

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2016

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to a named Judge as well as information relating to investigations into the conduct of the judiciary and the work of the Judicial Conduct Investigations Office.
2. The Ministry of Justice (MoJ) said that it did not hold some of the requested information and that some of it was accessible to the applicant by other means (section 21 FOIA). With respect to the remainder, MoJ refused to confirm or deny whether the information was held, citing section 32(3) (court records), 40(5) (personal information) and 44(2) (prohibitions on disclosure) of FOIA.
3. The Commissioner has investigated MoJ's application of section 44(2). His decision is that MoJ has correctly applied that exemption on the basis that confirmation or denial was prohibited by section 139 of the Constitutional Reform Act 2005 (CRA). He requires no steps to be taken.

Request and response

4. On 13 July 2015 the complainant made a multi-point request for information to the MoJ:

"Has His Honour Judge [name redacted] (who was sitting, at least, in part, at Maidstone Crown Court in March 2012) ever been the subject of any formal or informal disciplinary action?"

2. What was the nature and extent of the complaint(s) and disciplinary action?"

3. Was his Honour Judge [name redacted] (as above) suspended at any point?

(i) was there a suspension in 2012 or 2013 or 2014 for any improper activity, inter alia, unfairly or otherwise imposing sentences to defendants in excess (or above) what may reasonably be expected by the defendants, this activity may (or may not) have been driven by a 'competition' with other (known and /or unknown) members of the judiciary to increase (or to have the end result of having the most) the number of months and / or years of sentencing given to those defendants appearing before those members of the judiciary?

4. Has such a 'competition' found to have been (or may have been) in existence?

5. Have the defence counsel of those defendants involved been informed?

6. Has any activity cast any doubt and / or concern as to the actions and / or activities of those affected members of the judiciary in all cases in which they were sitting (before, during and after the material time) for example, during case management and summing up and what actions (if any) have been taken by the Ministry?

7. Has there been any concern and / or actions and / or statements / emails etc. that any improper activity may (or may not) render any conviction or any conviction of any defendant appearing before one / any such sanctioned member of the judiciary unsafe?

8. Has any employee of the Ministry of Justice taken any action or made any comment / statement in relation to any aspect raised herein, but specifically Question 7?

9. How many members of the judiciary have been the subject of any complaint / disciplinary action and leading to what outcome for the years 2005 to date?

(i) at what court / circuit?

(ii) how many of these were from Maidstone Crown Court?"

5. MoJ responded on 14 August 2015. It refused to confirm or deny whether it held the information requested at points 1-3 of the request. It cited both sections 40(5) (personal information) and 44(2) of FOIA (prohibitions on disclosure) in that respect.

6. With regard to the remaining parts of the request, MoJ said that the information requested at points 4-8 is not held. It cited section 21(1) in relation to some of the information requested at part 9 and said that the remainder – the breakdown by court /circuit of the judiciary complained about - is not held.
7. The complainant expressed dissatisfaction with respect to MoJ's response to points 1-3 and 9 of the request. Following an internal review the MoJ wrote to the complainant on 7 October 2015. It revised its position, additionally citing section 32(3) of FOIA (court records) in respect of point 3.

Scope of the case

8. The complainant provided the Commissioner with the relevant documentation on 5 January 2016 to complain about the way his request for information had been handled.
9. He disputes MoJ's refusal to confirm or deny holding information within the scope of his request. He told the Commissioner:

"It is this central piece of information that I require formally confirmed;

i) Was this specified Judge suspended?

ii) When was he suspended?

iii) For what was he suspended?

I am dissatisfied with the non provision/non release/non confirmation of these three specific points, especially as the Judge, the time, the Court and the reason(s) have been clearly stated in my request.

.... This matter is clearly of immense public importance, and wider interest".

10. The analysis below considers whether MoJ was entitled to neither confirm nor deny holding the information requested at points 1-3 of the request.

Reasons for decision

Section 44 prohibitions on disclosure

11. Section 44(1) of FOIA provides that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

12. Section 44(2) of FOIA provides that:

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)".

13. Section 44 is an absolute exemption: there is no requirement to consider the public interest test.

14. In correspondence with the complainant, MoJ said:

"In this instance, Section 139 of the Constitutional Reform Act 2005 (CRA) establishes a duty of confidentiality on those who have responsibilities in relation to matters of conduct and discipline involving judicial office holders, where information is provided under or for the purposes of a relevant provision of the Act. Information which is obtained for the purposes of a function under Part 4 of the CRA is confidential by virtue of section 139 of that Act".

15. It told him that confirmation or denial in this case would release information which would be in contravention of the CRA.

16. During the Commissioner's investigation, MoJ confirmed its application of section 44(2) of FOIA.

17. In support of its citing of section 44(2), MoJ explained that the confirmation or denial that would have to be given falls within paragraph (a) of subsection (1):

"The MoJ considers that section 44(1)(a) applies in this case as the information requested is confidential as defined under another enactment".

18. In that respect, it confirmed that section 139 of the CRA prohibits it from confirming or denying whether it holds the requested information. It told the Commissioner that any such information, if held, would be confidential information as defined by the CRA and therefore disclosure would be prohibited.

19. Section 139(1) of the CRA¹ provides that:

"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".

20. The 'relevant provisions' are contained in section 139(2) of the CRA. The Commissioner understands that the relevant provision in this case is Part 4 of the CRA: Part 4 relates specifically to judicial appointments and discipline.

21. In that regard, MoJ told the Commissioner:

"Part of 4 of the CRA 2005 deals with Judicial Discipline and is cited as one of the relevant provisions. Section 139 further states that information is confidential if it relates to an identified or identifiable individual (a subject). The circumstances in which information may lawfully be disclosed, which are limited under the Act, are set out in Section 139 (4) – (9).

The Department believes that to confirm or deny the existence of a complaint would breach the duty of confidentiality within the disciplinary process and would constitute release of data in its own right".

22. Given the wording of the request, the Commissioner is satisfied that the information, if held, relates to an identified or identifiable individual – the judge named in the request. He therefore considers the information, if held, would be confidential information as defined by the CRA.

¹ <http://www.legislation.gov.uk/ukpga/2005/4/section/139>

23. He is also satisfied that section 139 CRA only permits disclosure of confidential information obtained for the purposes of judicial discipline in limited and specified circumstances. Those circumstances are defined in section 139 of the CRA in what the Commissioner considers to be precise terms.
24. From the evidence he has seen, none of the limited and specific circumstances prescribed in the CRA which enable confidential information to be lawfully disclosed are met.
25. The Commissioner finds that, for the MoJ to confirm or deny whether it holds the requested information would itself reveal information, if it existed, that would be considered exempt from disclosure on the basis of section 44(1)(a).
26. Accordingly, by virtue of section 139 of the CRA, MoJ was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA to refuse to confirm or deny whether the requested information is held.
27. Having reached that conclusion, it has not been necessary for the Commissioner to consider whether the other exemptions cited by MoJ would also apply.

Right of appeal

28. 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

29. 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.
30. 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