

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about disciplinary decisions made in light of Advisory Committee Conduct Hearing recommendations. The Ministry of Justice ("MoJ") confirmed that it held the requested information but maintained that it was exempt from disclosure under section 44(1)(a) (prohibitions on disclosure) of the FOIA.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 44(1)(a) to withhold the requested information.

Request and response

3. On 8 May 2018, further to a series of requests for information which had been refused on cost grounds, the complainant wrote to the MoJ and requested information in the following terms:

"From 2015 to date please advise me of the number of cases where the Lord Chief Justice & The Lord Chancellor has [sic] rejected the Advisory Committee Conduct Hearing recommendations and increased the recommended disciplinary action. From the cases identified where the Lord Chief Justice & The Lord Chancellor have rejected the Advisory Committee Conduct Hearing recommendations, how many decisions were made to remove the magistrate from office."
4. The MoJ responded on 12 June 2018. It said that it held the requested information but that it was exempt from disclosure under section 40(2) (personal data) of the FOIA. It explained that the numbers for each part

of the request were low (five or fewer), and this meant that disclosure would put the individuals concerned at risk of identification.

5. The complainant requested an internal review on 12 June 2018. He disputed that the information he had requested constituted personal data.
6. Following the Commissioner's intervention, the MoJ provided the outcome of the internal review on 1 November 2018. It upheld its decision to withhold the requested information under section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 17 December 2018, expressing dissatisfaction with the outcome of the internal review. He explained that he was only interested in knowing the number of cases where Hearing recommendations had been rejected and disciplinary action had been increased, and that he did not require any personal information.
8. During the Commissioner's investigation, the MoJ explained to her that, while it considered that section 40(2) of the FOIA had been applied correctly, it was refusing the request primarily on the grounds that section 139 of the Constitutional Reform Act 2005 ("the CRA") prohibited the disclosure of the withheld information. The Commissioner has taken this as a claim that section 44(1)(a) of the FOIA applies, noting that she has previously considered similar requests for information under that exemption.
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
10. In light of the above, the analysis below considers:
 - whether the MoJ complied with the statutory timescale for compliance when responding to the request; and
 - whether the MoJ was entitled to rely on section 44(1)(a) of the FOIA to withhold the requested information.
11. The Commissioner has commented on the way the internal review was conducted in the 'Other matters' section at the end of this decision notice.

Reasons for decision

Section 1 – general right of access

Section 10 - time for compliance

12. Section 1(1) of the FOIA states:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

13. Section 10(1) of the FOIA states that on receipt of a request for information, a public authority should respond to the applicant within 20 working days.

14. The complainant emailed the request to the MoJ on 8 May 2018. However, the MoJ told the Commissioner that it did not receive the email, or a follow up email the complainant sent shortly afterwards. It said that it was not until the complainant sent a third email, on 14 May 2018, that it became aware of the request, and it therefore treated the request as having been received by it on that date. Taking 14 May 2018 as the date of receipt, it said that its response of 12 June 2018 fell within the twenty working day timescale for compliance.

15. The complainant said that he had not received an automated “message undeliverable” email to indicate that his email had not been delivered, and the MoJ said that there was no known issue with its email server. The original request email appears to have been correctly addressed to an individual member of staff at the MoJ with whom the complainant had previously corresponded, and who had successfully sent and received other emails on the day the request was emailed. The MoJ was therefore unable to account for why the email was not received by it on 8 May 2018.

16. The Commissioner notes that she, too, has experienced difficulties receiving the complainant’s emails. On two occasions he has emailed her (and has subsequently provided proof that the emails were sent) but his emails have not been received by the ICO. In light of this, and while it remains unclear why some of his emails have not been successfully delivered, the Commissioner has accepted the MoJ’s explanation that it did not receive the request until 14 May 2018, as there is no evidence to the contrary. In light of this, she finds that it complied with the

requirements of sections 1(1) and 10(1) of the FOIA with regard to the timeliness of its response.

Section 44 – prohibitions on disclosure

17. 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".

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

19. In this case, the MoJ considers that section 44(1)(a) is engaged, in that disclosure of the withheld information is prohibited by section 139 of the CRA. It explained:

"Section 139 of the 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. Therefore, information about the decisions by the Lord Chief Justice and Lord Chancellor to reject or increase a recommended sanction from an advisory committee fall within this remit."

20. The Commissioner has previously accepted¹ that section 139 of the CRA has relevance to disclosures of information obtained on behalf of the Lord Chief Justice and Lord Chancellor, for the purposes of judicial discipline.

21. Section 139(1) of the CRA states:

"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."

¹ See, for example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624739/fs50632953.pdf>

22. Section 139(3) of the CRA specifies that “*confidential information*” is information which relates to an identified or identifiable individual. The Commissioner has therefore considered whether the withheld information is capable of identifying an individual or individuals, and also whether the information reveals anything else which may not already be in the public domain (in view of the fact that the Judicial Conduct Investigations Office publishes the names of magistrates against whom sanctions are taken on its website).
23. The MoJ has made submissions on this point to the Commissioner, from which she is satisfied that the withheld information is capable of identifying a specific individual or individuals and that it reveals information about disciplinary decisions which is not in the public domain. She is unable to reproduce the MoJ’s submissions in the body of this decision notice, as to do so would disclose information which is exempt. The MoJ’s arguments are instead contained in a confidential annex to this decision notice, which has been provided only to the MoJ.
24. Having established that the withheld information falls within the category of information described by sections 139(1) and 139(3) of the CRA, the MoJ referred the Commissioner to her decision in FS50609789², which was a request for information similarly covered by the restrictions imposed by section 139 of the CRA.
25. In that case, the Commissioner accepted that section 139 of the CRA permits disclosure of confidential information obtained for the purposes of judicial discipline only in limited and specified circumstances. Those circumstances are defined in section 139 of the CRA, in what the Commissioner considers to be precise terms.
26. 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 the disclosure of the withheld information is prohibited by section 139 of the CRA, and thus that the MoJ was entitled to apply section 44(1)(a) of the FOIA to refuse the request.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173052/fs50692689.pdf>

22. Having reached that conclusion, it has not been necessary for the Commissioner to go on to consider whether section 40(2) of the FOIA, which was also cited by the MoJ, would also apply.

Other matters

27. Although they do not form part of this decision notice, the Commissioner wishes to highlight the following matters of concern.

Internal review

28. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
29. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint: so-called internal reviews. The Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days.
30. The complainant emailed a request for an internal review on 12 June 2018. As with the initial request, the MoJ said that it did not receive the email, and that it only became aware of the internal review request when the Commissioner forwarded a copy on 7 September 2018. It provided its response on 1 November 2018, 39 working days later.
31. The Commissioner is concerned that from first becoming aware of the internal review request, it took the MoJ 39 working days to conduct an internal review. The Commissioner considers that when conducting internal reviews, any time in excess of 20 working days should only be required in complex and voluminous cases, which this request was not.
32. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in

her draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

33. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Samantha Bracegirdle
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