

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2013

Public Authority: Ministry of Justice
Address: Data Access and Compliance Unit
Ministry of Justice
10th Floor,
102 Petty France
London SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information about a hearing held at Stevenage Magistrates Court.
2. The Commissioner's decision is that HM Courts & Tribunals Service has applied section 40(2) appropriately and is also correct to state that it does not hold certain information.
3. The Commissioner does not require HM Courts & Tribunals Service to take any further steps.

Request and response

4. On 28 January 2013, the complainant wrote to HM Courts & Tribunals (HMCTS), which is an executive agency of the Ministry of Justice (MoJ) and requested information in the following terms:

"Please can you provide the name of the Magistrates for the case of R v Doherty held on the 22nd, 23rd & 24th of January 2013 at Stevenage Magistrates court. Please identify which one was elected chair. Please also provide the name of the Clerk for our records. Also, please provide a full copy of the court clerk notes and Magistrates Notes."

5. HMCTS responded on 27 February 2013. It provided the names of the magistrates, confirmed who the Chair was, explained that it was

withholding the name of the court clerk under section 40(2) and that it did not hold the court clerk's notes or the magistrates' notes. HMCTS also explained that the FOIA did not apply to magistrates and so it did not have to consider this part of the request.

6. Following an internal review, HMCTS wrote to the complainant on 25 March 2013. It stated that it was upholding its application of section 40(2), reiterated that it did not hold the court clerk's notes and that the FOIA does not apply to magistrates.
7. On 26 April 2013 the complainant requested a second internal review. He stated that he wanted the full names of each of the magistrates and that he had been informed that there were clerk's notes available. HMCTS responded on 2 May 2013 confirming that it had already carried out an internal review and advised the complainant to appeal to the Commissioner. However, it did provide the full names of the three magistrates.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He claimed that HMCTS's response to his request was a 'bold faced lie', in that HMCTS claimed there were no clerk notes and the clerk was 'doing other administrative work' during a live court hearing instead of actually recording the court case.
9. The complainant also complained about HMCTS's claims as to the 'tone' of the email he had sent to it. He contended that it was perfectly acceptable to point out that a response was suspected of being fabricated. He also pointed out that there were no profanities or insulting words used and that he strongly wished to raise the 'abuse' nature of the way in which HMCTS had responded to his request.
10. The Commissioner can only investigate whether HMCTS has applied section 40(2) appropriately and whether it holds the court clerk's and the magistrates' notes. He cannot investigate the alleged 'bold faced lie' told by HMCTS or the alleged 'tone' of its response to the complainant. Furthermore, the Commissioner cannot consider the alleged 'abuse' nature of the way in which HMCTS responded to the complainant's request.
11. The Commissioner will therefore consider whether HMCTS has applied section 40(2) appropriately to the name of the court clerk, whether it is correct to state that it does not hold the court clerk's or the magistrates' notes and the length of time taken to respond to the request.

Reasons for decision

12. Section 40(2) of FOIA is an absolute exemption which relates to the personal information of anybody other than the requester.
13. Section 40(2) provides an absolute exemption if disclosure of information falling within the definition of personal data would breach any of the data protection principles. Personal data is defined by the Data Protection Act 1998 (DPA) section 1(1) 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 intention of the data controller or any other person in respect of the individual."

14. The Commissioner must consider whether the withheld information is the personal data of a third party.

Is the requested information personal data?

15. The two main elements of personal data as defined in section 1(1) of the DPA are that the information must relate to a living person and that the person must be identifiable. Information will relate to a living person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
16. In this case, the complainant has requested the court clerk's name. The Commissioner is satisfied that the court clerk's name constitutes 'personal data' as set out in section 1(1) of the DPA, as it is about that individual.

Will disclosure breach one of the data protection principles?

17. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the DPA. HMCTS explained that it considered that disclosure would breach the first data protection principle:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met."

Would it be fair to disclose the requested information?

18. Regarding fairness, the Commissioner recognises the importance of considering whether the data subject has consented to disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain. The Commissioner will also consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

19. In his guidance '*Personal information (section 40 and regulation 13)*' the Commissioner notes that regarding the issue of consent, data subjects must give their consent freely to the specific disclosure, with the understanding that their personal data will be disclosed to the requester and to the world.
20. HMCTS confirmed that the court clerk explicitly refused consent for her name to be disclosed.

Has the data subject actively put some or all of the requested information into the public domain?

21. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
22. In this case the Commissioner has not seen any evidence to suggest that the court clerk had actively placed her name in the public domain at the time of the request. The Commissioner notes that there was a trial and that this might mean the court clerk's name may have been made known. However, the Commissioner does not consider that such circumstances can be deemed an active disclosure by the named person, as such disclosure would be part of the court process rather than being an active disclosure by the named individual.

Reasonable expectations

23. When considering compliance with the first data protection principle, the Commissioner considers that it is necessary to consider what the

reasonable expectations of a third party would be in relation to how their information would be used and to whom it may be disclosed.

24. HMCTS explained that the named individual in question was a junior member of staff, in this case a legal adviser, in an inward facing role which contains no public facing element. Further, as explained above, the court clerk did not give consent for her name to be made public. HMCTS also confirmed that the court clerk has a reasonable expectation that her name would not be released into the public domain.
25. Taking the above into account, the Commissioner is satisfied that the court clerk has a reasonable expectation that her name would not be released into the public domain.

Consequences of disclosure on the data subject

26. The Commissioner will now consider whether disclosure would cause any unnecessary damage or distress to the data subject.
27. The Commissioner notes that disclosure under the FOIA is to the world at large. He considers that whilst the court clerk's name might have been known in the magistrates' court as she is a legal adviser, this is not the same as disclosure under the FOIA. The Commissioner also considers that, as the court clerk had not given consent for her name to be disclosed, she would have a reasonable expectation that her name would not be disclosed outside of the court proceedings.
28. Taking the above into account, the Commissioner is satisfied that disclosure in this case could cause distress.

Balancing the rights and freedoms of the data subject with legitimate interests

29. Despite the reasonable expectations of individuals and that damage or distress could result from disclosure, it may still be fair to disclose personal data if it can be argued that there is a compelling public interest in disclosure, that is, if there are any legitimate interests in disclosure.
30. Legitimate interests can include interests such as accountability and transparency as well as specific interests. When balancing legitimate interests with the rights of the data subject the Commissioner's view is that a proportionate approach should be taken.
31. In this case, whilst the data subject's name may have been available in the magistrates' court, it has not been disclosed to the public at large. The Commissioner considers that even if the complainant's interest in

knowing the name of the court clerk was legitimate, this private interest does not equate to a legitimate public interest.

Conclusion

32. The Commissioner considers that the data subject would hold a reasonable expectation that her name would not be disclosed outside of the court proceedings.
33. As the Commissioner has concluded that it would be unfair to the court clerk to disclose her name and that to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
34. As section 40 is an absolute exemption, there is no need to consider the public interest in disclosure.

Court clerk's notes

35. HMCTS has stated that it does not hold the court clerk's notes. The Commissioner has to determine whether, on the balance of probabilities, HMCTS is correct to state that it does not hold the court clerk's notes.

36. Section 1(1) of FOIA states that:

"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."

37. The Commissioner wrote to HMCTS asking it a number of questions regarding whether it held the court clerk's notes and it responded as follows.

- What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

MoJ's answer: The Stevenage Magistrates Court was sent an email asking about the clerk's notes in respect of the dates specified in [named individual] letter. It was expected that this search would assist in retrieving the notes if held. The court checked the court file as [named individual] is asking for hand written clerks notes. The

response received from the court was that there were no Clerks notes made for the dates requested. The investigating officer explains that the court in addition to searching the case file also contacted the Clerk who confirmed no notes were taken on this day. The court however provided notes from other hearing dates in this case. But as these were not the notes requested [named individual], they were not considered for release. And that had they being considered, they would have engaged sections 32 and 40 of the Freedom of Information Act.

- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

MoJ's answer: The search was for a copy of the hand written notes and would only have been available on the court file.

- If the information were held would it be held as manual or electronic records?

MoJ's response: The notes would have been on the court file if held, and so would have been held as a manual record.

- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

MoJ's response: No, no information within scope of the request was ever held let alone destroyed. As explained above, notes from other hearing dates are held in this case but are not relevant to the scope of this request.

- What does HMCTS formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can HMCTS describe the way in which it has handled comparable records of a similar age?

MoJ's response: I have cut out below extract of the HMCTS record retention policy relevant to this case:

Notes of Evidence in summary Jurisdiction cases, with exhibits and other related documents. Defendant's means forms kept in case files. Destroy these after 3 years subject to the local record office not seeking to retain them by virtue of Section 3(6) of the Public Records Act 1958.

- Is there a business purpose for which the requested information should be held? If so what is this purpose?

MoJ's response: Clerks notes are personal notes and in some cases there may be no need for notes to be taken.

- Are there any statutory requirements upon HMCTS to retain the requested information?

MoJ's response: Yes, only if the information existed but as explained above no such information existed. Had it existed, HMCTS would be required to retain it as part of the court file and above retention policy would then apply.

38. The Commissioner has considered HMCTS's response to his questions about the searches it has carried out. He is satisfied that, on the balance of probabilities, HMCTS's responses support its claim that it does not hold the court clerk's notes.
39. Therefore, the Commissioner does not consider that the MoD has breached section 1(1).

Magistrates' notes

40. The Commissioner notes that the HMCTS explained to the complainant that the FOIA does not apply to magistrates. The Commissioner contacted the MoJ for a further explanation about the HMCTS's relationship with magistrates. The MoJ explained that magistrates' notes are the property of magistrates themselves and are therefore not held by the HMCTS.
41. Given that the magistrates' notes are the property of the magistrates concerned, the Commissioner is satisfied that the HMCTS would not hold these notes.
42. The complainant also complained about the length of time taken to deal with his request. Section 17(1) of FOIA states that:

"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 for that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

(a) states the fact,

(b) specifies the exemption in question, and

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

43. Section 17 provides that the time limit for responding to an applicant, when citing exemption(s), is 20 working days after the date of receipt. HMCTS therefore breached section 17(1).
44. HMCTS received the complainant's request on 28 January 2013 but did not respond to it until 27 February 2013, citing section 40(2). In order for it to have complied with section 17(1), HMCTS should have responded to the complainant by 25 February 2013. The Commissioner therefore considers that HMCTS has breached section 17(1).

Right of appeal

45. 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

46. 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.
47. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF