

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2018

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, including the number of complaints made about him.
2. The Ministry of Justice (MoJ) confirmed it held some information within the scope of the request but refused to provide it citing section 32(1) (court records) of the FOIA. It also refused to confirm or deny holding some information within the scope of the request by virtue of sections 44(2) (prohibitions on disclosure), 40(5) (personal information) and 32(3) of the FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 32(1)(b) and (c)(ii) of the FOIA to withhold the information within the scope of parts 1-4 of the request. She also found that the MoJ correctly applied section 44(2) of the FOIA to the remaining requested information on the basis that confirmation or denial was prohibited by section 139 of the Constitutional Reform Act 2005 (CRA).
4. She requires no steps to be taken as a result of this decision.

Request and response

5. On 26 August 2017, the complainant wrote to the MoJ and requested information in the following terms:

"- How many sexual offence trials have been recorded by [name of judge redacted] since he began operating

- *How many of those trials were not guilty pleas*
- *How many of the not guilty pleas were found guilty*
- *How many appeals were lodged from those found guilty of the not guilty pleas*
- *How many complaints have been lodged against [name of judge redacted]*

I would be grateful if the information provided is given year on year".

6. The MoJ responded on 14 September 2017, confirming that it held some of the information within the scope of the request. However, it refused to provide the information requested at parts 1-4 of the request citing the following exemption as its basis for doing so:
 - section 32(1)(b) and 32(1)(c)(ii) (court records).
7. With respect to part 5 of the request, the MoJ refused to confirm or deny whether it held information within the scope of that part of the request, citing sections 32(3) (court records), 40(5) (personal information) and 44(2) (prohibitions on disclosure).
8. Following an internal review, the MoJ wrote to the complainant on 14 November 2017 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 27 December 2017 to complain about the way his request for information had been handled.
10. He disputed the MoJ's refusal to provide the requested information:

"Simply put, the information I have requested relates to statistics only, not the man himself".
11. During the course of the Commissioner's investigation, the MoJ confirmed its application of section 32(1), subsections (b) and (c)(ii), to the information within the scope of parts 1–4 of the request. It also confirmed its reliance on sections 44(2), 40(5) and 32(3) of the FOIA in relation to the requested number of complaints lodged against the named judge.
12. The analysis below considers the MoJ's refusal to disclose the information requested at parts 1-4 of the request. It also considers whether the MoJ was entitled to neither confirm nor deny holding the

information requested at part 5 of the request under section 44(2) of the FOIA.

Reasons for decision

Section 32 court records

13. Section 32 of the FOIA states:

“(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

...

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter”.

14. In other words, for section 32 to be engaged the information must be:

- contained in (or obtained from) a type of document specified by the exemption; and
- held ‘only by virtue...’ of being contained in that document.

15. Section 32(1) of the FOIA is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available.

16. What is important in this context is whether the information meets the criteria as set out in section 32(1)(b) or (c)(ii). As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document the information is contained in.

Is the information held only by virtue of being contained in a relevant document for the purposes of proceedings in a particular cause or matter?

17. With respect to the information withheld by virtue of section 32, the MoJ told the Commissioner:

"In the Crown Court the documents on the file are provided by the Crown Prosecution Service (CPS), Police and Defence and from this information the court record is created; and the offences, pleas and appeals are extracted from those documents. ... As per the question asked by the requester "how many appeals were "lodged..."; appeals are lodged by or on behalf of a defendant and so it was believed that section 32(1)(b) would apply to some of the information requested".

18. The MoJ confirmed that the remaining information in questions 1-4 was considered exempt under section 32(1)(c)(ii). In that respect it explained:

"...the information on results of a case, for example "found guilty" is recorded by the administrative staff of the court, usually the clerk of the court, at the end of the trial in order to process the court case and create the court orders".

19. In order for the exemption at section 32(1) of the FOIA to be engaged, the second test is that the information is held 'only by virtue of...'.

20. That phrase implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

21. The complainant disputed that the requested information is only held by virtue of being contained in a relevant document. He told the MoJ:

"... the information requested, is not only available through held records, but would be possible to be recorded in a member of the public's diary if they were to attend all the trials of this judge".

22. In support of its application of section 32(1) of the FOIA, the MoJ told the complainant:

"The information you have requested is solely recorded by the MoJ for the purposes of creating a court record to allow court proceedings to continue".

23. It further explained that, in order to retrieve the information requested as parts 1-4 of the request:

"... would require the MoJ to go into each individual court record involving [the named judge]".

Is the exemption engaged?

24. The Commissioner is mindful that the complainant has argued that the information he is seeking could have been recorded by a third party.
25. However, the issue for the Commissioner to decide is whether the requested information is held by the MoJ only by virtue of being contained in a court record.
26. As noted above, what is important is whether the information meets the criteria set out in section 32(1)(b) or (c)(ii) of the FOIA.
27. In determining whether the information is held '*only by virtue*', the Commissioner has considered the route by which the information was acquired and the purposes for which it is held.
28. In this case, the Commissioner is satisfied that the statistical information requested at parts 1-4 of the request was recorded in, or was acquired from, a document that falls within one of the categories listed in section 32(1)(b) or (c)(ii). She is therefore satisfied that it is contained in a court record.
29. From the evidence she has seen, the Commissioner found that the MoJ did not hold the withheld information outside of the court records, and that the withheld information was only created and used for the purposes of proceedings.
30. The Commissioner therefore decided that the information requested at parts 1-4 of the request fell within the scope of the section 32(1) FOIA exemption and that the MoJ was entitled to rely on sections 32(1)(b) or 32(1)(c)(ii) of the FOIA to withhold the information.
31. As section 32 of the FOIA is an absolute exemption, there is no requirement to consider whether there is a public interest in disclosure.

Section 44 – Prohibitions on disclosure

32. Section 44(1) of the 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".

33. Section 44(2) of the 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)".

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

35. It told the complainant:

"In this instance, confirming or denying that information is or is not held would be in breach of Section 139 of the CRA 2005. This establishes a duty of confidentiality on those who have responsibilities in relation to matters of conduct and discipline involving judicial office holders. 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".

36. During the course of the Commissioner's investigation, in support of its citing of section 44(2) of the FOIA, the MoJ confirmed that section 139 of the CRA¹ prohibits it from confirming or denying whether it holds the requested information.

37. It explained:

"Part 4 of the CRA 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. In this case the identifiable individual being [the named judge]. The circumstances in which information may lawfully be disclosed, which are limited under the CRA, are set out in section 139(4) – (9)".

38. 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. She therefore considers the information, if held, would be confidential information as defined by the CRA.

39. The Commissioner has considered the MoJ's application of section 44(2) of the FOIA to a request for information about complaints about an

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

identifiable judicial officer holder on previous occasions, for example FS50609789².

40. In that case, 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.
41. The Commissioner considers the nature and context of the request in the present case, and the arguments relied on, to be very similar.
42. 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.
43. 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 held information relevant to part 5 of the complainant's request.
44. 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.
45. Therefore, the Commissioner finds that for the MoJ to confirm or deny whether it held the requested information would itself reveal information that, if it existed, would be considered exempt from disclosure on the basis of section 44(1)(a).
46. Accordingly, the MoJ was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA - by virtue of section 139 of the CRA - to refuse to confirm or deny whether the information at part 5 of the request was held.
47. Section 44(2) of the FOIA is an absolute exemption, therefore there is no requirement to consider the public interest test.
48. Having reached that conclusion, it has not been necessary for the Commissioner to consider whether the other exemptions cited by MoJ would also apply to that part of the request.

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

Right of appeal

49. 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

50. 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.

51. 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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