

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2017

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the swearing-in of two named lay panel members of the First-tier Tribunal (War Pensions and Armed Forces Compensation).
2. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it citing section 40(2) of the FOIA (personal information).
3. The Commissioner's decision is that the MoJ correctly applied section 40(2) to the requested information. She requires no steps to be taken as a result of that decision.

Background

4. The request in this case relates to the First-tier Tribunal (War Pensions and Armed Forces Compensation). That tribunal is responsible for handling appeals by current and former servicemen or women in England and Wales against decisions by Veterans UK in relation to pensions, compensation and other amounts¹.

¹ <https://www.gov.uk/courts-tribunals/first-tier-tribunal-war-pensions-and-armed-forces-compensation>

5. The tribunal panel² is made up of:
 - a judge
 - a medical member
 - a service member.
6. Prior to the complainant making the request in this case, the MoJ confirmed to him that all panel members and Judiciary are sworn-in when they take up a post within the Ministry of Justice. The MoJ subsequently told him that, when judges are sworn-in they recite, then sign, the Judicial Oath. This is then retained on their personnel file and classed as 'personal information'.

Request and response

7. Further to earlier correspondence, and with reference to it, on 15 April 2017 the complainant wrote to the MoJ and made the following request for information under the FOIA:

"The information I require under the FOIA is not about judges swearing the judicial oath. It is information pertaining to two lay panel advisory members, [name redacted] and [name redacted] swearing the judicial oath, and being sworn in as Judicial office holders.

Are you saying that the only information in existence pertaining to the above individuals, is locked away on the individuals personnel file and there is no other documented proof on file that [name redacted] and [name redacted] did in fact swear the Judicial Oath, and are Judicial Office holders, and who within the judiciary administered the swearing of that Oath?"

8. The MoJ responded on 24 May 2017. It refused to provide the requested information, citing section 14(2) of the FOIA (repeated request) as its basis for doing so.
9. Following an internal review the MoJ wrote to the complainant on 4 July 2017 revising its position. It refused to provide the requested information, citing section 40(2) of the FOIA (personal information) as its reason for doing so.

² <https://www.gov.uk/war-pension-armed-forces-compensation-tribunal/tribunal-hearing>

Scope of the case

10. The complainant provided the Commissioner with the relevant documentation on 6 July 2017 to complain about the way his request for information had been handled.
11. He disputed the MoJ's application of section 40(2) of the FOIA to the requested information.
12. In support of his complaint, the complainant provided the Commissioner with copies of earlier correspondence between himself and the MoJ. In that correspondence the MoJ confirmed the dates on which the two individuals named in the request were sworn in, witnessed by an officer of the court.
13. The complainant explained to the Commissioner that his request was for documented proof with regard to their swearing of the Judicial Oath:

"i.e. signatures from all parties confirming that this very important historical act of swearing the Judicial Oath has in fact been carried out by [name redacted] and [name redacted]".
14. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the information withheld by virtue of that exemption. That information comprises signed judicial oath cards confirming the swearing of the oath by the individuals named in the request.

Reasons for decision

Section 40 personal information

15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
16. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of

that data would breach any of the data protection principles under the DPA.

Is the information personal data?

19. Section 1 of the DPA defines personal data 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."

20. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The request in this case is for information relating to two named individuals who took the Judicial Oath and who within the judiciary administered their swearing of that oath.
22. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information. The Commissioner is satisfied that each oath card records who was sworn, the date on which they were sworn and the officer of the court who witnessed the swearing of the oath.
23. In its submission to the Commissioner, the MoJ told the Commissioner that the judicial oath cards are contained in the personnel files of the lay panel members.
24. The request in this case relates to information about the two lay panel members who are named in the request. Details about a signed oath card would be significant to the named individuals and, since it would be known who the information relates to, the individuals would be identifiable from it. The Commissioner is therefore satisfied that the information is personal data.
25. The request also relates to information about the officers of the court who administered the swearing of the oath.
26. Regarding the requested information relating to the officers of the court, the MoJ told the Commissioner that it considers that that information is directly the personal data of the officers of the court and indirectly the

personal data of the lay panel members. It explained that in the context of a judicial oath card, the officer of the court is inextricably linked to the lay panel member as by signing the oath card they are confirming that the oath has been sworn.

27. In that respect, the MoJ told the Commissioner:

"These [judicial oath cards confirming the swearing of the oath] have been signed by an officer of the court as witness to these oaths ... The MoJ considers the signatures of these people to be their own personal data and exempted the information from disclosure under section 40(2) of the FOIA".

