

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 April 2019

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to an interview panel. The Ministry of Justice (the 'MOJ') said it did not consider some of the request to fall under FOIA, but provided a response outside of the Act. For the remainder, , the MOJ ultimately provided the national figure but refused to provide location specific information, citing section 40(2), personal information of the FOIA.
2. The Commissioner's decision is that section 40(2) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - disclose the figure for Hampshire and Isle of Wight at part two of the request.
4. The MOJ must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 2 December 2018 the complainant wrote to the MOJ and requested information in the following terms:

*"The original feedback was false and I reflected on why this might have been the case, citing specifically what was said in the interview. There were three members to the panel but if that panel all suffered from the same bias, the number does not address that issue.*

*The diversity statistics certainly show the effort made to monitor this. They refer only to BAME [Black, Asian and Minority Ethnic] as a group though and I note the monitoring form does include Chinese as a category.*

*I should therefore like to ask:*

*How homogenous was the interview panel*

*How many Chinese magistrates are there, nationally and for Hampshire & Isle of Wight. I understand you may only have the figure for the latter."*

6. The MOJ has explained that this request was originally handled by the Deputy Justices' Clerk ('DJC') as a human resources matter, and that a response was provided on 11 December 2018 from its Legal Team. That response was based on the advice provided by the Magistrates' Division of the Judicial Office ('MDJO') and provided answers to part one and the first element of part two of the complainant's request. The MOJ advised however, that the DJC, on the advice from the MDJO, refused to provide any information relating to numbers of Chinese Magistrates within Hampshire and the Isle of Wight, as it said the figure was below five.

7. The Commissioner has viewed the relevant correspondence herself and notes that the initial response of 11 December 2019 simply stated the following:

*"Unfortunately, due to Data Protection we are unable to break down figures by nationality."*

8. The complainant requested an internal review on 7 January 2019. His email clearly states the following:

*"I do not understand why Data Protection rules would prevent that being disclosed and have been advised by the Information Commissioner's Office that I should again "ask specifically why he or she believes that data protection matters are an obstacle to collating and supplying this data". They further advise that "If you are not satisfied with the response you should request an Internal Review of the decision on your FOIA request and explain to them why you believe their decision is incorrect".*

9. The DJC provided an internal review or, in its view, a further response, on 8 January 2019, stating:

*"With regards to the below query, having looked at the data that the stats were published from I can confirm that we have 38 magistrates as declaring themselves Chinese. As previously stated, I cannot give you the details just for Hampshire and IOW*

*[Isle of Wight] as the numbers are less than 5. If a request is made for information and the total figure amounts to five people or fewer, we must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of our statutory obligations under the General Data Protection Regulation and/or the Data Protection Act 2018."*

10. The MOJ also told the Commissioner:

*"As [the complainant] did not specify or state that his request was being made under the Freedom of Information Act 2000 (FoIA), the DJC made a judgement that [the complainant's] request would be addressed under normal business. I should add that [the complainant] has not submitted any request to either the Disclosure Team based at Petty France, or the South West Region's KILO team."*

11. The Commissioner has commented on the MOJ's handling of the request under the 'Other matters' section of this notice.

## **Scope of the case**

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12. The complainant initially contacted the Commissioner on 12 January 2019 to complain about the way his request for information had been handled. The Commissioner did not receive all the requisite correspondence to commence her investigation until 11 February 2019.

13. The complainant asked the Commissioner to consider the following grounds of complaint:

*"I should like to know the number of Chinese magistrates there are in Hampshire and the Isle of Wight. This is information collected on their Diversity Monitoring form. They initially replied that due to Data Protection rules, they are unable to break down the numbers by nationality (I assume they mean ethnicity). On further querying this, the reason given is because this number is less than 5. The email exchange sets this out.*

*I have no interest in identifying the individuals and do not see how this is even possible. If indeed this is a Data Protection rule, I must accept it as such, but is the purpose of the monitoring not to answer just these questions?"*

14. In this case, there has been a lack of clarity about processing the complainant's FOIA request. As long as a request is made in accordance with section 8 of FOIA (ie it is in writing, contains the name of the

applicant and an address for correspondence and describes the information requested) then the request is valid. The applicant is not required to state that he is making an FOIA request. Certainly, and at least by the time of the complainant's second email where he clearly references an "internal review", the Commissioner's view is that the request should have been referred internally on receipt at the MOJ to its Disclosure Team to be handled under the FOIA as this is how it says its FOIA requests are handled.

15. Given that no FOIA exemption was originally cited to withhold part of the information requested by the complainant in the second part of his request, the Commissioner asked the MOJ to issue a response under the FOIA to the complainant during the course of her investigation.
16. Subsequently, the MOJ issued its response on 25 March 2019. It said that it did not consider part one of the request to fall under FOIA but provided some information about the make-up of magistrate interview panels outside the Act. For part two, it reiterated the earlier response in relation to the national figure but now cited section 40(2) of FOIA for the area specific information.
17. The Commissioner has exercised her discretion in this case. Given that the MOJ had already internally reviewed its original decision on 8 January 2019, and to avoid any further delay for the complainant, she accepted this complaint without any further internal review.
18. Following the MOJ's revised response, the complainant confirmed that he remained concerned about part two only of his request, specifically that the number of Chinese magistrates at Hampshire and Isle of Wight was withheld.
19. The Commissioner has therefore considered whether the MOJ has correctly relied on section 40(2) in relation to this part of his request.

## **Reasons for decision**

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### **Section 40 - personal information**

20. 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(3A)(3B) or 40(4A) is satisfied.

21. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
22. 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 FOIA cannot apply.
23. 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?*

24. Section 3(2) of the DPA defines personal data as:-

*"any information relating to an identified or identifiable living individual".*

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
27. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
28. For the part of the request under consideration here, the complainant has requested the number of Chinese magistrates for Hampshire and Isle of Wight. The Commissioner has viewed the actual figure requested.

### **The Commissioner's view**

29. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.

30. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*

31. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

32. The Commissioner notes that the MOJ has advised the complainant that less than five magistrates for Hampshire and Isle of Wight area are Chinese. It has not disclosed the actual figure on the basis that this would be the personal data of the parties involved and the disclosure would mean that the parties could be identified.

33. The Commissioner asked the MOJ to consider the 'motivated intruder' position together with the anonymisation Code of Practice, provide the names of the individuals falling in the "less than five" category and to explain how any individual could be identified if the actual number of Chinese magistrates within the specified area was to be released.

34. In response the MOJ provided the requested names and submitted the following:

*"When magistrates apply for appointment they fill in an optional diversity form and this states:-*

APPENDIX A – DIVERSITY MONITORING FORM

*Completion of this Appendix is not mandatory. However, your response would be appreciated.*

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<sup>2</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

*This data helps advisory committees to assess the effectiveness of recruitment strategies and aids the identification of patterns and trends in judicial diversity.*

*Statistical data is published annually on the judiciary website<sup>3</sup>; for example to show the proportion of magistrates from Black and Minority Ethnic backgrounds. **The information is published in generalised form only – the personal details of individuals are never published.***

*The information provided in this Appendix is not taken into account in assessing suitability for appointment.”*

35. It said that the magistrates who completed this form indicating that they are Chinese have therefore not given permission to share that information.
36. However, other than providing the explanation in the paragraph above, the MOJ did not further explain how this identification could be achieved. The Commissioner, having had sight of the actual figure herself, has been unable to identify any party from conducting relevant internet searches using name, magistrate role and specified location.
37. Based on the above, it is not apparent to the Commissioner how knowing the actual number of Chinese magistrates within Hampshire and Isle of Wight would be more likely to lead to their identification as opposed to actually just disclosing that there are less than five. It is therefore not clear to the Commissioner how any party could be identified from the disclosure of the actual figure itself.
38. She is mindful of magistrates' expectations having completed the optional diversity monitoring form; however as no individual can be identified from disclosure of the actual figure for Chinese magistrates in the specified area, no personal data will be disclosed.
39. Therefore, in the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does not relate to any identifiable party. She is therefore not satisfied that this information identifies any data subject and it does not therefore fall within the definition of 'personal data' in section 3(2) of the DPA.

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<sup>3</sup> [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/)

## **Other matters**

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40. The Commissioner would remind the MOJ to ensure that all the organisations and departments falling within its remit are able to recognise an FOI request and an internal review request, and are also aware that such requests should be passed to its Disclosure Team for processing.



## Right of appeal

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41. 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)

42. 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.
43. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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