

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

### **Decision notice**

**Date:** 10 December 2015

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

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

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1. The complainant requested information about a named district judge. The Ministry of Justice (the 'MOJ') refused to confirm or deny whether it held the requested information, citing sections 32(3), court records, 40(5), personal information and 44(2), prohibitions on disclosure of FOIA in respect of parts 1, 2, 3, 4 and 6 of the request. The MOJ initially said it did not hold any information in respect of part 5, but changed its position during the investigation and instead relied on section 12(1), the cost exclusion.
2. The Commissioner's decision is that the MOJ has properly relied on sections 40(5) and 12(1) to refuse this request. As he has found sections 40(5) and 12(1) to be engaged, he has not considered the MOJ's reliance on the other exemptions. He does not require the MOJ to take any steps to ensure compliance with the legislation.

#### **Background**

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3. The complainant submitted her request to the Judicial Conduct and Investigations Office (the 'JCIO') which falls under the MOJ's remit. The MOJ explained that the JCIO is responsible for investigating complaints into judicial conduct. Its work is highly sensitive and is governed by section 139 of the Constitutional Reform Act 2005 (the 'CRA'). Part 4 of the CRA relates to the functions of the investigation of judicial conduct and discipline.
4. The MOJ advised that information on judicial conduct is strictly controlled, and that investigations are detailed and complainants are

notified of the outcome of the investigation into their complaints. The MOJ confirmed that such investigation letters have been subject to a number of FOIA requests. It explained that where the Lord Chancellor and Lord Chief Justice agree that a Judicial Office holder's conduct requires sanctions or disciplinary action, these are then published on the Judicial Office website by way of a press notice. In all other instances the outcomes of judicial conduct investigations are confidential by virtue of the CRA.

5. The complainant submitted a previous request on this subject on 15 June 2015, which is the subject of decision notice *FS50591877*<sup>1</sup>.

## Request and response

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6. On 5 August 2015 the complainant wrote to the MOJ and requested information in the following terms:

*"To the JCIO,*

*Request for Information in accordance with the Freedom of Information Act*

*RE Link below which is a matter of public record:*

*<http://whistleblowerkids.uk/2015/05/15/alerting-the-jcio-misuse-of-judicial-status-and-professionalmisconduct/>*

*"ALERTING the JCIO: Misuse of Judicial Status and Professional Misconduct"*

*Please would you provide me with the following information.*

- 1. Please confirm whether or not this matter was in fact referred to the JCIO.*
- 2. Please state whether there is in fact any substance to these allegations.*
- 3. Please provide details of the action taken by the JCIO, which specific rules and procedures were applied, and whether the matter was*

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560057/fs\\_50591877.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560057/fs_50591877.pdf)

*investigated by the JCIO and/or referred to JACO and/or referred to the Police and/or to any other Ministry/Organisation.*

*4. I should be grateful if you would let me know the outcome of the concerns raised and if the concerns were in fact upheld, not upheld, upheld in part, or rejected entirely without investigation, please specify.*

*5. How many similar referrals did the JCIO receive since 2008 regarding (A) the Court of Protection and the Family Court and (B) specific Judges.*

*6. Lastly, was the Lords Committee Inquiry made aware of such concerns, and the extent of those concerns, when they carried out their investigation into the Court of Protection and it's [sic] Procedures."*

7. The MOJ responded on 1 September 2015. It refused to confirm or deny whether it held information in respect of questions 1, 2, 3, 4 and 6 citing sections 32(2), 40(5) and 44(2) of FOIA. It also said it did not hold any information in respect of question 5.

8. The complainant requested an internal review on 1 September 2015 where she raised some additional questions, namely:

*"Please would you clarify whether DJ [name redacted] is in fact being investigated by the JCIO.*

*How many complaints have been raised and brought to the attention of the JCIO about him since 2008 to date.*

*How many were related to the Mental Capacity Act and how many were related to something else, please categorise.*

*How many of those were upheld, upheld in part, not upheld."*

9. Following an internal review the MOJ wrote to the complainant on 18 September 2015. It upheld its original decision and said that the previously cited exemptions also applied to the additional questions raised as part of the internal review.

10. Although the MOJ cited section 32(2) in its response and internal review outcome, it has confirmed to the Commissioner that it had intended to rely on the 'neither confirm nor deny' provision in section 32(3) of FOIA.

## Scope of the case

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11. The complainant contacted the Commissioner on 18 September 2015 to complain about the way her request for information had been handled.
12. The Commissioner has considered whether the MOJ was entitled to rely on the 'neither confirm nor deny' provision in sections 32, 40 and 44 in relation to this request. He has also determined whether section 12(1) applies to question 5 of the request.

## Reasons for decision

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### **Section 40(5) neither confirm nor deny in relation to personal information (parts 1, 2, 3, 4 and 6)**

13. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - (a) the duty to inform the applicant whether or not requested information is held and, if so,
  - (b) the duty to communicate that information to the applicant.
14. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').
15. In this case, the MOJ has not specified which limb of section 40(5) applies; however, as the request is for information about a named individual other than the complainant, the Commissioner considers section 40(5)(b)(i) applies.
16. The MOJ argued that confirming whether or not it holds the requested information would breach the data protection rights of the individual named in the request, as it would reveal under FOIA whether he had been subject to an investigation into his conduct. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
17. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of

personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

18. The definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

19. Following its internal review the MOJ told the complainant:

*"I conclude that section 40(5) was therefore applied correctly to your request as confirmation on whether this type of information is held or not about a specific individual would itself be a release of information about an individual and therefore the JCIO would be in breach of the Data Protection Principle that information must be processed fairly and lawfully."*

20. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual.

21. The Commissioner considers that to comply with section 1(1)(a) of the FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the named individual, which in turn would constitute disclosure of information that would relate to him.

22. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

*Would confirmation or denial breach one of the data protection principles?*

23. In the case under consideration here, the MOJ told the Commissioner:

*"The Department contends that, confirmation that the information is, or is not held would be in breach of principles 1 and 2 of the DPA as it would be actively placing information about Judge [name redacted] conduct in the public domain."*

24. When considering the first principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
25. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
26. When considering this it is important to note that when a request is received under the FOIA, a public authority must consider the request as if it has been received from any member of the public; it is not able to take into account any private or personal reasons which the requester may have for requesting the information. Nor can the MOJ take into account any prior knowledge that the requestor has about the issues that lie behind the request. Further to this, disclosures under the FOIA are intended to be global in nature and so the MOJ must consider a disclosure to the whole world rather than to a specific requester.

*Reasonable expectations*

27. The MOJ stated that an expectation of confidentiality would be paramount given the regulations set out in the CRA. The JCIO's correspondence clearly sets out to a member of the Judiciary how their personal data would be processed in the course of an investigation. It said there is no expectation that personal data collected in the course of an investigation would be published except for the exceptional process by which disciplinary measures are published (see 'Background' section of this notice).
28. In those instances, disclosure of personal data on the JCIO webpage would be carefully managed and the Judicial Office holder would be informed in advance. The MOJ said that disclosure under the FOIA would breach the fairness principles on the basis that the only anticipated disclosure a Judicial Office holder would have would be under the sanctions process.
29. In this case, the MOJ also argued that disclosure of information by confirmation that the information is held would also breach the lawfulness principle, as the requested information is covered by the CRA and a statutory bar which would engage section 44(2) of FOIA.
30. On this basis, the Commissioner is satisfied that the data subject would reasonably expect that his personal data, if held, would not be disclosed.

*Consequences of disclosure*

31. Although the MOJ did not submit any specific arguments in relation to the consequences of disclosure, the Commissioner considers that such a disclosure would cause the named individual unwarranted distress, particularly as the information, if held, would reveal that the named judge had been investigated following a complaint of misconduct (even though he was found to be 'not guilty', given that no sanctions appear in his name on the JCIO website).

*General principles of accountability, transparency and legitimate public interest in disclosure*

32. The Commissioner appreciates that there is a general public interest in accountability and transparency, and that the public is entitled to be informed about Judicial Office holders who are found guilty of misconduct. On the other hand, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held. Further, in this case, the process of managing Judicial Office holders' conduct is governed by the CRA. If sanctions are issued against a Judicial Office holder they will be published on the JCIO website, which meets the public interest concerning judges who are found to be guilty of misconduct.
33. The Commissioner is aware that the complainant may have a personal interest in the request. However, with respect to the legitimate interest in disclosure, the interest must be a public interest, not the private interests of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

*Conclusion*

34. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
35. With due regard to the reasonable expectations of the data subject, and the potential impact on him if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
36. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. He considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the

MOJ was therefore not obliged to confirm or deny whether it holds the information requested by the complainant.

37. The MOJ also argued that disclosure of the requested information would breach principle two of the DPA. However, as the Commissioner is satisfied that the first principle would be breached he has not found it necessary to consider this further.
38. Similarly, as the Commissioner has found section 40(5)(b)(i) is engaged, he has not needed to consider the MOJ's reliance on sections 32(3) or 44(2).

**Section 12(1) – cost of compliance exceeds appropriate limit (part 5 only)**

44. During the Commissioner's investigation the MOJ revised its position in relation to part 5 of the request. Although it initially advised the complainant that no information was held in respect of part 5, the MOJ said it now wished to rely on section 12(1) of FOIA.
45. The MOJ explained that the JCIO had confirmed that the information was not held as it related to statistical data rather than data attributable to a specific individual. It explained that the information requested is not actively collected by the MOJ as the JCIO are not required to collect data in respect of the courts (or type of courts) from which a case may arise as part of their statistical collection. It explained that, as such, the information was confined to the statistics collected for JCIO.
46. The MOJ said that whilst the JCIO is not required to collect this data, it had not considered that there may be some indication at the individual file level where the complaint originated from that would be in scope of the request. For this reason, the MOJ said that JCIO should have relied on section 12(1) of FOIA in respect of part 5, stating that this is a position which the JCIO has successfully defended in previous instances. The MOJ forwarded a copy of a decision notice in support of its view, which was upheld by the First tier tribunal and struck out by the Upper tribunal, reference *FS50530729*<sup>2</sup>. In that case section 12(1) was found to apply to the number of small claims and complaints arising from them in the County Court. Whilst the focus of the request differs, the way the JCIO record the information on complaints remains the same.

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2014/993200/fs\\_50530729.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2014/993200/fs_50530729.pdf)



47. On 2 December 2015, at the Commissioner's request, the MOJ issued a section 12(1) refusal notice to the complainant, in which it confirmed that it holds part of the requested information (namely complaints and/or referrals received by the JCIO over the last year regarding the Court of Protection and the Family Court). However, because the cost of complying with this part of the request would exceed the limit set by FOIA, the MOJ refused to provide the information.
48. The FOIA allows central government public authorities to decline to answer FOIA requests when it is estimated it would cost more than £600 (equivalent to 3½ working days' worth of work, calculated at £25 per hour) to identify, locate, extract, and then provide the requested information.
49. In this case, the MOJ explained that to provide the complainant with the information would necessitate accessing each and every complaint file over the past year, reading each complaint and making a determination as to whether it fell into the category described in part 5 of the request (arising from the Court of Protection and the Family Court).
50. The MOJ confirmed that there were 2432 complaints filed in the financial year 2014/15 and even if a minimum of ten minutes were spent on each complaint file, the cost of providing such information would far exceed the £600 limit. The MOJ explained that the files are of varying lengths so, for example, sometimes there may be more than one complaint about the same incident which would make some files larger than others depending on the type, severity and outcome of the complaint.
51. The Commissioner considers that ten minutes per file is a reasonable estimate based on the way the information is held.
52. Section 16 of FOIA requires a public authority to provide advice and assistance to a requester to as to how a request may be refined to try to bring it within the cost limit. In this case, the MOJ advised the complainant that even filing a refined request reducing the time period to six or even three months would not bring the figure within the cost limit. However, it referred the complainant to an earlier letter it had sent to her on 17 November 2015 which outlined the statistical data which the JCIO publishes, the context within which it is held, and how the figures are calculated, which it said should provide her with a basis in the event she wished to refine her request.
53. The view of the Commissioner is that the MOJ has properly relied on section 12(1) in relation to question 5 of the request.

## Right of appeal

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54. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

55. 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.
56. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**