

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2019

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 number of Judges caught in a sweep of the judicial internet.
2. The Ministry of Justice (MoJ) refused to confirm or deny whether it held the requested information, citing section 44(2) (prohibitions on disclosure) of the FOIA.
3. The Commissioner's decision is that the MoJ cited section 44(2) incorrectly.
4. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - confirm or deny whether it holds the information requested by the complainant. In relation to any information that is held, this should either be disclosed or the complainant should be provided with a notice setting out the grounds under the FOIA for refusing to disclose this information.
5. The MoJ must take this step 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.

Background

6. The Commissioner's published guidance¹ 'When to refuse to confirm or deny information is held' states:

"Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is known as 'the duty to confirm or deny'. In most cases, a public authority will be able to comply with its duty to confirm or deny under section 1(1)(a) – in other words, it will be able to respond to a request by at least informing the requester whether or not it holds the information. In most cases where information is held, a public authority will go on to consider whether information should be provided under section 1(1)(b), or whether it is subject to an exemption in Part II of the Act.

However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the Act allows a public authority to respond by refusing to confirm or deny whether it holds the requested information. This is called a 'neither confirm nor deny' (NCND) response".

Request and response

7. On 21 March 2019, the complainant wrote to the MoJ and requested information in the following terms:

"I refer to the decision made by the Ministry of Justice to remove 4 Judges from judicial office which was announced in the media on 17 March 2015.

I understand that the Judges concerned were caught in a sweep of the judicial internet.

... Please confirm to me how many Judges were caught in the sweep and the rank of the Judges concerned".

¹ https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf

8. The MoJ responded on 12 April 2019. It said that the requested information was exempt from disclosure by virtue of section 21 (information accessible to applicant by other means) of the FOIA.
9. Following an internal review, the MoJ wrote to the complainant on 23 May 2019, revising its position. It refused to confirm or deny that it held the requested information, citing section 44(2) (prohibitions on disclosure) of the FOIA by virtue of section 139 of the Constitutional Reform Act 2005 (CRA).

Scope of the case

10. The complainant contacted the Commissioner in correspondence dated 4 July 2019 to complain about the way his request for information had been handled.
11. The analysis below considers whether the MoJ was entitled to neither confirm nor deny holding the requested information by virtue of section 44(2) of the FOIA.

Reasons for decision

Section 44 prohibitions on disclosure

12. 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".

13. 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)".

14. In this case, the MoJ considers that the confirmation or denial that would have to be given falls within paragraph (a) of subsection (1). In other words, the MoJ's position is that provision of the confirmation or denial would be prohibited by an enactment.

15. In that respect the MoJ told the complainant:

"In this instance, section 139 of the Constitutional Reform Act 2005 (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".

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

17. In addition to providing her with an extract of the relevant section of the CRA, the MoJ observed that the Commissioner has previously 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 Commissioner's view

18. The matter for the Commissioner to determine in this case is whether the MoJ was prohibited by the CRA from confirming or denying whether it held the information requested by the complainant. If it was, the exemption was engaged and the MoJ was not obliged to comply with the complainant's information request.

19. In that respect, it is accepted that Part 4 of the CRA is entitled '*Judicial appointments and discipline*'. Similarly it is accepted that section 139(3) of the CRA states:

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

20. The Commissioner has considered the MoJ's submission in support of its decision to neither confirm nor deny whether it holds information relevant to the complainant's request.

21. She has also taken into account the media coverage from 17 March 2015 – the date specified in the request – regarding the resignation/removal of judges from judicial office following an investigation. She is also satisfied that the '*Disciplinary Statements*' section of the Judicial Conduct Investigations Office website includes a statement dated 17 March 2015 confirming how many judges were removed from judicial office and their roles within the judiciary.

22. In order to reach a decision in this case, the Commissioner must consider whether, if the requested information were held, to confirm that it was held would contravene the prohibition on disclosure in section 139 CRA.
23. The Commissioner is mindful that the decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits.
24. From the evidence she has seen, the Commissioner is not satisfied that giving the confirmation or denial in response to the complainant's request would amount to a contravention of section 139 of the CRA. She does not consider that providing a confirmation or denial in this case would disclose information relating to an identified or identifiable individual.
25. Accordingly, the MoJ was not entitled, in 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 requested was held.

Right of appeal

26. 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

27. 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.
28. 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
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