28. The Commissioner considers that context is important here. In her guidance *'Determining what is personal data'*³ she acknowledges that there are circumstances where the same information is personal data about two or more individuals. One of the examples she cites is where the content of the information is about one individual but it is processed in order to learn/record/decide something about another individual.

29. In this case, the Commissioner accepts that the signature of an officer of the court is the personal information of that individual (for example, because a signature is a form of identification and can be used to confirm an individual is who they say they are). However, in the context of a request such as the one in this case, she considers that it is processed in order to record something about another individual, namely the status of the lay panel member with regard to their taking of the judicial oath. The two are inextricably linked.

30. Having accepted that the request is for the personal data of living individuals other than the applicant, the Commissioner must go on to consider whether disclosure of the requested information would contravene any of the data protection principles.

31. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.

32. The Commissioner agrees that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

33. The first data protection principle states:

³ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

"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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

34. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

35. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
36. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the data subject(s) reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

37. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to the employee in their professional role or to them as individuals and the purpose for which they provided their personal data.

38. The MoJ told the complainant:

"Individuals have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA.

... you were clearly asking for information relating to two named individuals and others ...".

39. Furthermore, in relation to the lay panel members, the MoJ told the Commissioner:

"The only copies of these documents are held in the individual's personnel files and as such they would expect that these completed documents would be personal".

40. With respect to the expectations of an officer of the court, the MoJ confirmed that:

"The officer of the court is not a Senior Civil Servant and is not in a public facing role".

41. The Commissioner is mindful of the role of a lay panel member in a Tribunal setting. In this case, the Commissioner considers that the lay panel members could not reasonably have a strong expectation of confidentiality and privacy with respect to the withheld information that constitutes their personal information.

42. Turning next to the expectations of an officer of the court, the Commissioner is mindful of her guidance "*Requests for personal data about public authority employees*"⁴. That guidance states:

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

"It is not possible to set an absolute level across the public sector below which personal information will not be released; it is always necessary to consider the nature of the information and the responsibilities of the employees in question".

43. In this case, the Commissioner is satisfied that the officers of the court would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large. She has reached this conclusion having taken account of the role and responsibilities of the individuals as well as the information itself.

Consequences of disclosure

44. As to the consequences of disclosure upon the data subjects, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
45. In this case, noting that signatures are a form of identification, the MoJ told the Commissioner:

"The business unit considered that releasing the signatures of the individuals concerned may have an unjustified adverse effect on them and so regarded disclosure as incompatible with the purpose that the information was originally obtained for".

46. The Commissioner considers that disclosure in this case has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectations of the officers of the court.

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

The legitimate public interest

47. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
48. Arguing in favour of disclosure, the complainant told the MoJ:

"The information I require is a simple uncomplicated request. Not top secret and should be readily available to the general public".

49. Similarly, he told the Commissioner:

"The General public have a lawful right to see documented proof that those that sit in judgement are legally qualified to do so".

50. In its submission to the Commissioner the MoJ confirmed that it had considered whether disclosure into the public domain was necessary in this case to meet the public interest. In that respect it told the Commissioner that it considered that it had met those obligations and protected the individuals' personal data by providing the dates that the oaths were signed.

Conclusion

51. The Commissioner acknowledges that the information at issue is of particular interest to the complainant. However, in reaching a decision in this case, the Commissioner must consider whether there is a legitimate interest in the public or the requester having access to the information and the balance between this and the rights and freedoms of the data subjects.
52. Dealing first with the officers of the court, the Commissioner is satisfied that those individuals would have no reasonable expectation that the information in question would be disclosed to the world at large and that the loss of privacy could potentially cause unnecessary and unjustified distress. She is also satisfied that there is no legitimate interest in disclosure which would outweigh any detriment which might be caused to the data subjects as a result of disclosure of the requested information.
53. Therefore, disclosure would be unfair and would breach the first data protection principle.
54. As the Commissioner has concluded that it would not be fair to disclose the information relating to the officers of the court and as she considers, in the context of this case, that information about the officers of the court and the lay panel members is inextricably linked, it follows that she concludes that it would not be fair to disclose the information held in respect of the lay panel members.
55. As the Commissioner has determined that it would be unfair to disclose the requested information it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 DPA conditions is met.
56. The Commissioner is satisfied that the MoJ was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).

Other matters

57. The MoJ acknowledged that it had considered providing the requester with a redacted version of the oath card, with the personal data removed.

"However, the department considered that this would have been of little value to the requester".

58. Having viewed the withheld information, the Commissioner agrees that a redacted version of the oath card would not add to the information the MoJ has already provided to the complainant regarding the lay panel members taking of the oath.

Right of appeal

59. 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

60. 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.

61. 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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