

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

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

Decision (including any steps ordered)

1. The complainant made a three part request about General Civil Restraint Orders ('GCROs') issued by the Court of Appeal over a specified time period. The Ministry of Justice (the 'MOJ') responded to him on three separate occasions, but ultimately refused to provide the information requested in part one of the request citing section 40(2) (personal information) of FOIA. It relied on section 21 (information accessible to applicant by other means) in response to part two for 'live' GCROs and section 40(2) for those which had expired. For part three of the request, the MOJ provided a discretionary response outside of FOIA.
2. The Commissioner's decision is that the MOJ has provided inaccurate and misleading information in relation to part one. He finds that sections 21 and 40(2) are not engaged in relation to the names of the judges and that section 40(2) is not engaged in relation to some names of the individuals in part two. He also finds that the MOJ did not respond to part three of the request in accordance with FOIA. He does uphold the MOJ's reliance on section 21 in relation to the names of individuals with GCROs from the Court of Appeal which are currently in force.
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation:
 - Part 1 of request - MOJ to reconsider its position and issue a fresh response. In doing so it should take account of what is already available in the public domain and also ensure it clearly reads the request and considers data back to 2003.
 - Part 2 of the request – the MOJ should issue a fresh response. In respect of the names of judges the MOJ cannot rely on sections 21 or

40(2) of the FOIA. In respect of the names of individuals, the MOJ cannot rely on section 40(2) in respect of those individuals whose details are currently in the public domain.

- Part 3 of request – handled outside the scope of FOIA - MOJ to issue a response which is compliant with section 1 or section 17 of FOIA.
4. The MOJ must take these steps 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. Details of the types of Civil Restraint orders ('CROs') can be found on the www.gov.uk website¹. A CRO is a court order issued by a judge. They are usually given when a person's application for a court hearing is refused but they will not accept the judge's decision. A CRO then stops that person from re-applying to court. The judge will decide the most suitable type of order to issue.
6. A 'GCRO' is issued by the judge in the most extreme cases. This order applies to all the county courts and the High Court. GCROs last for two years, but can be renewed for a further two years. If this order is ignored, the person will be in contempt of court and may receive a prison sentence.
7. A list of GCROs which are currently in force can be viewed at the above weblink. This shows names of those subject to a GCRO, the court where the GCRO was issued and the expiry dates are published.
8. The Commissioner asked the MOJ to explain what happens to the publicly available records once they are removed from the website having expired. The MOJ has confirmed that it does not maintain a public list of expired orders, stating that once an order expires it is removed. The MOJ makes changes to the published list based on instructions it receives, which includes removing orders no longer in force and adding new ones.

¹ <https://www.gov.uk/guidance/civil-restraint-orders--2>

9. In addition, the MOJ advised the Commissioner that The National Archives ('TNA') has periodically taken 'snapshots' of the website and added those snapshots onto its own website. The MOJ provided links to some relevant pages, including a snapshot from 5 April 2012².
10. The Commissioner has found further examples of GCROs online. These are on the websites referred to at paragraphs 5 and 9 above. From his search, he has found there has been a different number of GCROs issued by the Court of Appeal than the MOJ has identified to him.
11. There is evidence of a GCRO issued by the Court of Appeal, which is currently in force published on the www.gov.uk website. Further, he has viewed the snapshot information on TNA's website and has found four entries of GCROs previously issued by the Court of Appeal; there may be more which are not displayed by TNA.

Request and response

12. On 21 August 2015, the complainant wrote to the MOJ and requested information in the following terms:

- “1. The number of General Civil Restraint Order (“GCRO”) made by the Court of Appeal on its own motion, yearly since 2003 to 2015?*
- 2. The names of the judges of the Court of Appeal who made the GCRO decisions in Point (1) above and the names of the individuals who were the subject of the GCRO, yearly from 2003 to 2015?*
- 3. Where a GCRO was made by the Court of Appeal in Points (1) and (2) above, did the Court of Appeal provided a right of appeal to the individual(s) subjected to the GCRO or not, yearly from 2003 to 2015?”*

13. On 10 September 2015 the MOJ responded. The MOJ said it had made enquiries with the Court of Appeal Civil Division in the Royal Court of
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²http://webarchive.nationalarchives.gov.uk/*/http://www.justice.gov.uk/courts/civil-restraint-orders and

<http://webarchive.nationalarchives.gov.uk/20120405142118/http://www.justice.gov.uk/courts/civil-restraint-orders>.

Justice in relation to part 1 of the request. The MOJ said that the court is not able to ascertain the number of GCROs granted on its Civil Appeal Office database.

14. In relation to part 2 of the request, the MOJ refused to provide the names of the judges, citing section 40(2), personal information, of FOIA. In relation to the names of the individuals with a GCRO, the MOJ cited section 21 (information accessible by other means) and provided a weblink³ to that information.
15. For part 3 of the request, the MOJ provided some information outside the FOIA, together with a weblink⁴. It advised that a person subject to a CRO or GCRO may request a hearing to reconsider the decision made within seven days of notice of that decision having been served.
16. The complainant requested an internal review on 10 September 2015. The MOJ sent him the outcome on 16 October 2015. It partly revised its position in that it confirmed it did hold some information pertinent to part 1 of the request, but now wished to rely on the cost exclusion, section 12(1) of FOIA. The MOJ said there were 1320 GCROs during the specified time frame.
17. The MOJ also revised its position with regard to part 2 of the request and cited section 21 for the names of judges. For the names of individuals, the MOJ said it still wished to rely on section 21 for current data for individuals with a GCRO, but cited section 40(2) for historical data. It maintained its approach to part 3 of the request, but said it could not offer any additional advice and assistance unless the complainant clarified exactly what information he required about the appeal process.
18. The complainant sent an email to the MOJ on 19 October 2015 which included some additional points about the GCRO appeal process. He specified that his request only related to GCROs and not to any other type of CRO.
19. The MOJ replied on 3 November 2015; it confirmed to the Commissioner that this reply constituted a second internal review (see 'Other Matters' section of this notice).

³ <https://www.gov.uk/guidance/general-civil-restraint-orders-in-force>

⁴ <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52#52.16>.

20. At this stage, the MOJ again revised its position and said that it had inadvertently included all CROs in the figure of 1320, as opposed to GCROs issued by the Court of Appeal, which is what the complainant had clearly specified in part 1 of his request. It said that it holds the requested information but refused to provide it on the basis of section 40(2), because the figure amounts to "five or fewer" individuals.
21. For part 2 of the request, the MOJ maintained its position and for part 3 of the request, the MOJ added the following:

"As part of my duty to assist and advise under section 16 of the FOIA, I can clarify that any member of the public may apply to a court for a copy of any order given or made in public under the Civil Procedure Rules (CPR0 5.4C(1)(b))⁵."

Scope of the case

22. The complainant contacted the Commissioner on 20 October 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider his view that, as the Court of Appeal keeps records of all orders and judgments made as a public record, section 40(2) cannot be relied upon.
23. The Commissioner has considered the MOJ's final position in relation to the exemptions relied on, together with its response to his investigation, namely:

Part 1 of request – section 40(2).

Part 2 of request – section 21 (live GCROs) and section 40(2) (expired GCROs) in relation to judges, and section 21 (live GCROs) and section 40(2) (expired GCROs) in relation to individuals subject to a GCRO.

Part 3 of request – responded to outside of FOIA.

Reasons for decision

Part 1 of request – section 40(2)

⁵ <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05#5.4C>

24. The MOJ told the Commissioner that since 2013 the Court of Appeal keeps only a manual log of GCROs it has issued, and that five or less GCROs were issued during that time (it provided the Commissioner with the actual number). Because the Court of Appeal doubted the accuracy of this information, the MOJ said it had initially advised the complainant that the information is not held. The Commissioner has commented further on this in the 'Other Matters' section of this notice.
25. The MOJ's final position is that section 40(2) applied to part 1 of the request because only a low number of GCROs have been issued by the Court of Appeal according to its manual records kept since 2013. However, it is unclear as to what, if any, records of GCROs are kept prior to 2013. The complainant clearly asks for the information on a yearly basis from 2003 to 2015.
26. In addition, all GCROs issued by all courts including the Court of Appeal, are available publicly on the www.gov.uk website during the time they are in force, and some archived 'snapshot' versions of expired GCROs are available via the TNA website.
27. As referred to in paragraph 10 above, the Commissioner has searched online for both current and historical GCROs issued by the Court of Appeal. In doing so he has found five such examples. This figure does not tally with the figure provided to him by the MOJ and he therefore concludes that its response to him is flawed.
28. Accordingly the Commissioner requires the MOJ to reconsider its position and issue a fresh response. In doing so it should take account of what is already available in the public domain and also ensure it clearly reads the request and considers data back to 2003.

