

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2022

Public Authority: Children and Family Court Advisory Support Service

Address: 3rd Floor
21 Bloomsbury Street
London
WC1B 3HF

Decision (including any steps ordered)

1. The complainant has requested, from the Children and Family Court Advisory Support Service ("CAFCASS"), information about staff complaints.
2. CAFCASS disclosed some of the requested information, found that some was not held and refused to disclose the remainder, on the basis of section 40(2) (Personal information) of FOIA.
3. The Commissioner's decision is that, where cited, the requested information was not held. However, although not cited by CAFCASS, it should have neither confirmed nor denied holding some of the requested information in reliance on section 40(5)(Personal information) of FOIA.
4. The Commissioner does not requires any steps as a result of this decision.

Background

5. The request concerns complaints and dismissals of CAFCASS staff, which the complainant asked to have provided in specific categories.
6. CAFCASS advised the complainant that, at the time of his request, it was using the following categories to record complaints against its staff:

1. Friendly, professional and respectful service
 2. Fairness of service
 3. Accessibility of service
 4. Working in children's best interests
 5. Provision of clear information
 6. Use of plain English
 7. Translation of information
 8. Listening to feedback
 9. Clear complaints process
 10. Solving problems quickly
7. During this investigation, CAFCASS also advised the Commissioner that the total number of dismissals for the time period of the request was 13, which it agreed could be shared. Furthermore, it advised that the categories used for recording dismissals are as follows:
- Dismissal
 - Misconduct
 - Lack of Capability

Request and response

8. On 13 May 2021, the complainant wrote to CAFCASS and requested information in the following terms:

"... I require the information with the proscribed timescales laid down within the Act.

1) How many complaints have CAFCASS received against their social workers/officers over the past 5 years from Service Users?

2) How many of the complaints were to do with the following:

- A) alleged corruption
- B) alleged gender bias against fathers/males
- C) alleged Perjury
- D) alleged Perverting the Course of Justice
- E) alleged collusion with mothers/females
- F) alleged changing of statements
- G) alleged threats/intimidation against father's/men

3) How many of these complaints were upheld by CAFCASS after an investigation?

4) How many of these complaints that were not upheld were then dealt with by the Parliamentary Ombudsman?

5) How many of these complaints were then reversed and overturned by the Parliamentary Ombudsman to show that the CAFCASS outcome was incorrect?

6) How many CAFCASS social workers/officers once found guilty of one of the named offences (2) were then sacked?

7) How many complaints have CAFCASS received against their social workers/officers based in their Plymouth office over the past 5 years from Service Users?

8) How many of the complaints were to do with the following:

- A) alleged corruption
- B) alleged gender bias against fathers/males
- C) alleged Perjury
- D) alleged Perverting the Course of Justice
- E) alleged collusion with mothers/females
- F) alleged changing of statements
- G) alleged threats/intimidation against father's/men

9) How many of these complaints were upheld by CAFCASS after an investigation?

10) How many of these complaints that were not upheld were then dealt with by the Parliamentary Ombudsman?

11) How many of these complaints were then reversed and overturned by the Parliamentary Ombudsman to show that the CAFCASS outcome was incorrect?

12) How many CAFCASS social workers/officers once found guilty of one of the named offences (2) were then sacked?

13) How many CAFCASS social workers/officers once found guilty of one of the named offences (2) were then sacked?

14) How many complaints has [name redacted] from your Plymouth office received in the last 5 years?

15) How many of the complaints were to do with the following:

- A) alleged corruption
- B) alleged gender bias against fathers/males

- C) alleged Perjury
- D) alleged Perverting the Course of Justice
- E) alleged collusion with mothers/females
- F) alleged changing of statements
- G) alleged threats/intimidation against father's/men

16) How many of these complaints were upheld by CAFCASS after an investigation?

17) How many of these complaints that were not upheld were then dealt with by the Parliamentary Ombudsman?

18) How many of these complaints were then reversed and overturned by the Parliamentary Ombudsman to show that the CAFCASS outcome was incorrect?"

9. On 10 June 2021, CAFCASS responded. It provided the information requested at part (1), said some was not held and said some was exempt by virtue of section 40(2) (Personal information) of FOIA. It also provided a partial response to part (2) of the request, but this was based on the categories against which it held data rather than what the complainant had asked for.
10. The complainant requested an internal review on 10 June 2021, saying that he did not agree with the citing of section 40(2) of FOIA.
11. CAFCASS acknowledged this, advising that it would consider its response in respect of parts (6) and (12) – (15) of the request, as these were the parts where it had cited section 40(2) of FOIA.
12. CAFCASS provided the outcome of its internal review on 25 June 2021. It revised its position and said it was no longer relying on section 40(2). It advised the complainant that: "Zero Cafcass social workers / officers were found guilty of the named offences". It did not address parts (14) and (15) of the request which were also previously withheld under section 40(2).

Scope of the case

13. The complainant contacted the Commissioner on 10 June 2021, to complain about the way his request for information had been handled. The Commissioner required further information from him which was provided on 5 July 2021.
14. The Commissioner noted that, following receipt of his internal review, the complainant had written to CAFCASS and included the following comment: "you clearly state that CAFCASS does not hold information

broken down under these categories yet now you supply information relating to these categories". The Commissioner therefore liaised with the complainant to clarify the scope of his complaint.

15. The complainant considered that CAFCASS's revised response to parts (6) and (12) – (15) of the request following its internal review could not be correct as it had previously stated that it did not record information in the categories he had specified. As a result, in his view, it could not then be in a position to say whether or not staff had been sacked for any of these offences; if it were able to do so for these parts of the request, then he considered that it would also hold the information sought for the rest of the request. He said: "I believe that have [sic] withheld the information and have contradicted themselves".
16. The Commissioner will therefore consider whether or not any information is held in respect of parts (6), (12) and (13) of the request. CAFCASS has since confirmed to the Commissioner that it wishes to rely on section 40(2) of FOIA in respect of parts (14) and (15) so these will also be considered below.
17. 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 1 of the FOIA. The FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – General right of access

18. Compliance with section 1 is being considered in respect of parts (6), (12) and (13) of the request (it is however noted that, were the Commissioner to determine that CAFCASS did hold this information, this would affect its earlier response to other parts of the request).
19. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
20. In this case, the complainant suspects that CAFCASS holds information from which it could answer parts (6), (12) and (13) of the request. CAFCASS's position is that it does not.

21. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
22. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
23. CAF/CASS has advised the Commissioner that it was:

“... able to provide the intelligence from HR that no social worker was dismissed for the named offences (set out in question 2), partly because we dismiss so few members of staff and partly because it is intelligence rather than data recorded. We believe on reflection that the response could have been clearer by confirming that we did not hold the information requested in the form of data sets or extractable data and that we were providing additional intelligence additionally to the formal FOI response”.
24. It also explained to the Commissioner that its HR Manager had: “reviewed the staff records and can confirm no staff have been dismissed under the categories provided by the requestor”.

The Commissioner's conclusion

25. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.
26. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the decisions it makes to hold some, but not other, information. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not,

on the balance of probabilities, the public authority holds the requested information.

27. While appreciating the complainant's frustration that CAFCASS does not hold information within the scope of his request, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)¹ which explained that FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

28. Based on the information provided, and the wording of the request which specifies particular categories of information, the Commissioner is satisfied that, on the balance of probabilities, no recorded information within the scope of parts (6), (12) and (13) of the request is held. He is therefore satisfied that CAFCASS has complied with the requirements of section 1 of FOIA in this case.

Section 40 - Personal information

29. Regarding the citing of section 40(2), reference has only been made to parts (14) and (15) of the request. However, the Commissioner considers that part (14) of the request introduces a named party in respect of parts (15) to (18) too, which all relate to that named party. Using his own discretion, the Commissioner will therefore also consider the application of section 40 to these five parts of the request.
30. Furthermore, the Commissioner notes that CAFCASS has cited section 40(2) of FOIA to withhold the related information. However, because simply confirming (or denying) whether any information is held in this case would itself reveal something about the named party (ie whether they had been the subject of serious allegations), the Commissioner has again used his discretion, as regulator of the data protection regime, to consider whether or not CAFCASS should have instead issued a neither confirm nor deny response, under section 40(5) of FOIA.
31. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in

¹<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.

32. Therefore, for CAFCASS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
- the requested information, if held, would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

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

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

34. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
35. Clearly, the complainant has referred to member of staff by name in respect of any information held. Therefore, confirming or denying whether any information is held would result in the disclosure of that individual's personal data, ie it would reveal whether or not they had been subject to any complaints, the nature of those complaints and their outcome.
36. For the reasons set out above, the Commissioner is satisfied that, if CAFCASS confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
37. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party, does not automatically prevent CAFCASS from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
38. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

39. 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".
40. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

41. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful **only** if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
42. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

43. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

44. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) **Legitimate interests**

45. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
46. The complainant has not indicated why this information, if held, should be placed in the public domain. CAFCASS has advised that the staff member was “involved in contested private family proceedings”; it is not known whether this is why the complainant is seeking information about them. The Commissioner can only surmise that the complainant’s legitimate interests are those of a personal matter whereby he has some issue in connection with the named member of staff; if this is not the case then the Commissioner cannot envisage any other legitimate interest in confirmation or denial in this case and the first part of the test would not therefore be met.

sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

47. Assuming that the information is being sought on the Commissioner's suggested grounds, he has gone on to consider the next part of the test.

(ii) Is confirming whether or not the requested information is held necessary?

48. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
49. The complainant has not specified why he considers disclosure to the general public is necessary in this case. Although invited to do so, CAF/CASS similarly did not comment. However, it is noted that, were the complainant to have any personal issues regarding the performance of this particular member of staff then he would be able to approach CAF/CASS to raise a complaint (details of how to do so can be found on its website). On this basis, which is the only basis that the Commissioner can surmise from the information provided to him, the Commissioner does not consider that disclosure of the requested information, if held, would be necessary as there is an alternative way for the complainant to seek redress for any personal issues he may have. The Commissioner is therefore satisfied that there are less intrusive means to raise any possible complaint or grievance about the named party and therefore confirmation or denial is not necessary in order to meet any legitimate interest in disclosure.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

50. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

51. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that confirmation or denial may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
52. CAFCASS explained that it: "has a duty of confidentiality towards the staff and outside of any regulatory body or court order there is an expectation that any employment records would be confidential". It confirmed that it had not asked the party whether they were willing to consent to the disclosure of any information, in this case the confirmation or denial as to whether or not any information about complaints about the staff member is held. CAFCASS also advised that it did not consider that it was necessary or fair to disclose the personal employment records of individual members of staff.
53. Most employees will have a legitimate expectation that their employer would not tell the public whether disciplinary information about them existed, and such a disclosure could clearly have the effect of causing the employee damage and distress. The Commissioner has found no information in the public domain to suggest that the named person is a senior member of staff which, in his view, further reduces any expectation the member of staff may have about disclosure of this type of information.
54. Whilst there may be a legitimate public interest in knowing that the employee is fit to practice, such public interest may be adequately met by the public authority's own disciplinary procedures, were the complainant to raise an issue about the person's capabilities through the appropriate channels.
55. On balance, and in the absence of any known legitimate interest, the Commissioner finds that the data subject's interests or fundamental rights and freedoms would be compromised were confirmation or denial disclosed to the public.

Fairness

56. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that CAFCASS was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's (ie the individual named in the request) fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
58. Section 40(5B)(a)(i) is therefore engaged in respect of parts (14) – (18) of the request.

Right of appeal

59. 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:

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

60. 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.
61. 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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