

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2018

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

Decision (including any steps ordered)

1. The complainant submitted an information request to the Judicial Conduct Investigation Office (JCIO), which operates within the Ministry of Justice (MoJ), asking whether they had received complaints against a named District Judge, the nature of those complaints (if any) and whether the complaints received (if any) were upheld. The MoJ refused to confirm or deny whether the information was held citing sections 40(5) (personal information) and 44 (2) prohibitions on disclosure) of FOIA
2. The Commissioner has investigated the MOJ's application of section 44(2). Her decision is that the MoJ has correctly applied that exemption on the basis that the confirmation or denial was prohibited by section 139 of the Constitutional Reform Act 2005 (CRA). The Commissioner finds, however, that in failing to respond to the complainant's request within the statutory timescale the MoJ breached section 10(1) of FOIA. She requires no steps to be taken.

Request and response

3. On 11 June 2017, following lengthy correspondence with JCIO, the complainant requested information in the following terms:

"I would also like to request under the Freedom of Information Act the following –

- 1. Have any complaints been made against DJ [name redacted] and if so how many*
- 2. The nature of the complaint*
- 3. Were any of complaints upheld"*

4. On 21 August 2017 the complainant received a response from the MoJ. It refused to confirm or deny whether it held the information requested, citing section 44(1)(a) of FOIA, explaining that such disclosure is prohibited by another enactment, more precisely section 139 of the Constitutional Reform Act 2005 (CRA).

5. Following an internal review the MoJ wrote to the complainant on 13 November 2017, where it stated:

"As part of my internal review I have looked again at whether it was correct to neither confirm nor deny the information was held and the exemption used. In respect of the information the incorrect subsection was used, this should have been section 44(2). The reply should also have read 'because such disclosure if held is prohibited under another enactment' rather than 'because such disclosure is prohibited under another enactment'. However, the original response was correct to neither confirm nor deny if the MoJ holds this information.

This information should also have been exempt by virtue of section 40(5) of the FOIA as the MoJ is not obliged to confirm or deny whether it holds information if to do so would contravene any of the data protection principles as outlined in the Data Protection Act 1998 (DPA)."

Scope of the case

6. The complainant contacted the Commissioner on 25 July 2017 to complain about the way his request for information had been handled.
7. She also complained about the length of time the JCIO/MoJ had taken to respond to her request.
8. The analysis below considers whether the MoJ was entitled to rely on the exemptions provided by section 44(2) and section 40(5). The

Commissioner has also considered the timeliness of the MoJ's response.

Reasons for decision

Section 44 – Prohibitions on disclosure

9. 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".

10. 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)".

11. Section 44 is an absolute exemption, therefore there is no requirement to consider the public interest test.

12. In this case, the MoJ considers that the confirmation or denial that would have to be given falls within paragraph (a) of subsection (1).

13. In correspondence with the complainant, the MoJ stated:

"...we are not obliged to confirm or deny whether we hold the information you have requested. This is because such disclosure, if held, is prohibited under another enactment: 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 function under part 4 of the CRA (Judicial Appointment and Disciplines) is confidential by virtue of section 139".

14. During the course of the Commissioner's investigation, the MoJ reiterated that in support of its position, it relied on similar arguments as those used in previous cases decided by the ICO, such as FS50632953 and FS50609789, in which the complainants put forward almost identical issues.

15. Given the wording of the request, the Commissioner is satisfied that the information, if held, related to an identified or identifiable individual – the judge named in the request. Therefore, she considers the information, if held, would be confidential information as defined by the CRA.
16. The Commissioner has considered the MoJ's application of section 44(2) of the FOIA to a request for information about complaints regarding an identifiable judicial office holder on previous occasions, such as in [FS50632953](#)¹ and [FS50609789](#)².
17. In the above mentioned cases the Commissioner accepted that section 139 of the 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.
18. The Commissioner considers the nature and context of the request in the present case, and the arguments relied on, to be very similar. However, while acknowledging the existence of a similar case having been investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA.
19. The Commissioner has considered the complainant's arguments in favour of disclosure and the MoJ's submission in support of its decision to neither confirm nor deny whether it holds information relevant to the complainant's request.
20. From the evidence she has seen in this case, none of the limited and specific circumstances prescribed in the CRA which enable confidential information to be lawfully disclosed are met.
21. Therefore, 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).
22. Having reached that conclusion, it has not been deemed necessary for the Commissioner to consider whether the other exemption under section 40(5) cited by MoJ would also apply.

Section 10 – time for responding

23. Section 10 of the FOIA provides that a public authority's response to a request must be provided within 20 working days of receipt. In this case the JCIO received the request on 11 June 2017 and the MoJ

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624739/fs50632953.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1560734/fs50609789.pdf>

responded on 21 August 2017, outside the 20 working days and accordingly this is a breach of section 10 of the FOIA. The Commissioner notes that in its internal review MoJ acknowledged the breach and apologised for the delay.

Right of appeal

24. 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

25. 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.

26. 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

Alun Johnson
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