Part 2 of request – Section 21 – Information accessible to the applicant by other means (live data) and Section 40(2) – Personal information (historical data)

29. Part 2 of the complainant's request covers two aspects, namely the names of the judges who issued GCROs in the Court of Appeal, and the names of the individuals who were issued with a GCRO in the Court of Appeal, both for the specified time period of 2003 to 2015.

Names of judges - section 21 (live data) and section 40(2) (historical data)

30. The Commissioner has first considered the MOJ's approach to the request about the judges. Having initially relied on section 40(2), the

MOJ's latest position was that section 21 applies to live GCROs and it provided the complainant with a weblink⁶. The MOJ explained that *"the name of the Judge who made a GCRO is not published on the list [ie the list of GCROs currently in force on www.gov.uk] with other details of the GCRO. However, all civil ticketed judges can make a GCRO, and I am therefore able to provide you with a link to the Judiciary UK website, where you can find a list of the Judiciary"*. (See weblink to www.judiciary.gov.uk below).

31. The MOJ maintained that section 40(2) applies to historical data (ie GCROs which are no longer in force) and this is considered under the section 40(2) analysis.
32. Section 21 of FOIA provides an exemption for information that is already reasonably accessible to the applicant. The purpose of the exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. It is an absolute exemption and as such no public interest test needs to be applied. It is one of only two FOIA exemptions where there is no exclusion from the duty to confirm or deny whether information is held.
33. Returning to the MOJ's reliance on section 21, the Commissioner has reviewed the publicly available information. As part of the investigation, the MOJ also provided weblinks to the TNA website, where 'snapshots' of GCROs in force at that time are published (the earliest snapshot date is 5 April 2012).
34. The names of the judges are not published on www.gov.uk where live GCROs are available; neither do they appear on the TNA snapshot webpages. The Commissioner has viewed the judiciary website link provided by the MOJ and carried out his own searches to try to determine which judges issued GCROs in the Court of Appeal, and has been unable to locate the requested information.
35. In order to cite section 21, a public authority must both hold that information and must be able to direct a requester to the exact location where that information is reasonably accessible. In this case, the Commissioner has not been able to find any names of the judges who issued GCROs in the Court of Appeal during the specified time period, via any of the weblinks given by the MOJ. The Commissioner therefore

⁶ <https://www.judiciary.gov.uk/>

does not uphold the MOJ's reliance on section 21 in relation to the names of the judges for live GCROs.

36. The Commissioner has next considered the MOJ's reliance on section 40(2) in relation to the names of judges for expired GCROs.

Is the information personal data?

37. 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".

38. 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 named individuals, given that part 2 of his request specifically asks for the names of the judges who issued a GCRO in the Court of Appeal during the specified time period.

The first data protection principle and fairness

39. 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.
40. 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.
41. 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.
42. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the

Commissioner finds that it would be fair will he go on to look at lawfulness or whether a Schedule 2 condition can be satisfied. Each GCRO contains the personal data of an individual and reveals that he/she has been issued with a GCRO due to a refusal to accept the judges' decision and is the most extreme sanction under the CRO system. The Commissioner will focus on whether disclosing the requested information would be fair to those individuals who were issued with a GCRO by the Court of Appeal during 2003-2015.

43. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

Names of judges

44. Judges making judgments which they know may be published have an expectation that their names will be in the public domain. There is also a legitimate interest in the public knowing which judges have handed down decisions. The Commissioner does not agree that disclosure of the names of judges, both in relation to live and expired GCROs, issued in the Court of Appeal would be unfair and he therefore requires the MOJ to disclose that information for the entire period 2003 to 2015.

Names of individuals - section 21 (live data) and section 40(2) (historical data)

45. Under part two of his request, the complainant also asked for the names of the individuals subject to a GCRO issued by the Court of Appeal between 2003 and 2015. The MOJ's final position is that section 21 applies to GCROs currently in force.

46. The MOJ maintained that section 40(2) applies to historical data (ie GCROs which are no longer in force).

47. In relation to section 21 (for the names of those issued with a GCRO by the Court of Appeal), the MOJ explained that it had provided the complainant with links to the www.gov.uk website where he could view the names of those individuals with a live GCRO. In addition, the MOJ

has provided the Commissioner with a link to the TNA website where 'snapshot' details of GCROs are publicly available.

