

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested information from the Office of the Public Guardian ("the OPG") in relation to accounts filed regarding the complainant's late mother's finances. The OPG is an executive agency of the Ministry of Justice ("the MoJ"), the MoJ therefore being the relevant public authority.
2. The MoJ has withheld the requested information citing section 40(2) of FOIA – personal information and section 41(1) of FOIA – information provided in confidence.
3. The Commissioner's decision is that the MoJ has correctly withheld the information, partly under section 40(2) of FOIA and partly under section 41(1) of FOIA. However, as the MoJ failed to provide a response within 20 working days, it has breached section 10(1) of FOIA.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

5. On 1 January 2022, the complainant wrote to the MoJ and requested information in the following terms:

"As [named person] indicates she is required to file details of her actions and Mum's accounts with OPG. I would therefore request that details of

any disclosures made by [named person] are disclosed to provide transparency in a case where there has already been a considerable failure by OPG to be transparent and demonstrate good governance.”

6. On 25 January 2022, the complainant clarified their request:

“The Communication was an application for a disclosure of the accounts the Deputy has filed with OPG as there was a query raised of £45k going out of Mum’s assests without any indication of what that dispoal or how any disposal of funds was to benefit to Mum.”

7. The MoJ responded on 22 February 2022, explaining that although the complainant’s mother was deceased and the Data Protection Act was no longer applicable, it still had a duty of care to protect the personal data of living individuals. The MoJ also explained that should they receive a request from the appointed executor, then they would reconsider the response to assist with the administration of the complainant’s mother’s estate.
8. The complainant contacted the MoJ on 24 February 2022 asking for a further explanation of the response.
9. On 17 March 2022, the complainant contacted the MoJ again to chase for a response and to complain about how their request for information had been handled.
10. On 6 May 2022, MoJ responded to the complaint. It explained that their response to the request for information had been reviewed and that the response was correct. It did explain that the request for information had been handled outside of FOIA as the requested information would have been exempt from disclosure under section 40(2), as it relates to the personal information of another. It also explained that the legal authority to investigate concerns about the estate lay with the executors or personal representatives.
11. Following an internal review the MoJ wrote to the complainant on 26 January 2023. It stated that it recognised that the requests should have been handled under FOIA, as well as being responded to within 20 working days. The MoJ acknowledged that the complainant’s mother’s own personal data is not applicable under section 40(2) of FOIA, it explained that other living individuals had contributed to compiling the reports and, as such, section 40(2) of FOIA is appliable to some of the information.
12. The MoJ went on to explain that it considers that section 41(1) of FOIA is also applicable. It advised that the information provided to the MoJ is sensitive data and is provide in confidence.

Scope of the case

13. The complainant contacted the Commissioner on 8 April 2022 to complain about the way their request for information had been handled.
14. The Commissioner considers that the scope of the case is to determine if the MoJ were correct to withhold the requested information under section 40(2) and section 41(1) of FOIA.

Reasons for decision

Section 41(1) – information provided in confidence

15. Section 41(1) of FOIA provides that –

(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and, (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

16. The Commissioner’s advice on section 41 states that “information will be covered by Section 41 if –
 - it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence.
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed.”¹

Was the information obtained from any other person?

17. Section 41(1)(a) states that the information must have been obtained from “any other person”
18. The information was provided to the MoJ by the Deputy who was overseeing the client’s affairs. The Commissioner is satisfied that this information which was obtained by the MoJ from a third party and, as such, this element of the exemption is met.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Would disclosure constitute an actionable claim for breach of confidence

19. In considering whether the disclosure of information constitutes an actionable breach of confidence the Commissioner will take account of the following:

- Whether the information has the necessary quality of confidence
- Whether the information was imparted in circumstances importing an obligation of confidence
- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

20. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

21. The Commissioner is satisfied that the matter to which the content of the withheld information relates, is the personal view, along with the personal estate of the client for which the third party was operating and, as such, it is not trivial.

22. With regard to accessibility, as far as the Commissioner is aware, the information contained within the email is not already in the public domain.

23. The Commissioner is satisfied that the withheld information is not trivial or otherwise accessible, and therefore has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

24. The MoJ has explained that on the form that a Deputy completes to account for their management of their client's affairs, it states "We will treat any information you give us in line with the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. This means we won't give it to anyone else unless we have a safeguarding concern or we have to apply to the Court of Protection, when it would be available to anyone involved in court proceedings".

25. The MoJ explained that there is a clear expectation in the wording on the form in question and the sensitive nature of the information provided by the Deputies that is supplied to the MoJ in confidence.

Would disclosure be detrimental to the confider?

26. The MoJ has explained that Deputies are obliged by the court order appointing them to report annually to MoJ as the supervisory authority.
27. The MoJ argues that if there was a breach in that confidence, it is likely to have a detrimental effect on how willing Deputies are to engage with the MoJ in the future.
28. The MoJ has advised that, in the absence of its knowledge as to the existence of an executor/personal representative, disclosure of the information could give rise to an actionable breach of confidence. It explained that should it receive a request from the executor, along with the proof they have been appointed as such, it may reconsider the response in order to assist in the administration of the estate.
29. The MoJ also explained that if it did receive such a request, it would likely be handled out of the scope of FOIA on a discretionary basis. It went on to advise that this is because disclosure under FOIA is disclosure to the world at large. The MoJ considers a person's financial records to be sensitive information, even if the individual is deceased.
30. Although section 41 is an absolute exemption and is not subject to the consideration of the public interest test under FOIA, there exists a recognised defence to an actionable breach of confidence, if there is an overriding public interest in the information being disclosed. The Commissioner has therefore gone on to consider this below.

Is there a public interest defence for disclosure?

31. The MoJ has argued that whilst it could be deemed to be in the public interest for greater transparency regarding how a Deputy manages a client's affairs, it could also have a chilling effect on the willingness of deputies to provide information to the MoJ. It explained that it would likely harm its statutory obligation to supervise them under the Mental Capacity Act 2005.
32. On balance, the MoJ has explained that the requested information is of a private interest to the complainant, rather than to one that serves the wider public interest. It added that it is a civil regulator which has a statutory duty to supervise deputies and will take appropriate action

when a deputy does not act in the best interests of their client, including making an application to the court.

The Commissioner's position

33. The Commissioner acknowledges why the complainant requires this information. However, the Commissioner considers that the public interest in preserving the principle of confidentiality, and the impact disclosure would have on the confider, carries significant weight in favour of the public interest in maintaining the exemption at section 41(1) in this instance. Therefore the information in question is exempt under section 41(1) of FOIA.
34. The Commissioner considers that FOIA is not the correct route for the complainant to attempt to obtain such information, due to disclosure under FOIA being to the world at large. If the information were released, it would be the equivalent to the MoJ posting the information on its website.

Section 40(2) – personal information

35. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles.
36. In this case, the complainant has requested information about accounts filed for their late mother's finances. These were filed by a third party and, as such, contain personal data about the third party/parties.
37. The Commissioner asked the MoJ to demonstrate the personal data contained within the files. From the evidence provided, he is satisfied that the personal data is that of the third party/parties and that they could be identified should the information be released.
38. The Commissioner appreciates that, for personal reasons, the complainant has a legitimate interest in this information that would be met through disclosing the information. As addressed above, the MoJ notes that there is a wider public interest in transparency about how Deputies handle such finances.
39. However, as set out in the MoJ's forms (which the Deputy has to sign for each case), the information is confidential and will not be disclosed to other parties.
40. It is reasonable to expect that the Deputies would not expect their personal data to be disclosed to the world at large under FOIA. Disclosure under FOIA would likely cause the individual harm or stress.

41. 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 disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation.

Right of appeal

42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

43. 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.
44. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF