Lord Chief Justice to exercise their functions in a way best calculated to guarantee that independence, integrity and competence. Accordingly it should be possible to take a variety of approaches depending on what the circumstances of a particular case are and it is not in the legitimate public interest to erode that possibility through full disclosure. It follows that there is a legitimate public interest in the maintenance of a proportionate relationship between the misconduct, the response to the misconduct and public perceptions.
64. Overall, the Commissioner has come to the conclusion that the confirming or denying of whether information is held in this case would be unfair to the data subject. He believes that the arguments about the legitimate interests of the public in knowing this information, if held, do not come close to outweighing the reasonable expectations of the individual in confirming or denying whether information is held in this case. As the processing would be unfair it would therefore contravene the first data protection principle. He therefore supports the public authority's position that section 40(5)(b)(i) applies in this case and dismisses the complaint.
65. The Commissioner has also considered conversely whether to confirm that a particular judge was **not** the subject of complaints from the public about their conduct would be unfair. In this case the Commissioner believes that the approach needs to be uniform. Any other approach would indirectly expose those that had been subject of complaints from the public about their conduct. The Commissioner therefore considers that to confirm that there were no complaints from the public about their conduct would be unfair too.
66. As the Commissioner has concluded that confirming or denying the existence of the information would breach the first data protection principle because it would be

unfair, he has not deemed it necessary to consider the lawfulness of disclosure of the data, or whether disclosure would meet any of the conditions in Schedule 2 of the DPA. It is also not necessary to consider whether complying with section 1(1)(a) would meet any of the conditions in Schedule 3 of the DPA, when it comes to revealing potentially sensitive personal information.

67. .As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider any other data protection principles.
68. The Commissioner notes that his verdict is supported on very similar facts by the Information Tribunal's decision in *Guardian News*. The Commissioner believes that the principles of *Guardian News* are relevant and authoritative to this case. He notes this despite the circumstances and exemptions being slightly different. The differences are only because the request in *Guardian News* was framed in a general manner that meant that the case turned on section 40(2), while in this case the request focuses on a specific named judge making the exclusion from the duty to confirm or deny whether information was held more relevant [section 40(5)]. The expectations and consequential unfairness arguments are in the Commissioner's view analogous and they have been directly considered in paragraphs 96 to 98 of the *Guardian News* decision. The Information Tribunal is the appellate body and has had the benefit of oral evidence and expert evidence to establish its considered view. The Tribunal's considerations are therefore highly persuasive in this case.

Procedural matters

69. Section 17(1)(b) requires the public authority to cite the exemption that it relies on in full by the time of its internal review. In this case the public authority stated that it was relying on section 40(5), but not that it was relying on section 40(5)(b)(i). In failing to cite the exemption in full the public authority breached section 17(1)(b). No remedial steps are required in respect to this breach.

The Decision

70. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- *The public authority applied section 40(5)(b)(i) correctly and was excluded from its duty under section 1(1)(a) to confirm or deny whether information was held in this case.*
71. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- *The public authority failed to cite the exclusion it relied on in full and therefore breached section 17(1)(b) in this case.*

Steps Required

72. The Commissioner requires no steps to be taken.

Right of Appeal

73. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of February 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

Section 1 provides that:

- (1) Any person making a request for information to a public authority is entitled—
- (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.

...

Section 17 - Refusal of Request

(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.

...

Section 40 – Personal information

Section 40 provides that:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- "data" means information which—

- (a)
is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b)
is recorded with the intention that it should be processed by means of such equipment,
 - (c)
is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d)
does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
 - “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
 - “data subject” means an individual who is the subject of personal data;
 - “personal data” means data which relate to a living individual who can be identified—
 - (a)
from those data, or
 - (b)
from those data and 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 intentions of the data controller or any other person in respect of the individual;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a)
organisation, adaptation or alteration of the information or data,
 - (b)
retrieval, consultation or use of the information or data,
 - (c)
disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d)
alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is

structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 - Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.