48. The Commissioner has reviewed the current GCRO list on www.gov.uk; this website is described as:

"The websites of all [government departments](#) and many other agencies and public bodies have been merged into GOV.UK.

Here you can see all [policies](#), [announcements](#), [publications](#), [statistics](#) and [consultations](#)."

49. The MOJ has confirmed that it *"holds some of this information, but on this occasion will not be providing it to [the complainant] as it is already publicly available."* As the www.gov.uk website holds a complete list of those individuals currently subject to a GCRO which is live, the Commissioner is satisfied that the names are reasonably accessible. Therefore, he considers that section 21 is engaged in relation to the names of the individuals issued with GCROs currently in force.
50. The Commissioner has next considered the MOJ's reliance on section 40(2) in relation to the individuals' names where the GCRO is no longer live and thereby no longer publicly available on the www.gov.uk website.
51. The Commissioner is satisfied that the names of those with an expired GCRO constitute personal data because they can be linked with living individuals. He has considered whether disclosure of the names would be fair to those individuals. In doing so, he has viewed all the snapshot details available on the TNA website. These show the names of individuals whose GCROs have expired such that those names remain in the public domain.
52. It not entirely clear to the Commissioner whether the snapshot records on the TNA site represent a full archived GCRO record. The Commissioner has viewed the snapshots which are taken four or five times a year from 5 April 2012 onwards. Of greater significance, however, is that the TNA records only start from 5 April 2012, whereas the complainant has asked for the information from 2003.
53. Given that the names of those individuals whose GCROs expired are available on the TNA website, with the earliest snapshot date of 5 April 2012, the Commissioner has concluded that it would not be unfair to disclose the names of these parties.
54. In respect of any records which are not displayed on TNA's website, the Commissioner requires the MOJ to issue a fresh response.

Part 3 of request

55. The question asked by the complainant in part 3 of his request is *"Where a GCRO was made by the Court of Appeal in Points (1) and (2) above, did the Court of Appeal provided a right of appeal to the individual(s) subjected to the GCRO or not, yearly from 2003 to 2015?"*
56. The MOJ's final position in relation to this part of the request is that it had provided the information outside the scope of FOIA, and directed the complainant to the Civil Procedure Rules process, through which any member of the public may apply to a court for a copy of any order given or made in public under specified Civil Procedure Rules (5.4C (1)(b)).
57. The MOJ also addressed the points raised by the complainant on 19 October 2015 about the appeal process, in that it advised that an applicant wishing to appeal a GCRO issued by the Court of Appeal, must first exhaust the jurisdiction of the Court of Appeal by requesting an oral hearing from it. Any subsequent appeal would then be directed to the Supreme Court, subject to either the Court of Appeal or Supreme Court granting permission to appeal.
58. The weblinks provided by the MOJ in response to this part of the request are those belonging to the MOJ. It is unclear to the Commissioner as to why the MOJ has chosen to respond to the part of the request outside FOIA. Further, the Commissioner has viewed the weblinks for himself and is not satisfied that the information contained in them satisfies this part of the request.
59. He therefore requires the MOJ to issue a response which is compliant with section 1 or section 17 of FOIA.

Other matters

60. The Commissioner is very disappointed with the MOJ's handling of this request. The complainant quite clearly sets out in part 1 of his request that he is asking for information about GCROs made by the Court of Appeal on a yearly basis from 2003 to 2012. However, the MOJ responded to the complainant three times and changed its position each time. Furthermore, it became apparent to the Commissioner during his investigation that the figures provided by the MOJ were inaccurate and therefore misleading. This is clearly unacceptable in relation to a straightforward and clearly worded request. The Commissioner would remind the MOJ of the importance of reading requests carefully.
61. In its initial response of 10 September 2015, the MOJ responded that the information was not held in relation to part 1, because, since 2013,

the Court of Appeal has only kept a manual record of GCROs it has issued, and the accuracy of that information was doubted. However, FOIA entitles requesters to information held, subject to any exemption(s), whether or not that is accurate. The MOJ should have provided an accompanying explanation as to why it considers that the information may not be accurate.

62. In this case the MOJ issued two internal review outcomes, the first on 16 October 2015 and the second on 3 November 2015. The FOIA only allows for one internal review. The MOJ should ensure it only issues one internal review outcome when handling requests.
63. Further, the first internal review was issued late. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 27 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

64. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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

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