

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 2020

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ), including information from a named Judge's personal file.
2. The MoJ confirmed it held the requested information but refused to provide it, citing section 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) to withhold the requested information. However, she finds that the MoJ failed to respond to the request within 20 working days and therefore breached section 10(1) (time for compliance with request) of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 13 October 2019, the complainant wrote to the MoJ and requested information in the following terms:

"1. You have stated that a document from HHJ [His Honour Judge] [name redacted]'s personal file was examined by yourselves; From this information you say that he was temporarily appointed a Deputy High Court Judge of the Queen's Bench Division (at the time the defendant's application for [redacted] was made).

I ask that you forward a copy of this to myself.

Under Open Justice rules it is quite appropriate to do this.

You have stated you hold information on this document and have examined it.

...

3. The other FOIA request is:

Who is responsible for assuring that a transfer order is implemented.

Is it

(a) HMCTS [Her Majesty's Courts and Tribunals Service].

or:

(b) The judge who made the order.

or:

(c) The person who made the application.

or

(d) Any other party.

...".

6. The correspondence also included points (2) and (4) that were not requests for information.
7. The MoJ responded on 3 December 2019. It refused to provide the information requested at (1), citing section 40(2) (personal information) of the FOIA. It provided information within the scope of point (3).
8. The complainant expressed dissatisfaction with the MoJ's response to part (1) of his request. In correspondence which also raised a number of other matters, he told the MoJ:

"4. I ask that you say if this document was from the person or body claimed by [name redacted] to have made the appointment.

If so who was that person or body. This information cannot be construed as personal data.

I further ask that you supply the document with any personal data redacted.

If this document appears to be not from the person or body said to have made it; please state this clearly and unequivocally”.

9. He also expressed dissatisfaction with the timeliness of its response.
10. Following an internal review of its handling of part (1) of the request, and with reference to point (4) of his further correspondence, the MoJ wrote to the complainant in correspondence dated 8 January 2020. It maintained its position that section 40(2) applied to the requested letter.

Scope of the case

11. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation, on 7 February 2020, to support his complaint about the way his request for information had been handled.

12. He told the Commissioner:

“My complaint is about their refusal and the late reply to the FOI request”.

13. As is her practice, the Commissioner wrote to both parties setting out the scope of her complaint. She told the complainant:

“I am therefore considering the MoJ’s response to question 1 of your initial request (and question 4 of your additional questions in your request for an internal review) and the MoJ’s explanation that it is withholding the requested information under section 40(2). I will also be considering the length of time taken by the MoJ to deal with your request”.

14. The complainant confirmed that he was content with that scope.
15. During the course of her investigation, the Commissioner wrote to the MoJ asking to be provided with a copy of the withheld information, together with its submission.
16. The MoJ confirmed that it held information within the scope of the request. However, it told the Commissioner that, due to circumstances beyond its control, it was not able to provide her with a copy of the withheld information. It explained that the document in question was kept within a physical file, rather than electronically, and that as a result of restrictions in place due to the pandemic, it did not have access to the file.

17. The Commissioner recognises that, since March 2020, public authorities have faced challenges, including with respect to accessing information held in hard copy format. In this instance, the Commissioner also recognises that the MoJ is unlikely to be able to access the file in the near future. In the circumstances, rather than delay matters further, she progressed her investigation without having sight of the withheld information.
18. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the withheld information.

Reasons for decision

Section 40 personal information

19. 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.
20. In this case, the relevant condition is contained in section 40(3A)(a). 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
21. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
22. 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 DP principles.

Is the information personal data?

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

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

24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. 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.

26. 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.
27. In order to assist with her investigation, and mindful of the reason why the MoJ was unable to provide her with a copy of the actual withheld information in this case, the Commissioner asked the MoJ questions about how appointment letters are produced. She asked the MoJ to provide her with the template used for such letters and, if one was available, an example of an appointment letter.
28. The MoJ provided the Commissioner with a copy of the relevant template. It confirmed that the content of the letters which are produced are unique for each letter. It told the Commissioner:

"...the template only has some headings marking the letter as official".
29. The Commissioner accepts that the template comprises those details.
30. The MoJ also confirmed that it was unable to provide an example of another appointment letter. It told the Commissioner:

"The judicial office do not have access to other letters as they are also kept within physical files which are kept at the office".
31. In this case, the wording of the request – which specifically names him - makes it clear that the information requested could only relate to the Judge. The requested information concerns the Judge's appointment, has him as its main focus and has biographical significance for him.
32. In the circumstances, despite not having had the opportunity to consider the withheld information, the Commissioner is satisfied that this information both relates to, and identifies, the Judge, and is held on his personal file. This information therefore falls within the definition of personal data in section 3(2) of the DPA.
33. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

36. In the case of an 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 lawful, fair and transparent.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

38. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
39. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

40. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

¹ Article 6(1) goes on to state that: -

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- (ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

- 42. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
- 43. The Commissioner acknowledges that the information is clearly of interest to the complainant. In his correspondence, he provided context to his request and asked the Commissioner "*to uncover the truth of the content* [of the document]".
- 44. In the circumstances of this case, the Commissioner considers that the requester is pursuing a purely private concern, unrelated to any broader public interest. The complainant has not put forward any arguments in support of a wider public interest in disclosure of the requested letter. Nor has the Commissioner seen any evidence of a wider public interest in its disclosure.
- 45. However, in light of the wording of the request referring to a temporary judicial appointment, the Commissioner considers that there is a generic legitimate interest, namely transparency.

Is disclosure necessary?

- 46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

47. In support of his complaint, the complainant disputed the need to have personal information in an official letter of appointment.

48. In that respect, the MoJ told the Commissioner:

"We deem Judges appointment letters as personal information as it's his/her own letter and they are classed as 'Official-Sensitive'. The letters contain personal e-mail addresses and can contain personal details such as appointment dates, retirement dates etc, therefore these details are personal to the Judge.

These letters have never been released in the past.

Appointments of Judges are published on the Courts and Tribunals web page, but as mentioned the actual letters are personal to the Judges".

49. The Commissioner is mindful that disclosure under the FOIA is a disclosure to the world at large. Therefore, the effect of complying with this request would be that the Judge's personal details were effectively being publicly disclosed and would be accessible to anyone, for any purpose.

50. She has also taken into account that while details of appointments to, and retirements from, the judiciary are published on the Courts and Tribunals website, the request in this case specifies a temporary appointment.

51. As the Commissioner is unable to view the withheld information in the circumstances of this case, she cannot be satisfied that disclosure is not necessary to meet the legitimate interest identified. She has therefore gone on to conduct the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

52. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

53. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
54. In the Commissioner's view, a key issue is whether the individual concerned has 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 an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
55. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
56. With respect to the withheld information in this case, the MoJ told her:
- "The document is a private letter addressed to the judge which contains the judges address and is about the judge being appointed a Deputy High Court Judge ..."*
57. In view of the recognised procedure for announcing judicial appointments and retirements, the Commissioner appreciates that the Judge involved would have no expectation that their personal data would be disclosed under the FOIA. Furthermore, she accepts that disclosure of the withheld information risks invading the privacy of the individual concerned.
58. The Commissioner considers that disclosure of their personal information under the FOIA would be likely to result in unwarranted damage or distress to the Judge.
59. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
60. The Commissioner has therefore decided that the MoJ was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 10 time for compliance

61. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held

and, if the information is held, to have that information communicated to them, unless an exemption applies.

62. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
63. The request in this case was submitted on 13 October 2019. However, it was not until 3 December 2019 that the MoJ provided its substantive response.
64. The Commissioner finds that the MoJ breached section 10(1) of the FOIA by failing to comply with section 1(1) of the FOIA within the statutory time period.

Other matters

65. The Commissioner recognises that, in support of his complaint, the complainant told her:

"There is no reason why personal information should be on an official letter of appointment. However following the refusal to disclose I said I would accept the document with any personal data deleted. This request was ignored".

66. On the basis of the evidence provided to her in this case, namely the generic nature of the template, and that each letter is unique to the situation, the Commissioner considers it unlikely that disclosure of the letter in redacted form would aid the complainant.

Right of appeal

67. 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

68. 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.

69. 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

**Gerrard Tracey
Principal Adviser FOI
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**