

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 June 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 requested information about the appointment of named High Court Judges. The Judicial Appointments Commission (the 'JAC') refused to provide the requested information citing section 41 of FOIA – information provided in confidence, for parts 1, 2 and 4 of the request. For part 3, it said the information could be found on its website and provided a weblink. During the course of the Commissioner's investigation, the JAC also cited section 44(1)(a) of FOIA - statutory prohibitions to disclosure - for the remaining withheld information. The complainant is only concerned with the material exempted under sections 41 and 44.
2. The Commissioner's decision is that the JAC has correctly applied section 44 on the basis that disclosure of the information requested in parts 1, 2 and 4 of the request was prohibited by section 139 of the Constitutional Reform Act 2005. However, by relying on section 44(1)(a) at a late stage the JAC has breached section 17(1) of FOIA.
3. The Commissioner does not require the JAC to take any steps as a result of this notice.

Background

4. The JAC is an independent body that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals with UK-wide jurisdiction.
5. Its website states that candidates are selected on merit, through fair and open competition and that the JAC is committed to attracting applicants from as wide a field as possible, working closely with a range of organisations to promote vacancies to eligible candidates.
6. Candidates are recommended for offices such as the High Court, Upper Tribunals and all others listed in Schedule 14 of the Constitutional Reform Act 2005¹ ('CRA'), as amended by the Crime and Courts Act 2013.
7. The JAC does not select magistrates or judicial office-holders for the UK Supreme Court.
8. When applying for judicial positions, candidates are required to do so via the JAC's online recruitment system. They submit their applications including details of their chosen independent assessors. The JAC publishes advice for independent assessors on its website².
9. 'Independent assessments' (previously known as references) are carried out by 'independent assessors'. The JAC uses independent assessments as a source of evidence to assess the merit of candidates, to verify candidates are of good character and to identify issues to explore further during the selection process.
10. The advice includes the following in relation to confidentiality to the assessors:

"The JAC will treat independent assessments as confidential and in communications with candidates, the information provided will not be attributed to you.

If you raise a serious allegation that the JAC believes should be investigated, you will not be identified as the source without your consent.

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

² <https://www.judicialappointments.gov.uk/references-guidance-referees>

Unsuccessful candidates can request written feedback on their application but nothing will be attributed to you."

Request and response

11. On 22 August 2017 the complainant wrote to the JAC and requested information, in relation to five newly appointed High Court Judges, in the following terms:

"1) The names of the 'independent assessors' selected by the candidates;

2) The names of the 'independent assessors' actually used to assess the candidates;

3) In respect of the named individuals, whether or not they hold any judicial office (and, if so what that office might be, as recorded by the Judicial Appointments Commission); and

4) Copies of the reports of the 'independent assessors' submitted to the Judicial Appointments Commission."

12. On 14 September 2017 the JAC responded. It confirmed it held information in relation to parts 1, 2 and 4 of the request, but refused to provide the requested information, citing section 41, information provided in confidence, of FOIA.

13. In relation to part 3 of the request, the JAC said that the information it holds could be found on its website, and it provided the complainant with a weblink³.

14. On 1 October 2017, the complainant requested an internal review in respect of parts 1, 2 and 4 only (ie where the requested information had been withheld under section 41 of FOIA). The JAC provided an internal review on 7 November 2017 in which it maintained its original position.

³ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-court-judges/>

Scope of the case

15. The complainant contacted the Commissioner on 30 December 2017 to complain about the way his request for information had been handled. He argued that section 41 cannot apply because there is no right to sue.
16. During the course of the Commissioner's investigation, the JAC said it wished to maintain that section 41 applied for parts 1, 2 and 4 of the request, however, it now also cited section 44(1)(a) of FOIA – the exemption for statutory prohibitions to disclosure.
17. The JAC wrote to the complainant setting out its reasoning for citing section 44; in turn he submitted his comments about the JAC's reliance on section 44(1)(a) to the Commissioner for her consideration.
18. The complainant has confirmed he is only concerned with the material exempted under sections 41 and 44; therefore, the Commissioner has disregarded part 3 of the request for the purposes of her investigation.
19. Therefore, in this case, the Commissioner has considered whether the JAC is entitled to rely on the exemptions it has cited for parts 1, 2 and 4 of the request.

Reasons for decision

Section 44 - prohibitions on disclosure

20. 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."*

21. Section 44 is a class based exemption: if the information conforms to the class described in this section, the exemption is engaged.
22. By way of explanation about its citing of section 44, the JAC told the complainant:

"The relevant enactment which prohibits disclosure is section 139 of the Constitutional Reform Act 2005 (CRA). 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;*
- e) the disclosure is required, under rule of court or court order, for the purposes of legal proceedings of any description.*

I have considered these exclusions, but do not consider that any apply.

As such I now consider that section 44(1)(a) also applies in respect of your request for information."

Is disclosure prohibited by or under any enactment?

23. With respect to section 44 of FOIA, the Commissioner's website states⁴:

"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'."

