

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 August 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 the Justices' Clerks' Society. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to provide the remainder citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) to withhold the information. However, the Commissioner finds that the MoJ breached section 10(1) of the FOIA as it failed to provide a response within 20 working days.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### Background

---

4. In its correspondence with the complainant, the MoJ told him:

*"The Justices' Clerks' Society was founded in 1839 and from 1903 until 2011 was a company limited by guarantee. It is now an unincorporated association which provides professional leadership for Justices' Clerks and Assistant Justices' Clerks and continually supports the development of an effective system of summary justice in England and Wales ..."*

#### Background

---

5. The MoJ is relying on section 40 (personal information) of the FOIA in this case.

6. That exemption covers the personal data of third parties (anyone other than the requester) where complying with the request would breach any of the principles in the Data Protection Act 1998 (DPA).
7. As the MoJ's refusal of the request was before 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers the DPA 1998 applies.

## Request and response

---

8. On 12 December 2017, the complainant wrote to MoJ and requested information in the following terms:

*"Please kindly supply me with the following data you may hold; under authority of the Freedom of Information Act 2000 ('FOIA'), s.1, s.3, s.6 and s.8:*

*1. A current (up to date) list of all members of the Justices' Clerks' Society also known as JCS (of HMCTS, 3rd Floor, Temple Court, 35 Bull Street Birmingham B4 6EQ or other location), to include their title and department as at 12 December 2017.*

*2. A current document or statement of (link to relevant HMCTS website may be acceptable where data is held) aims and objectives, mission statement, vision, remit etc., as at 12 December 2017".*

9. The request was made via the 'whatdotheyknow' website.
10. The MoJ eventually responded on 12 February 2018, (the correspondence bearing a date of 19 January 2018). It refused to confirm or deny whether it held the information requested at part (1) of the request, citing section 40(5) of the FOIA (personal information). It provided information within the scope of part (2) of the request.
11. Following the Commissioner's intervention, the MoJ wrote to the complainant on 6 April 2018 having completed its internal review. It upheld its original position with respect to exemptions.

## Scope of the case

---

12. Following earlier correspondence, the complainant contacted the Commissioner on 7 April 2018 to complain about the way his request for information had been handled.

13. During the course of the Commissioner's investigation, the MoJ revised its position. It confirmed it held information within the scope of part 1 of the request, but refused to provide it citing section 40(2) (personal information). The MoJ provided the Commissioner with a copy of the correspondence it sent to the complainant in that regard.
14. The analysis below considers the MoJ's application of section 40(2) to the information within the scope of part 1 of the request. That information comprises a list of all members of the Justices' Clerks' Society.
15. The Commissioner has also considered the timeliness of the MoJ's response.

## **Reasons for decision**

---

### *Section 40 personal information*

16. 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.
17. 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 DPA.
18. 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.
19. 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?*

20. 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."*

21. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
22. 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.
23. The request in this case is for information relating to the members of the Justices' Clerks' Society (JCS).
24. During the course of her investigation, the MoJ provided the Commissioner with details of the withheld information together with a sample of that information. From the evidence she has seen, the Commissioner is satisfied that the withheld information records the names and email address of the members of the JCS.
25. Clearly, as the members are named, and therefore identifiable, the Commissioner is satisfied that the information is personal data.
26. 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.
27. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.
28. The Commissioner agrees that the first data protection principle is most relevant in this case.

*Would disclosure contravene the first data protection principle?*

29. The first data protection principle states:

*"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."*

30. 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?*

31. 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.
32. 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*

33. 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.
34. Regarding the withheld JCS member information, the MoJ told the complainant:

*"We hold their personal information solely for the purpose of organising meetings and distributing collective materials and we have no authority from the membership to disclose their personal details".*
35. In that respect it told him:

*"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".*
36. Similarly, in correspondence with the Commissioner, the MoJ said the JCS:

*"...is an unincorporated association and HMCTS possesses its membership list only because HMCTS provides secretariat support.*

*Given that the Society's membership is not a public matter, HMCTS would require the permission of JCS (and all its members) to disclose private information".*

37. In this case, the Commissioner is satisfied that the JCS members would have 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 reason why the MoJ hold the information as well as the information itself.

#### *Consequences of disclosure*

38. 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.

39. In this case, the MoJ told the Commissioner:

*"...there have been examples of convicted defendants publishing the name of the legal adviser in their trial on social media with a request for additional personal information including home addresses".*

40. The Commissioner accepts that the information under consideration in this case comprises names and e-mail addresses of each JCS member. She also understands that members will be a justices' clerk or assistant justices' clerk.
41. 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 members.

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

##### *The legitimate public interest*

42. 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.

43. From the evidence she has seen in this case, the requester did not put forward any private interest reasons to be taken into account when considering disclosure.

44. In its submission to the Commissioner the MoJ said:

*"There does not appear to be any pressing social need for the publication of this information..."*

#### *Conclusion*

45. The Commissioner is satisfied that JCS members 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.

46. Therefore, disclosure would be unfair and would breach the first data protection principle.

47. 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.

48. The Commissioner is satisfied that the MoJ was entitled to withhold the information under section 40(2) of the FOIA by way of section 40(3)(a)(i).

#### *Section 10 time for compliance*

49. Section 1(1) of the FOIA states that upon receipt of a request a public authority must confirm or deny whether information is held, and if that information is held it must be communicated to the requester.

50. Section 10(1) of the FOIA states that public authorities must comply with section 1(1) within 20 working days of receipt of the request.

51. In this case it is evident that MoJ did not respond to the complainant within the statutory time frame and so it is in breach of section 10(1) of the FOIA.

## Other matters

---

52. Although he did not raise the issue directly with the MoJ, the complainant noted that correspondence from the MoJ bore a different date to the date it was posted on *'whatdotheyknow'*.
53. By way of explanation, the MoJ told the Commissioner that a response to the request was drafted and the response sent to the relevant team for checking and publication:

*"...The content was checked for accuracy, cleared and published on 12 February 2018 but unfortunately the final response bore the date of first drafting as opposed to publication".*
54. The Commissioner expects that, in future, the MoJ will accurately reflect the date of its correspondence.



## Right of appeal

---

55. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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 .....**

**Deborah Clark**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**