

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2018

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

Decision (including any steps ordered)

1. The complainant requested transcripts of interviews with judges and prosecutors relating to their views on the effects and impact of unrepresented defendants in courts. The Ministry of Justice (MoJ) refused to provide the requested transcripts, citing section 41 of FOIA (information provided in confidence). During the course of the Commissioner's investigation, the MoJ also relied on section 31(1)(c) of FOIA (the administration of justice).
2. The Commissioner's decision is that the MoJ is not entitled to rely on section 41 for the reasons outlined in this notice. She also finds that section 31(1)(c) is engaged, and that the public interest test favours withholding the requested information. She does not require the MoJ to take any steps to ensure compliance with the legislation.

Background

3. The MoJ told the Commissioner that in 2015 it had commissioned "*small scale research with the aim of filling the evidence gap on the potential impact of unrepresented defendants on court processes and reforms*".
4. In order to deliver this, the MoJ's Analytical Services Directorate conducted telephone interviews with 21 practitioners (15 Crown Court judges and six CPS Crown Court Prosecutors).
5. The MoJ advised the participants that the aim of these interviews was to gather information around matters such as:
 - Practitioner experiences of unrepresented defendants.

- What sort of defendants are unrepresented.
 - What effect (if any) unrepresented defendants are having on the court process.
 - How the court experience could be improved for unrepresented defendants.
6. The Commissioner notes that the complainant's request specifies that he was happy for personal data such as interviewees' names to be redacted.
7. Interview participants were told that they did not have to answer all the questions posed, and that after taking part, they could decline to be included in the study and ensuing report. They were also informed that:

"The main output will be a report designed for briefing policy/delivery colleagues on a specific information requirement that draws on research and analysis. The report will not be published, but may be subject to Freedom of Information Requests. Your name will not be used or recorded in the report and no information that could be used to identify you will be included in the supporting documents. However, we will likely mention the viewpoints of different roles and professions, for example 'the majority of judges interviewed believed that ...'"

8. The MoJ advised that all those who agreed to participate in the interview process signed a consent form which included the following clauses:

"• I consent to being interviewed by Ministry of Justice Analytical Services regarding my experiences of unrepresented defendants.

• I understand that a report that summarises the findings of the interviews will be written. The report will be seen by MoJ and HMCTS staff and by representatives from across the criminal justice system, including the judicial office. The report will not be published although it may be subject to Freedom of Information Requests. We will not identify individuals by name in the report, although we will likely mention the viewpoints of different roles and professions, for example 'the majority of judges interviewed believed that...'

• I agree that my interview can be recorded and that this anonymous recording can be transferred to a professional transcription service."

9. A summary report subsequently appeared on the BuzzFeed website (see request below for weblink).

Request and response

10. On 1 May 2018, the complainant wrote to the MoJ and requested information in the following terms:

"Please could I be provided with the following information pursuant to the Freedom of Information Act 2000: All interview transcripts of interviews conducted for the purposes of the Ministry of Justice's 'Unpublished Analytical Summary 08/2016' on 'Exploratory research into unrepresented defendants in the Crown Court in England and Wales – perspectives from a small sample of practitioners', with personal data such as interviewees names redacted. I understand that this should consist of a total of 21 interview transcripts – 15 with Crown Court judges and 6 with CPS Crown Court prosecutors."

11. The MoJ responded on 21 May 2018 and refused to provide the requested information citing section 41 of the FOIA.
12. On 19 June 2018 the MoJ provided an internal review in which it maintained its original position.

