

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 December 2016

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the number of charging orders granted on specific days, by named Judges, at specific Courts.
2. The Ministry of Justice (MoJ) confirmed it held information within the scope of the request but refused to provide it citing section 40(2) of the FOIA (personal information).
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) of the FOIA to withhold the requested information.
4. She requires no steps to be taken as a result of this decision.

#### Background

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5. By way of background to the subject matter of the request, the MoJ told the Commissioner:

*"If a creditor takes court action because of an unpaid debt, they will seek to have a county court judgment (CCJ) or other court order made against the debtor. If the debtor doesn't keep to the terms of the court order, the creditor can go back to court and apply for a charging order.*

...

*A charging order (known as a final charging order) secures the debt against a debtor's home or other property owned by the debtor. If a*

*debtor does not pay back what is owed once a final charging order is in place it could mean that they lose their home”.*

## Request and response

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6. On 18 April 2016, the complainant wrote to the MoJ and made the following request for information under the FOIA via the [whatdotheyknow](https://www.whatdotheyknow.com)<sup>1</sup> website:

*“Please confirm how many charging order applications DJ Smith sitting at the county court at Maidstone granted on 27 February 2014.*

*Please confirm how many charging orders have been granted by DDJ Swales in the county court at Maidstone on 8th October 2014”.*

7. The MoJ provided a response on 28 April 2016 and a revised response on 13 May 2016. In the latter response it confirmed it held information within the scope of the request. However, it refused to provide it citing the section 40(2) exemption of the FOIA on the basis that the numbers involved are five or fewer.
8. The MoJ provided an internal review on 20 June 2016 in which it maintained its position regarding section 40(2). However, it also told the complainant that if its interpretation had included interim charging orders, the request would have been refused under section 12 of the FOIA (cost of compliance).

## Scope of the case

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9. The complainant contacted the Commissioner on 23 June 2016 to complain about the way his request for information had been handled. He disputed that providing the numbers requested would disclose any personal details.
10. The Commissioner sought clarification from the complainant with respect to the nature of his complaint, including with respect to interim and final charging orders.
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<sup>1</sup> [https://www.whatdotheyknow.com/request/county\\_court\\_charging\\_orders#outgoing-553380](https://www.whatdotheyknow.com/request/county_court_charging_orders#outgoing-553380)

11. On receipt of his clarification, the Commissioner wrote to the complainant setting out the proposed scope of her investigation. She invited the complainant to respond if he did not agree with that scope. No response was received.
12. During the course of the Commissioner's investigation the MoJ confirmed that its response to each part of the request was that the number of final charging orders granted was five or fewer.
13. The analysis below considers the MoJ's application of section 40(2) of the FOIA to that information.

## Reasons for decision

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### *Section 40 personal information*

14. Section 40(2) of the 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(3) or 40(4) is satisfied.
15. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

### *Is the information personal data?*

18. Section 1 of the DPA defines personal data as:

*" ...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

19. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
20. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The MoJ told the complainant that the number of orders granted on each of the days specified in the request was five or fewer. It explained, however, that it was unable to provide him with the exact figures he had requested:

*".. because this information, if released, could lead to the identification of the individuals concerned".*
22. Noting his dissatisfaction with the response, following an internal review the MoJ advised him:

*".. the original response was not intended to be vague, evasive or unhelpful. It is to protect the identity of individuals and is consistent with the MoJ's stance not to provide exact figures where the true number falls between one and five and there is a potential risk of identification".*
23. During the course of the Commissioner's investigation, the MoJ explained that the requested information is considered personal data as charging orders relate to the finances of individuals. It further explained that it considered that disclosing the specific numbers of charging orders given on a specific day:

*"...may inadvertently confirm that an individual is subject to a Charging Order and therefore having financial difficulties".*
24. In other words, it considered that disclosure of the requested information may allow identification of those concerned.
25. The Commissioner is satisfied that information about a person's financial situation undoubtedly relates to them.
26. The second part of the test is whether the withheld information identifies any individual.
27. In support of its view that disclosing the requested numbers of charging orders may lead to the identification of those concerned, the MoJ told the Commissioner that there may be more information available in the public domain that would allow a matrix of information to be built up and allow identification of the individual(s) concerned.

28. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low.
29. The complainant does not consider it acceptable that the MoJ can only provide him with "*a vague figure*" of five or fewer. He disputes that disclosure of the requested information would disclose personal details.
30. However, 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.
31. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
32. 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.
33. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*
34. In summary, the motivated intruder test is that if the risk of identification is reasonably likely the information should be regarded as personal data.
35. The Commissioner is satisfied that, given the nature of the information, the information withheld by virtue of section 40(2) constitutes information that falls within the definition of 'personal data'. In other words, she is satisfied that it relates to living individual(s) who may be identified from that data and that it constitutes their personal data.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

36. She has reached that conclusion on the basis that the focus of the information is the individual(s) against whom charging order(s) were made and that the information is clearly linked to those individual(s) because it is about their financial situation.
37. In the circumstances of this case, the Commissioner is further satisfied that the individual(s) concerned would be reasonably likely to be identifiable, by a 'motivated intruder', from that information when combined with other information in the public domain.
38. Having accepted that the information requested constitutes the personal data of a living individual(s) other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
39. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.
40. The Commissioner agrees that the first data protection principle is most relevant in this case.

*Would disclosure contravene the first data protection principle?*

41. The first data protection principle states:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

42. 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 if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions, if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

43. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
44. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the data subject(s) reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
- the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

### *Reasonable expectations*

45. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual(s) concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
46. The MoJ told the complainant that disclosure under the FOIA, which is considered disclosure to the world at large, would be beyond the reasonable expectations of the data subject(s).
47. Similarly, the MoJ told the Commissioner that all individuals have a "*clear and strong expectation*" that their personal data will be held in accordance with the DPA and not disclosed to the public under the FOIA.
48. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that it will respect their confidentiality.
49. She also acknowledges that the disputed information in this case relates to individual(s) in relation to court proceedings.

### *Consequences of disclosure*

50. The Commissioner considers that disclosure is unlikely to be fair if it would have unjustified adverse effects on the individual(s) concerned.
51. In respect of the consequences of disclosure in this case, the Commissioner acknowledges that the information relates to the private life of the individual(s) concerned.

### *The legitimate public interest*

52. Assessing fairness also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to

disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

53. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject(s), including their right to privacy.
54. The Commissioner accepts that legitimate interests include the general public interest in transparency. However she has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subjects and support further disclosure.

### *Conclusion*

55. Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subject(s), the potential consequences of disclosure, and any public interest factors, the Commissioner has concluded that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subject(s) as a result of disclosure of the requested information. Therefore, disclosure would be unfair and would breach the first data protection principle.
56. The Commissioner is therefore satisfied that the MoJ was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).
57. As the Commissioner has concluded that the disclosure of this information would be unfair, and would therefore be in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....

**Jon Manners**  
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