

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2023

Public Authority: Ministry of Justice

Address: 102 Petty France
London SW1H 9AJ

Decision

1. The complainant has requested information relating to a named individual in a named court.
2. The Commissioner decided that the Ministry of Justice was entitled to rely on section 32(3) FOIA to neither confirm nor deny that the requested information is held.
3. The Commissioner does not require the Ministry of Justice to take any steps as a result of this decision notice.

Request and response

4. On 30 October 2022, the complainant wrote to the Ministry of Justice (MOJ) and requested the following information; the Commissioner has made redactions to protect the identity of a specified Court and of a named individual:

"The Notice about hearing from [area name redacted] Magistrates Court ([reference number redacted]) is authorized/signed by:
"[name and office redacted]"

Could you please confirm the above name refers to below individual:
[two hyperlinks redacted]

If not, could you please provide a full name of the above [court office redacted] from the Notice.

Could you please also confirm his postal address for correspondence."

5. On 28 November 2022, MOJ requested clarification of the request, which the complainant provided. On 28 December 2022, MOJ refused the request, citing the section 32(3) (Court records) and section 40(5) (Personal information) FOIA exemptions to neither confirm nor deny (NCND) holding the information requested. On 13 January 2023, MOJ responded again, following an internal review of its handling of the matter. MOJ maintained that sections 32(3) and 40(5) had been applied correctly.

Scope of the case

6. The complainant contacted the Commissioner on 13 January 2023 to complain about the way her request for information had been handled. She said that MOJ was a public body but that an official's name on documents from a named court were not sufficiently clear to identify who he was. She opined that he held a public position and that his name and correspondence address should be clear to the public. She added that similar past requests had been answered.
7. MOJ neither confirmed nor denied (NCND) holding the information, relying on the section 32(3) and section 40(5) FOIA exemptions. The Commissioner considered whether or not MOJ was entitled to rely on those exemptions.

Reasons for decision

Section 32 FOIA – court records etc

8. Section 32 FOIA covers information held 'only by virtue' of being contained in documents that are created or held for the purposes of court, inquiry or arbitration proceedings. Section 32(3) FOIA provides that, if a public authority receives a request for information which – if held - would be exempt under the section 32(1) or section 32(2) FOIA exemptions, it can rely on section 32(3) FOIA to NCND holding the requested information.
9. These are absolute exemptions and do not require a public interest test.
10. On 28 December 2022, the complainant set out her view of the matter saying that MOJ had told her that FOIA was a public disclosure regime, not a private regime. This meant that any information disclosed under FOIA by definition became available to the wider public. If any information were held, confirming this would reveal to the world at large whether an individual was involved in the justice system. This would

constitute the personal data of that individual. This was not a private question.

11. The complainant added that links she had provided were public notices sent from the court. She asked if the court was really a justice system or a "caricature of justice system sending notices signed by unknown secret someone or something". She added that even MOJ officers writing to her did not want to disclose their name, signing MOJ's response by: "Knowledge and Information Liaison Officer (1) [regional name redacted] Region". She said that if the named individual worked in the public services - he held a public office. He did not operate in private.
12. The complainant later told MOJ that her request related to a criminal matter in a Magistrates' court.
13. MOJ said that the sections 32(3) and 40(5) FOIA exemptions had been engaged correctly.
14. MOJ said that its decision to NCND the request was taken from the standpoint that the complainant was asking a question relating to information on a specific case, and if information were disclosed relating to a specific case it would indicate its existence as a court record. So the section 32(3) FOIA exemption, meant that the information requested was exempt from having to be disclosed under FOIA.
15. MOJ added that the information provided by the complainant was not sufficient for MOJ to identify whether the hearing notice referred to in the request was held by, or even originated from, MOJ or from elsewhere, for example from a Local Authority. However, because the request referred to a hearing notice, it could still be construed by the wider world that confirming or denying the existence of the information would, in effect, confirm or deny the existence of a specific case and, by extension, that the individual requesting the information had been involved in the justice system. Therefore, protecting the requester's own personal data, was a further reason for MOJ to refuse to confirm the information due to the sections 32(3) and 40(5) FOIA exemptions.
16. MOJ added that the requested information, if held, would relate to a specific member of court staff, and details such as their qualifications, would be their personal information exempt due to section 40(5) FOIA. If held, the information requested would be exempt from disclosure because it might be contained in a court record. To confirm whether a relevant court record was held would indirectly confirm that personal information was or was not held.
17. MOJ said that if it was to reconsider the request solely from the standpoint of whether the named MOJ officer is also named on the

named websites, and disregard the link to any court case, then the response would be that the information was not held. This was because MOJ was not responsible for the content of the named websites, and did not hold recorded information confirming whether or not information about the officer named by the complainant was recorded there.

Commissioner's decision

18. As the Commissioner's guidance makes clear, the purpose of a NCND response is to leave open the position about whether or not a public authority holds the requested information so that no inferences can be drawn from the authority's response (<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/>).
19. In most cases, a public authority should be able to say whether or not it holds information relevant to the request. However, there are matters when confirming or denying if information is held can – in itself – disclose information which is exempt or which could prejudice the interest an exemption is there to safeguard. In these circumstances, the right under section 1(1)(a) FOIA (General right of public access to information) is disapplied and FOIA allows the authority to make a NCND response. This means that the authority can respond by refusing to inform the applicant whether or not they hold any information.
20. For section 32 FOIA, the duty to confirm or deny relates to information that is exempt (or would be, if it were held). It is important for a public authority to use NCND responses consistently. Not doing so could undermine the effectiveness of the exclusion to confirm or deny whether information is held.
21. The Commissioner understands that section 32 FOIA was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings. In effect, section 32 ensures that FOIA cannot be used to circumvent existing court access and discovery regimes. Also, public authorities are not obliged to disclose any information in connection with court, inquiry or arbitration proceedings outside of those proceedings.
22. In this matter, the requested information was for information about an individual who, if it were held, would be an MOJ official and officer of a named court. The specific nature of the request meant that the requested information, if held, would be held within court records and would disclose an individual's engagement and role within an identified court; that is exempt information.

23. FOIA is a public disclosure regime so that any information disclosed under FOIA, by definition, becomes available to the wider public. If any information were held, confirming this would reveal to the world at large that a named individual had been involved in the justice system at an identified court. If held, the requested information would be held in relation to court proceedings and there would be no other reason for MOJ to hold it other than for the purposes of those proceedings.
24. The Commissioner therefore decided that MOJ was entitled to rely on the section 32(3) FOIA exemption in response to the complainant's request and was not obliged to confirm or deny whether MOJ held the information.
25. In the light of this decision, the Commissioner did not consider any further the MOJ reliance on the section 40(5) FOIA exemption.

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

Dr R Wernham
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