Scope of the case

13. The complainant contacted the Commissioner on 22 July 2018 to complain about the way his request for information had been handled.
14. During the Commissioner's investigation the MoJ also sought to rely on section 31(1)(c) of the FOIA (administration of justice). The complainant was informed accordingly on 31 August 2018 by the MoJ.
15. The complainant wrote to the Commissioner on the 31 August 2018 explaining that he does not agree with the MoJ's decision to rely on section 31(1)(c) of the FOIA to withhold the information requested. He stated the following:

"... I do not accept that the disclosure of suitably redacted transcripts would be likely to prejudice the administration of justice, even if judges and prosecutors could be identified. The MoJ say that disclosure of the transcripts is "likely to lead to a reaction (positive or negative) by others" and disclosure "would or would be likely to prejudice" the "perception of the independence and fairness of the court system" held by parties in the cases mentioned in the transcripts. If the transcripts

reveal a lack of independence or fairness on behalf of the judges and prosecutors in specific cases, there is fact a strong public interest in this being known. Indeed, disclosure would seem to actually aid the administration of justice by exposing a potential lack of independence or fairness on behalf of judges and prosecutors, and allowing this to then be addressed."

16. The complainant therefore considers that disclosure of the transcripts would reveal whether or not the judges and prosecutors had a lack of independence or fairness in "specific cases". However, as per the wording of his request, the complainant has already agreed that "personal data such as interviewees names [can be] redacted" so the transcripts could be anonymised. Therefore, the Commissioner cannot see how any "specific cases" would fall to be considered here as their inclusion could reveal not only the judge / prosecutor concerned but also any defendants. Therefore "specific cases" fall outside of the scope of the wording of the original request.
17. The Commissioner has recently issued a decision notice addressing a similar request for information to the MoJ under reference FS50768300.
18. The Commissioner has considered whether the MoJ was entitled to rely on sections 31 and 41 to refuse this request.

Reasons for decision

Section 41 - information provided in confidence

19. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
20. Section 41(1) of the FOIA states that information is exempt from disclosure if:
 - "(a) 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."*
21. The Commissioner considers that "person" referenced above can be a legal or natural person.
22. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third

party that is a legal or natural person **and** the disclosure of that information has to constitute an actionable breach of confidence.

Was the information obtained from another person?

23. The first step is for the Commissioner to consider whether the information was obtained by the MoJ from any other person in order to satisfy the requirement of section 41(1)(a).
24. In this case the information was provided to the MoJ by a number of Crown Court judges and prosecutors.
25. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Actionable claim for breach of confidence

26. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. That judgement suggested that the following three-limbed test should be considered in order to determine if the information was confidential:
 - whether the information had the necessary quality of confidence;
 - whether the information as imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
27. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim. However, further case law has argued that where the information is of a personal nature, it is not necessary to establish whether the confider(s) will suffer a detriment as a result of disclosure.
28. In this case, in support of its reliance on section 41, the MoJ has provided the Commissioner with a copy of the consent form which all those participating in the interview process had signed (see paragraph 8). The Commissioner is aware that this consent form appertains to the summary report and is not specific to the interview transcripts themselves.

29. In reaching her decision, the Commissioner has reviewed the 21 transcripts in scope of the request; together with the report summaries available on Buzzfeed.
30. The Commissioner considers that with suitable redaction to remove potentially identifying information, such as the court details, any specified cases, judges' and prosecutors' experience/time served at particular courts etcetera from the judges' and prosecutors' transcripts, no judge or prosecutor would be identifiable.
31. In light of the above, the Commissioner is not satisfied that any of the withheld information, once redacted for personal information, is exempt under the confidentiality exemption. The Commissioner's decision turns on the fact that no individual would be reliably identified from the withheld information.
32. In order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore if one or more of the elements is not satisfied then section 41 will not apply. The Commissioner has explained why she does not consider it possible to reliably identify an individual as the subject of the withheld information from its contents or if it is linked with other material available to the general public. In such circumstances she does not consider that there can be an expectation of confidence or that disclosure would cause detriment by way of an invasion of privacy. Therefore it follows that there can be no breach of confidence to action and section 41 does not apply. As section 41 of FOIA is an absolute exemption, there is no need to consider the public interest test.

Conclusion

33. The Commissioner finds that section 41 is not engaged in the circumstances of this case. She will now consider the MOJ's reliance on section 31 of FOIA, which it has also cited in respect of the requested withheld information.

Section 31 – law enforcement

34. During the course of the Commissioner's investigation, the MoJ said it also wished to rely on section 31(1)(c) of the FOIA (prejudice to the administration of justice).
35. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this

is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.

36. The relevant parts of section 31 of the FOI provide that:

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(c) the administration of justice

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are –

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise"

37. The Commissioner's guidance¹ on section 31 states that:

"As well as preventing any prejudice to particular cases, section 31(1)(c) can protect a wide range of judicial bodies, such as courts, coroner's courts and tribunals from disclosures that would in any way interfere with their efficiency and effectiveness, or their ability to conduct proceedings fairly. This will include prejudice to the administrative arrangements for these bodies and the appointment of magistrates and judges, or arrangements for the care of witnesses. It would also cover any disclosures that would interfere with the execution of process and orders in civil cases."

"Anything that would make it harder for the public to access the justice system could also engage the exemption."

38. The MoJ told the Commissioner that it had commissioned small scale research with the aim of filling the evidence gap on the potential impact of unrepresented defendants on court processes and reforms via interviews with 21 practitioners made up of 15 Crown Court judges and six CPS Crown Court prosecutors. The MoJ also said:

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

"In accordance with the Guidance to the Judiciary on engagement with the Executive², the appropriate judicial approvals were obtained through the Judicial Office in advance of the interviews taking place. Agreement was also obtained from the CPS to the interviews with prosecutors. Interviewees participated voluntarily and the transcripts contain the private views of a small number of judges and prosecutors, given implicitly in confidence. If the transcripts were disclosed it would set a precedent that would be likely to prejudice the ability of the department to conduct future research into the impact of policy on the administration of justice, in particular the effective and efficient operation of the courts in any jurisdiction and access to justice."

39. The MoJ has argued that the transcripts contain information which could lead to identification of the interviewees; it provided the Commissioner with some examples to support this view. It said that identification of the interviewees would:

"seriously impact their ability to carry out their professional duties and would undermine two important principles: judicial independence and the maintenance of an independent and effective legal profession. Furthermore, as a result, key stakeholders such as the judiciary and the legal profession would be discouraged from engaging in future research projects".

40. The MoJ also stated:

"If the judicial transcripts were disclosed there would be prejudice to the fundamental constitutional principle of judicial independence, in particular the constitutional convention that limits judicial engagement with the Executive. The judiciary engaged in this research project in accordance with the principles and constitutional conventions set out in the "Guidance to the judiciary on engagement to with Executive" which recognises that there may be limited engagement relating to measures that affect the operation of the courts or the administration of justice but that it is crucial the constitutional conventions are adhered to."

² <https://www.judiciary.uk/wp-content/uploads/2016/07/guidance-to-the-judiciary-on-engagement-with-the-executive.pdf>

41. As set out in her analysis of whether section 41 is engaged, the Commissioner does not consider that the point about identification of individual judges applies given suitable redaction of identifying information in the transcripts – a point which was also made by the complainant. However, she does accept that section 31 is engaged in this case because she accepts that disclosure of the transcripts could adversely affect the administration of justice.
42. Therefore the Commissioner considers that section 31(1)(c) is engaged in relation to the requested information. The exemption is a qualified exemption which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has therefore gone on to consider the public interest arguments.

Public interest arguments in favour of disclosure

43. The MoJ acknowledged there is a public interest in knowing about the views of key stakeholders on how an unrepresented defendant impacts the administration of justice in the criminal courts.
44. It is also aware of the public interest in government transparency and in knowing about the validity and impartiality of government research.

Public interest arguments in favour of maintaining the exemption

45. The MoJ has argued that if the transcripts were disclosed, it would discourage participation of key stakeholders in other research projects into the workings of the criminal justice system as well as other categories of justice (civil, family, administrative). It said it is in the public interest to protect the ability of key stakeholders to share their knowledge and experiences and to express their views candidly.
46. The MoJ was concerned that if the judicial transcripts were disclosed, it would undermine the well-established and constitutionally significant principle of judicial independence, which is a cornerstone of our system of government. It considered that the judiciary must be seen to be independent of the legislative and executive arms of government both as individuals and as a whole. To support this principle, the MoJ advised that there is a long standing convention that judges should not comment publicly on the merits, meaning, or likely effect of government policy or proposals, recognised in the Judiciary's 'Guide to Judicial Conduct'³. It

³ <https://www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf>

argued that it is in the public interest to preserve that convention and to respect the limits of judicial engagement with the Executive where such is engagement permitted. Judicial independence is a crucial aspect of the rule of law for which we all have a statutory duty to uphold.

47. Additionally, the MoJ told the Commissioner that Section 3 of the Constitutional Reform Act 2005⁴ provides that responsibility to uphold the continued independence of the judiciary extends to the Lord Chancellor, Ministers of the Crown and *'all with responsibility for matters relating to the judiciary or otherwise to the administration of justice'*. The same section requires the Lord Chancellor to have regard to the need to defend judicial independence and the need for the public interest in matters relating to the judiciary, and the administration of justice more generally, to be properly represented in decisions affecting those matters. The MoJ argued that it is in the public interest for it to uphold that statutory duty. Specifically, it said that the candid nature of judiciary (and prosecutors') transcripts could adversely affect the working relationship between the Judiciary, MoJ, HMCTS (Her Majesty's Courts and Tribunals Service) and CPS particularly as there is a risk of specific interviewees being identifiable. It again highlighted the examples it had provided to the Commissioner to support this stance.

Balance of the public interest arguments

48. The MoJ told the Commissioner it had undertaken the balancing exercise by considering the public interest arguments on each side and by attaching weight to each argument; it said:

"We have concluded that there is a strong inherent weight in preserving the constitution principle of judicial independence and the principle of an independent legal profession. We also consider there is significant weight to be attached to the ability to conduct future research on the impact of policy on the administration of justice. In our view, the weight of the arguments in favour of disclosure are relatively low for the reasons given below."

49. The MoJ expressed concern that the severity of the prejudice caused to the scope of future research projects would impact across all jurisdictions, impact on the development and evaluation of a wide range of MoJ policies and make existing public commitments such as post implementation reviews (which require candid stakeholder engagement) difficult to deliver.

⁴ <http://www.legislation.gov.uk/ukpga/2005/4/contents>

50. The MoJ acknowledged that the age of the requested information may tend to support the argument in favour of disclosure. However, it also said that media coverage suggests that the information remains topical and sensitive and the likelihood of the prejudice has not significantly diminished. It argued that the public interest around disclosure of information provided implicitly in confidence is also unlikely to be reduced by the age of the information.
51. The MoJ accepted that the information could contribute to improved public understanding of issues around unrepresented defendants which would favour its disclosure. It also acknowledged that there is weight in the general argument for transparency and having the 'full picture' that would favour disclosure. However, it said that the key findings of the research, including its limitations, are already in the public domain due to previous FOI requests. Therefore, it considers that disclosure of the transcripts will have only a limited effect on improving public understanding.
52. In reaching a view on where the public interest lies in this case, the Commissioner accepts there is a legitimate public interest in informing the public about the full picture of the research undertaken.
53. Balanced against this is the need to allow the MoJ to conduct research into the effects of legislative change; in this case the changes to the legal aid system and the impact of unrepresented defendants, without disclosure through FOIA to third parties.
54. The Commissioner is also mindful that the key findings of the research undertaken are in the public domain. She does not consider that disclosure of the redacted transcripts would add anything further to the public interest.
55. However, the Commissioner would again reiterate that with suitable redaction for personal information, the MoJ's argument in respect of identification of the interviewees who participated is not valid.
56. Therefore the Commissioner considers that the public interest arguments for withholding this information outweigh the public interest arguments for disclosure.

Conclusion

57. The Commissioner therefore finds that section 31(1)(c) is engaged in relation to the withheld information and the public interest favours maintaining the exemption.

Right of appeal

58. 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@hmcts.gsi.gov.uk

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

59. 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.
60. 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

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