24. The complainant argued that the JAC's reliance on s.139 of the CRA is misconceived, because he said there are exemptions to confidentiality under s.139 that the JAC has elected not to explore. For example, he argued that the JAC could ask for the Judges in question for their consent as per s.139(4)(a) (the JAC has confirmed that it has not done this). The complainant contended that a judge refusing to provide consent may well be committing judicial misconduct, especially in respect of those referees who only provided references by virtue of their judicial position. Similarly, he argued that the FOIA (or alternatively a separate 'Magyar' claim under the Human Rights Act (1998)) serves as a purpose under s.139(4)(b) and thus enables disclosure despite the provisions of s.139 of the CRA.
25. The Commissioner has considered these points. Firstly, in respect of consent, she would not usually expect a public authority to seek consent, and if consent was refused, (which she considers very likely), any potential 'judicial misconduct' matters would be outside the Commissioner's remit. It is also likely that there are proper channels for raising any misconduct matters rather than through FOIA.
26. Secondly, the Commissioner does not consider FOIA is a 'purpose' under 139(4)(b). This section says: *"the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision"*. She does not consider that FOIA is a relevant provision, and there are no relevant 'functions' under FOIA that would apply. FOIA is also not 'a person', and the requester is also not exercising a function under a relevant provision under the CRA.

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

27. Thirdly, the complainant argued that the independent assessments could be redacted, stating: *"The style, length, whether or not the author held Senior Judicial Office and so forth of these references are still of interest (especially to an academic like myself), but this would not amount to confidential information if an individual Judge cannot be identified from it (see s.139(3))."* The Commissioner would note that this does not fall in line with the request itself which specifically asks for names. She considers that this revision would constitute a different information request to that which is being considered here.
28. Section 139(3) of the CRA states: *"Information is confidential if it relates to an identified or identifiable individual (a "subject")."* However, this is qualified by: *"Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—"* and lists the five lawful authority exclusions set out in paragraph 22 of this notice.
29. The JAC told the Commissioner that the enactment and specific provision of the enactment it is relying on is s139(1) of the CRA which states:

"A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority."

30. It explained that this is satisfied as follows:

- *The person obtaining the confidential information is the JAC.*
- *The information (the identity of the independent assessors and their reports) as it relates to an identified or identifiable individual (the independent assessors and/or the judicial candidates) within the scope of s139(3) CRA.*
- *The information was provided as part of the selection process for High Court judges. The selection process is set out in s85-94C of part 4 of the CRA and regulations made under part 4, namely the Judicial Appointment Regulations 2013/2192. These are "relevant provisions" for the purposes of s139(1) CRA-s139(2)(b) and (c) provides that "relevant provisions" include all of part 4 of the CRA and rules and regulations made under part 4 of the CRA.*
- *The information may only be disclosed with lawful authority. Confidential information is disclosed with lawful authority (ie the gateways to disclosure referred to by the ICO) only if and to the extent that one of the five exceptions in s139(4) applies. None of these apply as follows (see paragraph 22 for more details):*

- *s139(4)(a) – neither the independent assessors nor the candidates have given their consent for the information to be disclosed. Indeed, when being asked to provide the information, the independent assessors were informed by the JAC that the information would be held confidentially.*
- *s139(4)(b) – the relevant provisions are those set out in s139(2) of CRA. Nothing on the facts engages a person (JAC or otherwise) to disclose the information in accordance with such relevant provisions.*
- *s139(4)(c) – the section of the Senior Courts Act 1981 relates to removal of a judge by address presented by both Houses of Parliament. This is not applicable on the facts.*
- *s139(2)(d) – s108 CRA relates to disciplinary functions in respect of a judge. This is not applicable on the facts.*
- *s139(2)(e) - This is not applicable on the facts.*

31. In support of its position, the JAC cited a previous decision notice *FS50692689*⁵ which concerned judicial complaints, which falls under part 4 of the CRA and the regulations made under that part. In that decision, the Commissioner found that the Ministry of Justice had correctly applied section 44 FOIA relying on the prohibition of disclosure set out in s.139 of the CRA, as it related to judicial complaints which were “relevant provisions” within the scope of s.139(2) of the CRA. The JAC accepts that the current case differs in that it concerns judicial appointments, but considers that the two are sufficiently similar in terms of the legislative provisions relied upon.

32. The Commissioner considers that the legislative provisions relied upon in the present case and *FS50692689* to be 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. From the evidence she has been provided with, the Commissioner is satisfied that the requested information is covered by s.139(1) of the CRA.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173052/fs50692689.pdf>

33. The Commissioner has considered the complainant's arguments in favour of disclosure and the JAC's submissions in support of its decision to rely on section 44(1)(a).
34. Additionally, 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. The exemption provided by section 44(1)(a) is therefore engaged in relation to the information requested in parts 1, 2 and 4 of the request.
35. 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.
36. Having reached that conclusion, it has not been deemed necessary for the Commissioner to consider whether section 41 would also apply.

Breach of section 17 for late reliance on section 44(1)(a)

37. Section 1(1) of FOIA states:

"(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

38. Section 17(1) of FOIA states:

*"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

39. Breaches of section 17 will also be found if the public authority seeks to rely on another exemption during the investigation which it had not mentioned at or before internal review.
40. In this case, the JAC relied on section 44(1)(a) during the course of the Commissioner's investigation thereby breaching section 17(1).

Right of appeal

41. 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

42. 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.
43. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF