

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2018

Public Authority: Judicial Appointments Commission

Address: 5th Floor
Clive House
70 Petty France
London
SW1H 9EX

Decision (including any steps ordered)

1. The complainant has requested information relating to the completed application and supporting documents of a Senior Circuit Judge.
2. The Commissioner's decision is that the Judicial Appointments Commission (JAC) was entitled to rely on section 44 of the FOIA (prohibitions on disclosure) to withhold the information requested.
3. The Commissioner does not require the JAC to take any steps as a result of this notice.

Request and response

4. On 2 May 2018, the complainant wrote to the JAC and requested information in the following terms:

"In relation to the Senior Circuit Judge – Designated Civil Judge Selection Exercise:

Copy of the completed application and supporting Documents in related to [name redacted]

5. The JAC responded on 10 May 2018. It stated that the information requested was exempt under section 41 of the FOIA (information provided in confidence).
6. Following an internal review the JAC wrote to the complainant on 25 May 2018. It stated that in reviewing the request as well as applying the original exemption (section 41), it also considered section 44(1)(a) applied.

Scope of the case

7. The complainant contacted the Commissioner on 7 June 2018 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the JAC was entitled to rely on section 41 and 44(1)(a) of the FOIA to refuse to provide the information requested.

Reasons for decision

9. The Commissioner firstly considered the JAC's application of section 44.

Section 44 – prohibitions on disclosure

10. Section 44 of the FOIA provides that:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court."

11. Section 44 is a class based exemption: if the information conforms to the class described in this section, the exemption is engaged.

Is disclosure prohibited by or under any enactment?

12. With respect to section 44 of the FOIA, the Commissioner's website states:

"This exemption is often used by regulators. For example, the Information Commissioner is prohibited by section 59 of the Data Protection Act from disclosing certain information she has obtained in

the course of her duties, except in specified circumstances. The Freedom of Information Act does not override other laws that prevent disclosure, which we call 'statutory bars'."

13. The JAC told the Commissioner that the enactment on which it is relying is section 139(1) of the Constitutional Reform Act 2005 ("CRA")¹:

"In summary, this section establishes a duty of confidentiality on those who have responsibilities in relation to matters of selection of judicial office holders.

Under s139(1) of the CRA, where information is provided under or for the purposes of a "relevant provision" that information will be confidential and must not be disclosed except with "lawful authority".

The "relevant provisions" are set out in s139(2) and include part 4 of the CRA (Judicial Appointment and Disciplines) and rules and regulations made under part 4 of the CRA. The selection process for high court judges is contained within such relevant provisions; specifically within sections 85-94C of part 4 of the CRA and those regulations made under that part 4, namely the Judicial Appointment Regulations 2013/2192. These relevant provisions permit the JAC to determine its selection procedure for high court judges. Therefore, the names of the assessors and their reports should be considered as confidential information provided under these relevant provisions, and disclosure should only be permitted if disclosure falls within one of the "lawful authority" exclusions set out in s139(4) of the CRA.

Under s139(4) there are five lawful authority exclusions. These are:-

a) the disclosure is with the consent of each person who is a subject of the information;

b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;

c) the disclosure is for (and is necessary for) the exercise of function under section 11(3A) of the Supreme Court Act 1981 (c.54) or a decision whether to exercise them

d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;

¹ <http://www.legislation.gov.uk/ukpga/2005/4/contents>

e) the disclosure is required, under rule of court or court order, for the purposes of legal proceedings of any description."

14. The JAC confirmed to both Commissioner during her investigation that none of the exclusions under section 139(4) of the CRA apply.
15. The Commissioner has considered these exclusions and in respect of section 139(4)(a) of the CRA, the JAC confirmed to the Commissioner throughout her investigation that the information was provided for a "relevant provision" under the CRA and that the information will be confidential and must not be disclosed except with "lawful authority".
16. The JAC stated to the Commissioner that the "relevant provisions" are set out in section 139(2) and include part 4 of the CRA (Judicial Appointment and Disciplines) and rules and regulations made under part 4 of the CRA and that the selection process for high court judges is contained within such relevant provisions.
17. The Commissioner is therefore satisfied that the "relevant provisions" permit the JAC to determine its selection procedure for high court judges and disclosure should only be permitted if disclosure falls within one of the "lawful authority" exclusions set out in section 139(4) of the CRA.
18. The Commissioner also notes that there is no obligation for a public authority to obtain consent of each person who is a subject of the information. The Commissioner refers to the following comments by the Information Tribunal in the case of *Kirkham v Judicial Appointments Commission & IC (EA/2018/0116)* in which a request was made to the JAC for information supplied by independent assessors about candidates for judicial appointment in England and Wales. The request was also refused under section 44 of the FOIA relying on section 139(1) of the CRA. The Commissioner notes particularly the following comments in paragraph 28 which states the following:

"Thirdly, the appellant maintained that the JAC ought to have tried to obtain consent from the relevant candidates or from the independent assessors. In our view, there was no requirement, under section 44 of FOIA or otherwise, for the JAC to take any such step."
19. In regards to section 139(4)(b) of the CRA, The Commissioner does not consider that the FOIA is a "purpose" under section 139(4)(b) of the CRA, which states that: "*the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision*". She does not consider that the FOIA is a relevant provision and there are no "relevant functions" under the FOIA that would apply.
20. Section 139(4)(c) of the CRA does not apply in this case as it relates to the removal of a judge by address presented by both Houses of

Parliament. In addition, section 139(4)(d) is not applicable in this case as it relates to section 108 of the CRA, which relates to disciplinary functions in respect of a judge. Section 139(4)(e) of the CRA also does not apply as there is no rule of court or a court order for the purposes of this case.

21. Therefore, from the evidence she has seen in this case, none of the limited and specific circumstances prescribed in the CRA which enable confidential information to be lawfully disclosed are met. The Commissioner therefore accepts that disclosure in response to the request would breach the CRA and upholds the JAC's decision to rely on section 44(1)(a) of the FOIA to withhold the requested information.
22. As Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in section 44 then it is exempt from disclosure, there is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.
23. As section 44 is engaged, it has not been deemed necessary for the Commissioner to consider whether section 41 of the FOIA would also apply.

Right of appeal

24. 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

25. 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.
26. 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

Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF