

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2019

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information regarding complaints about coroners. The Ministry of Justice has withheld some information under section 44 (Prohibitions on disclosure) of the FOIA by virtue of section 139 of the Constitutional Reform Act 2005 and section 40(2) (Personal information) of the FOIA.
2. The Commissioner's decision is that the Ministry of Justice has appropriately applied section 44(1)(a) of the FOIA by virtue of section 139 of the Constitutional Reform Act 2005.
3. The Commissioner does not require the Ministry of Justice to take any steps as a result of this decision.

Request and response

4. On 8 October 2018, the complainant wrote to the Ministry of Justice (MoJ) and requested information in the following terms:

"1) Please state the number of complaints made against coroners in each of the following financial years:

i) 2013/14

ii) 2014/15

iii) 2015/16

iv) 2016/17

v) 2017/18

vi) 2018/19

2) Please provide a breakdown of this number by the kind of reason the complaints were made for each year.

3) Please state the number of complaints upheld in each year

4) For complaints upheld, please provide a summary of or the free text description of the complaint held in your recording software, and state what disciplinary action that was taken against the coroner, for each case in each year.

While some of the information held may be personal data, please provide as much as possible, redacting sensitive personal information and note a blanket exemption is not permitted under the FOIA."

5. The MoJ responded on 5 November 2018. In relation to question:

1(i)-(iv): It explained that this information was exempt under section 21 and provided the complainant with a link to the information.

1 (v): It answered the question.

1(iv): It confirmed that it did not hold the requested information.

2: It explained that compliance with this part of the request would exceed the appropriate cost limit citing section 12 and advised the complainant to submit a refined request within the cost limit. It also provided him with an example of how he could refine the request and provided him with a link to the Commissioner's website.

3: It explained that this information was exempt under section 21 and provided the complainant with a link. It also cited section 22 (future publication) to the 2017-2018 annual report as it was not ready to publish and it did not hold information in relation to 2018-2019.

4: It cited section 44(2) (by virtue of section 139 of the Constitutional Reform Act 2005), explaining that it was neither confirming nor denying whether it held the requested information.

6. On 13 November 2018 the complainant requested an internal review in relation to the MoJ's response to question 4. In relation to question 2 he asked for information up to the cost limit.

7. Following an internal review the MoJ wrote to the complainant on 6 December 2018. It explained that in relation to question 4, section 44(2) did not apply and confirmed that it held the information. In relation to the first part of question 4: *"for complaints upheld, please provide a summary of or the free text description of the complaint held in your recording software"*, it exempted the information under section 44(1)(a) by virtue of section 139 of the Constitutional Reform Act 2005 (CRA). It also applied section 40(2). In relation to the second part of the question 4: *"what disciplinary action was taken against each coroner for each year for the period of 2013/14 to 2018/19"*, the MoJ applied sections 21 and 22. It also provided links to the information withheld under section 21 of the FOIA.
8. With regard to question 2 the MoJ explained that it considered that the complainant's request for all of the information up to the cost limit, was an amended request. On 10 December 2018 the MoJ responded to the amended request and confirmed that it held relevant information but was withholding it under section 44(1)(a) by virtue of section 139 of the CRA.
9. Following an internal review regarding the amended request, the MoJ wrote to the complainant on 19 December 2018. It explained that it had considered his amended request in two parts:
 - (1) Please state the number of complaints made against coroner in 2017/18.
 - (2) Provide a breakdown by the kind of reason the complaints were made.
10. The MoJ answered part (1), confirming that the number of complaints made against coroners in 2017/18 was 82. In relation to part (2), the MoJ explained that it was withholding the information, citing section 40(2). It explained that if a request was made for information and the figure amounts to five or fewer people, it must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of its statutory obligations under the General Data Protection Regulation (GDPR) and/or the Data Protection Act 2018 (DPA). It also explained that it considered that in this case, disclosure of the requested information would risk identification of the individuals concerned, therefore it was not providing the exact figure of the breakdown where the number fell between one to five. The MoJ also explained that it should not be assumed that the actual figure represented falls at any particular point within this scale; 'five or fewer' is used as a replacement value from which it would be difficult to isolate or extract any individual data.

11. Additionally, the MoJ explained that personal data can only be disclosed if to do so would not contravene any of the data protection principles set out in Article 5(1) of the GDPR and section 34(1) of the DPA. It also explained that it believed that disclosing the requested information would be unlawful; 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.

Scope of the case

12. The complainant contacted the Commissioner on 15 January 2019 to complain about the way his request for information had been handled. He explained that he considered that it was not at all clear that releasing summaries of the confidential information, without providing information that would identify the coroner or complainant in question, could be held to be in breach of either section 44(1)(a) or section 40(2) of the FOIA, as they were not blanket exemptions.
13. The complainant also pointed out that part 3 of section 139 of the CRA notes "*Information is confidential if it relates to an identified or identifiable individual (a subject)*". He explained that this would not be the case for an anonymous summary. The complainant also explained that it seemed clear that as anonymous summaries of events are not the same kind of information as identifiable detail of a coroner's actions and interactions with a complainant, it does not follow that the release of a summary would breach section 139 as if they do not identify persons, they are not confidential under section 139.
14. In addition, the complainant explained that if absolutely all information regarding to a complaint about a coroner was held to be confidential under section 139 of the CRA, and disclosing it ruled unlawful, then it would follow that statistical information and outcomes of complaints data as listed in the Judicial Conduct Investigations Office (JCIO) annual report, could also not be provided lawfully, which does not seem correct.
15. The complainant concluded that sufficiently anonymised summaries could be provide without this being unlawful or in breach of FOIA exemptions.
16. During the Commissioner's investigation, the MoJ confirmed that it was also relying on section 44(1)(a) by virtue of section 139 of the CRA in relation to part 2 of the amended request.
17. The complainant confirmed to the Commissioner that he was complaining about the way in which the MoJ handled his amended request in relation to question 2 and question 4 of his original request.

18. In relation to his amended request, the Commissioner and complainant agreed that this should be considered as part of the present complaint rather than being dealt with separately.
19. The Commissioner will consider the MoJ's application of sections 44(1)(a) and 40(2) to part 2 of the amended request and part 4 of the original request.

Reasons for decision

Section 44 – Prohibitions on disclosure

20. Section 44(1)(a) of the FOIA provides

*"(1) 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."*

21. Section 44 is a class based exemption which means if the requested information falls within the class of information described in section 44(1)(a), the exemption is engaged. As section 44(1)(a) is also an absolute exemption, it is not subject to any public interest considerations.

Is disclosure prohibited by or under any enactment?

22. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
 - primary legislation (an Act of Parliament); or
 - secondary legislation (a Statutory Instrument).
23. The MoJ explained that the JCIO is an independent statutory body that supports the Lord Chief Justice and Lord Chancellor in their joint responsibility for judicial discipline. Its remit is to consider complaints of judicial misconduct. It is an advisory body with no power to make findings of misconduct or to discipline an office holder. The process it follows when considering complaints is set out in statutory regulations¹ and supporting rules.

¹ The Judicial Discipline (Prescribed Procedures) Regulations 2014.

24. In relation to the amended question 2 request (ie the complainant wanting all the information up to the cost limit) and the first part of question 4 (ie: "for complaints upheld, please provide a summary of or the free text description [sic] of the complaint held in your recording software") the MoJ explained to the Commissioner that it considered that the requested information was exempt information by virtue of section 139(1) of the CRA.²
25. It also explained that section 139 of the CRA places a duty of confidentiality on those who have responsibilities in relation to judicial conduct and discipline, where information is provided under, or for the purposes of, a relevant provision of the CRA. Information obtained for the purposes of a function under Part 4 of the CRA is confidential by virtue of section 139.
26. Additionally the MoJ provided the following:

"139 Confidentiality

(1) 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.

...

(3) Information is confidential if it relates to an identified or identifiable individual (a "subject").

(4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—

(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));

(b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;

(c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c. 54) or a decision whether to exercise them;

(d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;

² <http://www.legislation.gov.uk/ukpga/2005/4/contents>

(e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.

...

(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision.

(7) This section does not prevent the disclosure of information which is already, or has previously been, available to the public from other sources.

(8) A contravention of this section in respect of any information is actionable, subject to the defences and other incidents applying to actions for breach of statutory duty.

(9) But it is actionable only at the suit of a person who is a subject of the information."

27. In addition, the MoJ explained that paragraph 14 of Schedule 3 to the Coroners and Justice Act 2009 (2009 Act) extends the judicial disciplinary arrangements (as set out in chapter 3 of Part 4 of the CRA) to all coroners. The Lord Chancellor, with the agreement of the Lord Chief Justice, has the power to remove a senior coroner, area coroner or assistant coroner from office if that coroner is incapable of performing his or her functions, or for misbehaviour (i.e. judicial misconduct). The 2009 Act also makes senior coroners, area coroners and assistant coroners subject to the disciplinary provisions of the CRA (which includes the power for the Lord Chief Justice to issue formal advice, formal warnings or reprimands for judicial misconduct). In practice, this means the JCIO has responsibility for considering complaints of judicial misconduct against any coroner in England and Wales.³
28. Section 139(3) of the CRA specifies that "*confidential information*" is information which relates to an identified or identifiable individual. The Commissioner must therefore consider whether the withheld information is capable of identifying an individual or individuals.

³ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/coroners/guidance/chief-coroners-guide-to-act-sept2013.pdf>

29. In relation to question 2, the MoJ has made submissions on this to the Commissioner, from which she is satisfied that the withheld information is capable of identifying a specific individual or individuals. The Commissioner 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 set out in a confidential annex to this decision notice, which has been provided to the MoJ only.
30. The MoJ also explained that it had considered whether there was other information in the public domain that, taken together with some of the withheld information, could lead to an individual being identified.
31. The Commissioner has published guidance on information in the public domain.⁴ She considers that there is no simple rule about the effect of information in the public domain; the Commissioner considers that the correct approach will always be to look at the effect the disclosure would have in light of the information already in the public domain. This will vary from case to case, depending on the exact content and context of the information.
32. Relevant information in the public domain might include the requested information itself, or some other information on the same subject, or similar information on a similar subject. Each will have a different effect.
33. A public authority might consider that the existence of relevant information in the public domain means the information should not or need not be disclosed. On the other hand, a requester could argue that this means it can and should be disclosed. The fact that relevant information can be found in the public domain does not automatically support either side.
34. Before considering the effect of any information already in the public domain, the first step is to decide whether the relevant information was actually 'in the public domain' at the time of the request. This is a question of degree, and will depend on the circumstances. For these purposes, information is in the public domain if it is realistically accessible to a member of the general public at the time of the request.
35. In particular, information is not necessarily in the public domain just because it is known to the requester. The question is still whether a hypothetical interested member of the public could access the

⁴ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

information. If a member of the public can no longer access the information at the time of the request, the FOI or EIR disclosure would, in practice, be revealing 'new' information over and above what is currently public knowledge.

36. The guidance states that public authorities should always consider the quality and content of the information in the public domain and compare it carefully with the withheld information to determine its relevance in the particular circumstances of the case.
37. The Commissioner has considered the MoJ's arguments regarding this in the confidential annex.
38. In relation to question 4, the MoJ explained to the Commissioner that the withheld information contains the names of some coroners and complainants as well as summaries of the complaints. It argued that this data fell within section 139 of the CRA. The Commissioner has considered the withheld information. She notes the withheld information consists of summaries of complaints about coroners and considers that they are still confidential in nature as they relate to confidential information in the original complaints.
39. In addition, the MoJ also directed the Commissioner to a previous decision notice⁵ in which she 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. The decision noted that those circumstances are defined in section 139 of the CRA in what the Commissioner considered to be "*precise terms*".
40. The Commissioner considers that the withheld information is confidential information for the purposes of section 139 of the CRA.
41. 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.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2260090/fs50773474.pdf>

Conclusion

42. Taking all of the above into account, the Commissioner is satisfied that section 44(1(a)) (by virtue of section 139 of the CRA) has been applied appropriately in this case.
43. The Commissioner has therefore not considered the MoJ's application of section 40(2).

Right of appeal

44. 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

45. 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.
46. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF