

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 27 October 2011

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

Decision (including any steps ordered)

1. The complainant has requested information relating to lay members of Leeds Employment Tribunal. The Ministry of Justice (MOJ) refused to confirm or deny whether it held this information, relying on the exemption at section 40(5) of the Act.
2. The Commissioner's decision is that the MOJ correctly applied the exemption at section 40(5) to the information requested at part 2 of request 1. However, the MOJ incorrectly refused to confirm or deny whether it held the information requested at part 1 of request 1, and part 2 of request 2.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Confirm or deny whether it holds the information requested at part 1 of request 1 and part 2 of request 2.
4. The public authority must take this step within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following request (request 1) to the Ministry of Justice (the MOJ) on 6 January 2011:

- "1. Although [name] ceased to hold office as of the 18th November 2008 I would be grateful if you could confirm the date when [name] actually gave notification of her intention to cease her office or the date when the Tribunal Service were first aware that she was going to relinquish her position.*
- 2. Conversely if the cessation of [name]'s office was due to any disciplinary action when she was first given notification of the intention to dismiss.*
- 3. Finally when an Employment Tribunal Judge ceases office is there any formal notification to the wider judiciary specifically the Employment Appeal Tribunal and Court of Appeal."*
6. The complainant made a further request (request 2) to the MOJ on 11 January 2011:
- "1. I understand [name] a Leeds ET lay member unfortunately died last year. Could you please confirm if he ceased to be a lay member on his passing or if he ceased to be a lay member prior to his death. If the latter can you please confirm the date he ceased to be a lay member.*
- 2. In addition I understand that [name] is still a lay member operating out of the Leeds Tribunal. Can you please confirm that this is the case and that since November 2006 there has been no disruption to his service i.e. that he did not leave and then come back to his position as a lay member. If there was an interruption in his service I would be grateful if you could confirm the dates of the interruption."*
7. Although the MOJ did acknowledge the requests the complainant did not receive a substantive response, and she complained to the Commissioner on 14 February 2011.
8. Following the Commissioner's intervention, the MOJ responded to both requests on 10 March 2011.
9. The MOJ provided information in response to question 3 of request 1 and question 1 of request 2. However the MOJ refused to confirm or deny whether it held the remaining requested information under section 40(2) and section 40(5) of the Act.
10. The complainant requested an internal review on 29 March 2011, and the MOJ responded on 14 April 2011, upholding its original decision.

Scope of the case

11. On 24 May 2011 the complainant contacted the Commissioner to complain about the MOJ's refusal to provide her with all the information she requested.
12. The Commissioner notes that the MOJ did provide the complainant with some of the requested information. Therefore his investigation was limited to the MOJ's refusal to confirm or deny whether it held the information requested at parts 1 and 2 of request 1, and part 2 of request 2. The Commissioner has not investigated whether any information should (if it were held) be disclosed.
13. On 21 July 2011 and 5 September 2011 the Commissioner sought further information from the MOJ in relation to the complaint. The MOJ responded to the Commissioner on 25 July 2011, 24 August 2011 and 26 September 2011.

Reasons for decision

Section 40 exemption

14. Section 40(5)(b)(i) of the Act provides that a public authority is not obliged to confirm or deny whether information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

15. The DPA defines personal information as:

"...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 of the data controller or any person in respect of the individual."

16. In this case the complainant has requested information relating to a number of named individuals in their capacity as lay members of the Employment Tribunal. The Commissioner is satisfied that the requested information would (if it were held) be considered personal data relating

to the named individuals. This is because this information could reveal details of these individuals' service as lay members, and also whether or not disciplinary action was taken against any of these individuals.

Would confirming or denying that the requested information is held breach a data protection principle?

17. The first data protection principle says that personal data must be processed fairly and lawfully. The MOJ claimed that confirming or denying whether any of the remaining requested information was held would be unfair to the relevant individuals (in this case the lay members), and would therefore breach the first data protection principle.
18. In establishing whether confirming or denying would be fair, the Commissioner will look to balance the consequences of any release of personal data and the reasonable expectation of the lay members, with general principles of accountability and transparency.
19. The MOJ argued that the lay members had a reasonable expectation that their information would be held in confidence, because it would be a breach of the DPA to disclose this information. However the Commissioner considers this to be a circular argument. The Commissioner asked the MOJ to provide evidence to explain how individuals might have formed this expectation, for example any guidance issued by the MOJ which explained how lay members' personal data would be handled. The Commissioner notes that the MOJ has failed to provide any such evidence or explanation.
20. The Commissioner recognises that individuals who undertake public duties should expect that some information relating to these duties will be disclosed into the public domain. For example, the names of lay members of the Employment Tribunal are a matter of public record, as are the cases they sit on.
21. The Commissioner notes that in this case the requested information relates to the lay members' public duties. However, the Commissioner is mindful that not all information relating to an individual's professional or public role is automatically suitable for disclosure. For example, there may still be a reasonable expectation that more sensitive information such as details of appraisals, disciplinary proceedings, etc will not be disclosed.
22. In light of the above the Commissioner is of the view that the lay members should expect that the MOJ would confirm or deny whether it holds information relating to their dates of service. The Commissioner considers that to do so would not be unfair to the lay members. Therefore the Commissioner finds that the MOJ incorrectly refused to

confirm or deny whether it held the information requested at part 1 of request 1, and part 2 of request 2.

23. However the Commissioner considers that in the circumstances of this case lay members would have a reasonable and legitimate expectation that the MOJ would not confirm or deny whether it held information relating to disciplinary proceedings; such information is clearly more sensitive than the other details requested in this case. Therefore the Commissioner finds that the MOJ correctly applied the exemption at section 40(5) to the information requested at part 2 of request 1.

Right of appeal

24. 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: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF