

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to complaints made against a named Circuit Judge. The Ministry of Justice (MoJ) refused to confirm or deny whether the information was held, citing sections 32(3) (court records), 40(5) (personal information) and 44(2) (prohibitions on disclosure) of FOIA.
2. The Commissioner has investigated the MoJ's application of section 44(2). His decision is that the MoJ has correctly applied that exemption on the basis that confirmation or denial was prohibited by section 139 of the Constitutional Reform Act 2005 (CRA). He requires no steps to be taken.

Request and response

3. On 18 April 2016, the complainant wrote to the MoJ via the What Do They Know? website¹ and requested information in the following terms:

"Dear Ministry of Justice,

Please disclose all records held of complaints made about Circuit Judge [name redacted] with particular regard to corruption."

¹ <https://www.whatdotheyknow.com/>

4. Having received clarification from the requester in relation to his identity, the MoJ responded on 9 May 2016. It refused to confirm or deny whether it held the requested information, by virtue of the following exemptions:
 - section 32(3) court records
 - section 40(5) personal information
 - section 44(2) (prohibitions on disclosure).
5. The complainant requested an internal review on 17 May 2016. The MoJ sent him the outcome of its internal review on 7 June 2016 upholding its original position.

Scope of the case

6. The complainant contacted the Commissioner on 8 June 2016 to complain about the way his request for information had been handled. He disputes the MoJ's refusal to confirm or deny holding information within the scope of his request.
7. He told the Commissioner:

"For these judges to be properly held accountable, it is essential that their conduct records are made available to members of the public..."
8. The analysis below considers whether the MoJ was entitled to neither confirm nor deny holding the requested information.

Reasons for decision

Section 44 prohibitions on disclosure

9. Section 44(1) of FOIA provides that:

"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".

10. Section 44(2) of FOIA provides that:

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)".

11. Section 44 is an absolute exemption: there is no requirement to consider the public interest test.

12. In this case, the MoJ considers that the confirmation or denial that would have to be given falls within paragraph (a) of subsection (1).

13. During the course of the Commissioner's investigation, the MoJ explained that the Judicial Conduct Investigations Office (JCIO) is responsible for investigating complaints into judicial conduct.

14. In correspondence with the complainant, the MoJ said:

"In this instance, Section 139 of the Constitutional Reform Act 2005 (CRA) establishes a duty of confidentiality on those who have responsibilities in relation to matters of conduct and discipline involving judicial office holders, where information is provided under or for the purposes of a relevant provision of the Act. Information which is obtained for the purposes of a function under Part 4 of the CRA is confidential by virtue of section 139 of that Act.

I conclude that confirmation or denial of whether the JCIO holds the information you have requested, would release information which would be in contravention with the CRA and as such, section 44(2) of the FOIA is engaged".

15. In other words, the MoJ told him that it is relying on section 44(2) of the FOIA by virtue of section 139 of the CRA.

16. During the course of the Commissioner's investigation, in support of its citing of section 44(2), the MoJ confirmed that section 139 of the CRA prohibits it from confirming or denying whether it holds the requested information.

17. It explained:

"Part of 4 of the CRA 2005 deals with Judicial Discipline and is cited as one of the relevant provisions. Section 139 further states that information is confidential if it relates to an identified or identifiable individual (a subject). The circumstances in which information may lawfully be disclosed, which are limited under the Act, are set out in Section 139 (4) – (9)".

18. Given the wording of the request, the Commissioner is satisfied that the information, if held, relates to an identified or identifiable individual – the judge named in the request. He therefore considers the information, if held, would be confidential information as defined by the CRA.
19. The Commissioner has considered the MoJ's application of section 44(2) of the FOIA to a request for information about complaints about an identifiable judicial office holder on a previous occasion².
20. In that case the Commissioner accepted that section 139 of the CRA only permits disclosure of confidential information obtained for the purposes of judicial discipline in limited and specified circumstances. Those circumstances are defined in section 139 of the CRA in what the Commissioner considers to be precise terms³.
21. The Commissioner considers the nature and context of the request in this case, and the arguments relied on, to be very similar. However, while acknowledging the existence of a similar case having been investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA.
22. The Commissioner has considered the complainant's arguments in favour of disclosure and the MoJ's submission in support of its decision to neither confirm nor deny whether it holds information relevant to the complainant's request.
23. From the evidence he 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.
24. Therefore the Commissioner finds that, for the MoJ to confirm or deny whether it holds the requested information would itself reveal information, if it existed, that would be considered exempt from disclosure on the basis of section 44(1)(a).
25. Accordingly, the MoJ was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA - by virtue of

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560734/fs50609789.pdf>

³ <http://www.legislation.gov.uk/ukpga/2005/4/section/139>

section 139 of the CRA - to refuse to confirm or deny whether the requested information is held.

26. Having reached that conclusion, it has not been necessary for the Commissioner to consider whether the other exemptions cited by MoJ would also apply.

Right of appeal

27. 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

28. 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.
29. 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

Jon Manners
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