

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to record keeping procedures (part A of the request) and correspondence between the Employment Tribunal and the Respondent's Representative (part B of the request).
2. The Ministry of Justice (MoJ) provided information within the scope of part A of the request but refused to confirm or deny whether it holds information in scope of part B, citing sections 40(5) (personal information) and 32(3) (court records) of FOIA.
3. The Commissioner's decision is that the MoJ was entitled, by virtue of section 40(5A) of FOIA, to neither confirm nor deny holding the requested information in scope of part B of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 20 August 2022, the complainant wrote to the MoJ and requested information. The first part of the request, Parts A 1-4, related to record keeping procedure at the Employment Tribunal.
6. At Part B of the request, the complainant requested information in the following terms:

B Correspondence between the Employment Tribunal and the Respondent's Representative

1 Please provide me with information about which email address [was] used by the Respondent or their Representative to send the claim response to the Employment Tribunal. The email to which the claim response was attached was sent by [name redacted]. You will find the text of the email in the attachment: 'Respondent's response without date'.

2 Please provide me with the date when the first email from the identified email address of the Respondent's Representative from which the claim response was sent to the Employment Tribunal was sent to the Case Number:[reference redacted] and recorded on the ET data base.

3 If the email address of the Respondent's Representative from which the claim response was sent to the Employment Tribunal is different from the usual email address of the Respondent's Representatives, which is [email address redacted], please provide me with the date when an email from the usual email address of the Respondent's Representatives was recorded for the first time to the Case Number: [reference redacted] on the ET data base system.

4 Please provide me with information regarding whether on the 04/04/2022 the ET received any emails from the email address of the Respondent's Representative from which the claim response was sent to the Employment Tribunal or from the usual email address of the Respondent's Representative. - If relevant emails were identified, please provide me with a copy of an automated response generated from the email address the Respondent's Representative used for sending the emails. - If no emails could be identified, please state this clearly in your response.

5 Please provide me with a copy of the very first email sent by the Respondent's Representative to the Case Number: [reference redacted] from either email address."

7. The MoJ responded on 20 September 2022. In response to parts A1-4 of the request, the MoJ provided the complainant with information about the record keeping procedure of the Employment Tribunal. It said that the remaining requested information, parts B1-5 of the request, was exempt from disclosure by virtue of sections 32 (court records) and 40 (personal information).
8. The complainant requested a review of the MoJ's handling of part B of the request.

9. Following an internal review, the MoJ revised its response to part B of the request. It told the complainant that it would direct that part of the request to the Tribunal to be dealt with as business as usual.
10. During the Commissioner's investigation, the MoJ confirmed that the Employment Tribunal had written to the complainant, outside of FOIA, regarding part B of the request.
11. It also confirmed that, having revisited its handling of that part of the request, its formal response under FOIA was to neither confirm nor deny holding information within the scope of Part B of the request. It cited sections 32(3) (court records) and 40(5) (personal information).

Scope of the case

12. The complainant confirmed that while they were satisfied with the response to Part A of the request, they were dissatisfied with the MoJ's response to Part B of the request. They disputed that the MoJ was entitled to neither confirm nor deny holding the requested information.
13. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
14. While acknowledging that the complainant also raised a concern in relation to an attachment they had received, the Commissioner considers that matter falls outside his remit.

Reasons for decision

Section 40 – personal information

15. Section 40(5A) of FOIA provides that the duty to confirm or deny whether information is held does not arise in relation to information which constitutes personal data of which the applicant is the data subject.
16. Therefore, for the MoJ to be entitled to rely on section 40(5A) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of parts B1-5 of the request, confirmation or denial would need to constitute the disclosure of the complainant's own personal data.

Would confirmation or denial constitute the disclosure of the requester's own personal data?

17. Section 3(2) of the DPA 2018 defines personal data as:

“any information relating to an identified or identifiable living individual”.

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. Given the wording of the request, and the context provided by the complainant, the Commissioner is satisfied that the requested information, if held, relates to the requester. He is further satisfied that, in the context of the request, they are identifiable from that information. The information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
21. In this case, the Commissioner is satisfied that disclosure, by way of confirmation or denial, would reveal whether or not the requester was involved in the Employment Tribunal proceedings specified in the request.
22. It follows that the Commissioner is satisfied that, if the MoJ confirmed whether or not it held the requested information, this would result in the disclosure of the complainant’s own personal data.
23. In light of the above, the Commissioner has decided that the MoJ was entitled to apply the exemption at section 40(5A) of FOIA to the information in scope of parts B1-5 of the request.

Other exemptions

24. As the Commissioner has concluded that the MoJ correctly applied section 40(5A), he has not gone on to consider the other exemption cited by the MoJ in this case.

Other matters

25. In the Commissioner’s view, it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the appropriate access regime.
26. In this case, the Commissioner is satisfied that the MoJ advised the complainant with respect to the Employment Tribunal being asked to provide a response. From the correspondence he has seen, he is also

satisfied that the Employment Tribunal provided a response to the requester.

Right of appeal

27. 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

28. 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.
29. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**