

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2023

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has requested to know the number of times a particular barrister was appointed as Prosecution Counsel for the Crown Prosecution Service ('the CPS') over a three year period. The CPS refused the request on the grounds that the information was exempt from disclosure under section 40(2) of FOIA.
2. The Commissioner's decision is that section 40(2) was correctly applied to withhold the information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 22 June 2022, the complainant wrote to the CPS and requested information in the following terms:

"Could you please tell me how many times [barrister's name redacted] have been appointed as Prosecution Counsel for the Crown Prosecution Service (CPS) in the last 6 years?"
5. The CPS responded on 21 July 2022. It confirmed that it held the requested information, but said that it was exempt from disclosure under section 40(2) of FOIA. It maintained this position following an internal review.

Reasons for decision

6. The analysis below considers whether the CPS was entitled to apply section 40(2) of FOIA to refuse the request. Section 40(2) of FOIA states that information is exempt from disclosure if it is the personal data of another individual and disclosure would contravene one of the data protection principles.
7. The withheld information in this case is the number of times a particular barrister was appointed as Prosecution Counsel¹ by the CPS. The Commissioner is satisfied that the withheld information is the personal data of the barrister ('the data subject'). They can be identified as they are named in the request and the information is clearly about them, specifically.
8. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
9. In the case of an FOIA request, 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.
10. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider:
 - whether a legitimate interest is being pursued in the request for information;
 - if so, whether disclosure is necessary to meet the legitimate interest in question; and
 - whether those interests override the rights and freedoms of the data subject.

¹ The CPS's website contains information about the role of Prosecution Counsel: <https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates#:~:text=It%20is%20the%20duty%20of,case%20well%20before%20its%20commencement.>

11. The complainant has not explained why he wants the information. However, he has commented that a similar request for information (submitted by a different requester) about another barrister was recently complied with, and that disclosure in this case is in the public interest. On that point, the Commissioner recognises that the purpose of FOIA is to promote public authority transparency and accountability. Disclosure would serve and support that general interest.
12. Turning to whether that interest is sufficiently strong to override the rights and freedoms of the data subject, the CPS has explained that the withheld information is personal data about the data subject in their work capacity.

“We believe releasing information relating to the individual’s livelihood into the public domain would be unfair to the individual concerned; Counsel instructed by the CPS to conduct prosecutions have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOI Act.”
13. The CPS said that the information provides an insight into the data subject’s employment record and, to some degree, their potential income. It argued that to place the information in the public domain would be unfair to them and would contravene their right to privacy.
14. It also explained that the data subject has been consulted regarding the request and has declined to consent to the disclosure.
15. From the CPS’ submissions, the Commissioner considers that the data subject has a reasonable expectation that information about their employment will remain confidential and will not be disclosed to the world at large, under FOIA, without proper justification. He recognises that the withheld information will also be pertinent to the data subject when competing for work outside of the CPS, and that it is therefore intrinsically connected to their income and earnings. The Commissioner accepts that data subjects are entitled to regard such information as sensitive and personal and to expect to retain control over who may have access to it.
16. As regards the complainant’s argument that similar information has previously been disclosed by the CPS, the Commissioner notes that, in that case, the data subject had attained Queens Counsel (now Kings Counsel, or ‘KC’) status, and was a senior barrister who would therefore have had more expectation that details about their work could be disclosed to the general public. The data subject in this case is not a KC.
17. Based on the above factors, the Commissioner has determined that the legitimate interests in disclosure are not strong enough to outweigh the data subject’s fundamental rights and freedoms. Therefore, he considers

that there is no legal basis for the CPS to disclose the requested information, and that to do so would be in breach of principle (a).

18. The Commissioner's decision is therefore that the CPS was entitled to rely on section 40(2) of FOIA to refuse the request.

Right of appeal

19. 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

20. 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.
21. 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

Samantha Bracegirdle
Senior Case Officer
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Wycliffe House
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SK9 5AF