

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2024

Public Authority: Judicial Appointments Commission
Address: 5th Floor Clive House
70 Petty France
London
SW1H 9EJ

Decision (including any steps ordered)

1. The complainant requested information relating to candidates who identified themselves as Muslim in various selection exercises. The Judicial Appointments Commission (the JAC) denied holding some of the requested information. While it provided some information within the scope of the request, it refused to provide numbers for specific exercises, citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the JAC was entitled to withhold the information by virtue of section 40(2) (personal information) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On, or around, 29 June 2023, the complainant wrote to the JAC and requested information in the following terms:

“Unsuccessful Muslim candidates – High Court, deputy High Court, specialist CJ and CJ exercises for 2020, 2021, and 2022

(1) Please provide information about how many individuals identifying themselves as Muslim in respect of the selection exercises referred to above applied to be appointed to the positions advertised for those exercises?

(2) Please indicate how many of such Muslims were interviewed for those positions and were appointed to the positions.

Decisions about candidates

(3) Please provide information about how many candidates in the last 5 years in any selection exercise who were successful at interview were not recommended for appointment?

(4) Please specify how many such candidates identified themselves as being from a BAME or Muslim background?

(5) Please provide the reasons why they were not recommended for appointment?

(6) Please provide information about how many candidates in the last 5 years in any selection exercise who were unsuccessful at interview were nonetheless recommended for appointment?

(7) Please specify how many such candidates identified themselves as being from a BAME or Muslim background?

(8) Please provide the reasons why they were recommended for appointment?

(9) Please specify the number of instances (by reference to the relevant selection exercises) when the JAC had to apply the "equal merit" policy and the reasons why?"

5. The JAC responded on 4 July 2023. It confirmed it holds information within the scope of parts 1 and 2 of the request. It provided some generic numeric information but refused to provide the requested information for each specific exercise, citing section 40(2) (personal information) of FOIA. It denied holding information within the scope of parts 3-8 of the request. It provided some information within the scope of part 9, but cited section 40(2) of FOIA to withhold the remainder.
6. Following an internal review, the JAC wrote to the complainant on 19 July 2023, maintaining its position.

Scope of the case

7. The complainant contacted the Commissioner to challenge the JAC's application of section 40(2) to withhold information within the scope of parts 1, 2 and 9 of the request. They dispute that the requested information is capable of identifying a living individual.
8. With regard to its handling of part 9 of the request, the JAC told the Commissioner:

“The JAC could have considered a section 21 [information accessible to applicant by other means] response to point 9 of the request as the requested information was already available on the JAC website and via our annual reports and both the FOI and IR responses noted this. However, the JAC endeavoured to break the data down further so that they could answer the request as fully as possible. It was noted that despite providing this information, that some information remained exempt under Section 40(2) of the FOIA”.
9. During the course of the Commissioner's investigation, the JAC disclosed further information within the scope of the request to the complainant. However, it confirmed its application of section 40(2) to the remaining withheld information.
10. The following analysis explains why the Commissioner is satisfied that the JAC was entitled to apply section 40(2) to withhold the remaining information in scope of parts 1, 2 and 9 of the request.

Reasons for decision

Section 40 personal information

11. Section 40(2) of 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.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

13. 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 FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. The disputed information in this case comprises the number of individuals, identifying as Muslim, who meet the criteria specified in parts 1, 2 and 9 of the request.
20. The JAC withheld information where the numbers are low, telling the complainant:

"We believe that the release of some of this information would risk identification of the individuals concerned. For this reason, the JAC has chosen not to provide an exact figure where the true number falls between one and 10".
21. The complainant disputes that providing the information will identify an individual or compromise any person's personal data.

22. The Commissioner acknowledges that the JAC considers that, given the low numbers involved, there is a strong possibility an individual would be identified.
23. In that respect, it told him:

“Given that the requester has asked for this religious data in relation to quite senior exercises, numbers of applicants will be lower than larger exercises and all of the eligible applicants will have significant experience and standing within the judicial community”.
24. However, while the fact that low numbers are involved provides a starting point to protecting information, decisions about withholding information need to be made on a case by case basis, considering all relevant circumstances.
25. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
26. He accepts that different members of the public may have different degrees of access to the ‘other information’ needed for re-identification to take place.
27. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a ‘motivated intruder’ would be able to recognise an individual if he or she was intent on doing so. The ‘motivated intruder’ is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
28. In this case, having considered the wording of parts 1, 2 and 9 of the request and viewed the withheld numerical information, the Commissioner considers that the information relates to the individuals who meet the criteria specified in the request.
29. He has reached that conclusion on the basis that the focus of the information is those individuals and that such information is clearly linked to them.
30. The Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of

the judicial community and of the pool of potential applicants with the relevant skills and experience required for the positions.

31. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

35. 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.
36. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
37. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

38. Information relating to special category data is given special status in the UK GDPR.
39. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
40. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the request clearly states that it is for information relating to unsuccessful Muslim candidates.

41. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
42. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
43. With respect to consent, the JAC said that it does not seek explicit permission from individuals to share their diversity data in an identifiable manner.
44. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
45. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
46. The Commissioner has therefore concluded that the JAC was entitled to withhold the information under section 40(2) by way of section 40(3A)(a).

Right of appeal

47. 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

48. 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.
49. 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
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