

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 March 2024

**Public Authority:** Judicial Appointments Commission  
**Address:** 5th Floor  
70 Petty France  
London  
SW1H 9EX

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to selection exercises for specified judicial positions and for minutes of meetings. The Judicial Appointments Commission (JAC) provided some information within the scope of the request but withheld the remainder, citing sections 36 (prejudice to effective conduct of public affairs) and 40 (personal information) of FOIA.
2. The Commissioner's decision is that the JAC was entitled to withhold the information by virtue of sections 36(2)(c) and 40(2) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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4. On 18 May 2023, the complainant wrote to the JAC and requested information in the following terms:  
"Situational and other questions and specimen answers  
[...]"

1. Please provide copies of all situational and other questions and specimen answers for the following exercises:

a) High Court selection exercises for 2020, 2021 and 2022.

b) Any DCJ selection exercise conducted in 2021 and 2022.

c) Any specialist CJ exercise conducted in 2021 and 2022.

2. Please provide the scoring framework to mark candidates in respect of the above selection exercises.

3. Please provide details of how each of the candidates (anonymised appropriately) appointed to the above positions scored in such selection exercises.

Board Minutes

4. Please provide copies of the Commissioners' April 2023 and May 2023 board minutes".

5. The JAC responded on 14 June 2023. It confirmed it holds some information within the scope of the request. It refused to provide that information, citing sections 36(2)(c) (prejudice to effective conduct of public affairs), 40(2) (personal information) and 22 (information intended for future publication).

6. The complainant requested an internal review, in which they also made a fresh request for information and clarified the nature of the information they were seeking in Q3, namely:

"information as to whether there were any candidates recommended for appointment for each of the selection exercises ... who were graded C or D".

7. The fresh request was in the form of a question in relation to the minutes (Q4):

"The minutes do not refer to any of the litigation currently involving the JAC. Please let me know if these are or were discussed at the meetings and why there is no mention of them in the minutes".

8. Following an internal review, the JAC wrote to the complainant on 21 September 2023. In light of the clarification about Q3, the JAC provided some information in scope of that part of the request but continued to withhold a small amount, citing section 40(2). It maintained its application of section 36 to the information in scope of Q1 and Q2.

9. With respect to the additional information requested at Q4, it confirmed that there was a discussion regarding litigation at the board, but that it is exempt from publication and disclosure under section 42 (legal professional privilege) of FOIA.

## **Scope of the case**

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10. The complainant disputes the JAC's refusal to provide all of the information within the scope of the request. They told the Commissioner that some information about how candidates scored has been provided by the JAC on other occasions.
11. Although the Commissioner understands from this that the JAC would appear to have complied with a similar request, this does not set an automatic precedent for disclosure under FOIA.
12. In the course of their correspondence with the Commissioner, the complainant raised a number of issues which are outside the scope of the Commissioner's remit. 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 I of FOIA.
13. During the Commissioner's investigation, the JAC revisited its handling of its response to the additional information requested at Q4.
14. It accepted that the published minutes for April 2023 and May 2023 state that the Chief Executive provided a legally privileged update on ongoing litigation. However, it told the Commissioner that the update was provided orally and was not minuted. It explained that as the information was not recorded it is not held and therefore an exemption cannot be applied.
15. On the basis that the JAC has provided a plausible response to the complainant's question about the minutes, the Commissioner has not considered further whether, on the balance of probabilities, it does, or does not hold, the requested information.
16. The analysis below considers the JAC's application of section 36 of FOIA to the information in scope of Q1 and Q2 and section 40 of FOIA to the requested information in scope of Q3.
17. The small amount of withheld information in scope of Q3 comprises two percentage figures.

## Reasons for decision

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### Section 36 prejudice to the effective conduct of public affairs

18. Section 36(2)(c) provides that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
19. With respect to the nature of the prejudice in regard to section 36(2)(c), the Commissioner states, in his guidance<sup>1</sup>:

“Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure”.
20. Explaining why it considered that section 36(2)(c) applies in this case, the JAC told the complainant that there was a good likelihood that the requested information, namely the situational and other questions and specimen answers, may be used or referred to, in part or full, in future judicial appointment exercises. It argued that disclosure of the information would not allow that to happen.
21. The JAC provided evidence to the Commissioner that the qualified person’s opinion was sought from Richard Jarvis, the then Chief Executive of the JAC, on 11 June 2023. The qualified person gave their opinion that the exemption was engaged on 13 June 2023.
22. In this case the Commissioner acknowledges that the prejudice envisaged in the submission to the qualified person is with respect to the impact of disclosure on future selection exercises for judicial appointments. He also acknowledges that the qualified person considers that the lower threshold of prejudice applies.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#other>

23. The Commissioner has considered the submissions about the impact on the operational functions of the JAC in future exercises if the requested information is disclosed.
24. The Commissioner is satisfied that it was reasonable to argue that disclosure in this case would be likely otherwise to prejudice the effective conduct of public affairs, namely the selection process for judicial appointments. He therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would be likely otherwise to prejudice the effective conduct of public affairs by virtue of section 36(2)(c).

### **Public interest test**

25. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
26. He has carried the lower level of prejudice through to the public interest test.

### **Public interest considerations in favour of disclosure**

27. In respect of the information withheld by virtue of section 36, the complainant told the JAC that they do not believe that the public interest has been properly applied. In their view, it is in the public interest to provide the withheld information given "intense scrutiny" of the JAC in relation to how it operates the judicial appointments system. They also argued that it is in the public interest to understand whether the JAC takes a consistent approach across the candidates who are interviewed.
28. The JAC accepted that there may be some public interest in the disclosure of the requested information, particularly in the case of someone making an application or thinking of doing so in the future. It also accepted that there is a public interest in understanding how the JAC ensures candidates are marked consistently.
29. However, it argued that this public interest is better achieved by the information that is already available about the processes used by the JAC to ensure consistency, such as the use of independent panel members, calibration meetings and Advisory Group.

### **Public interest considerations in favour of maintaining the exemption**

30. Arguing in favour of maintaining the exemption, the JAC told the complainant that disclosing the test materials and scoring framework would mean that they were in the public domain for all future

candidates, such that the tests and/or any part of the tests could not be used in any future exercise.

31. They argued that if new tests or materials were required, this would be detrimental to the judicial appointment process and would place an additional burden on judicial resource who are key in producing such information. It did not consider that necessitating the removal of judges from their court/tribunal work, in order to draft fresh selection exercise material, was in the public interest.

### **Balance of the public interest**

32. The Commissioner has previously considered the public interest in a case involving a request to the JAC for the scoring framework for various selection exercises.
33. In that case<sup>2</sup>, having considered the views of the complainant and the JAC, the Commissioner found that avoiding the need for new situational scenarios, which would need to be created by a drafting judge who would, in turn, be prevented from working on judicial casework while doing so, outweighs the public interest in openness and transparency.
34. The Commissioner recognises that the public interest arguments put forward by the JAC in this case relate to avoiding disruption to future selection exercises and to judicial availability within the court system.
35. Having considered the public interest factors applicable to this case, the Commissioner is satisfied that the similarity between this case and IC-181733-R3T0 is such that he is able to reach the same decision about the balance of the public interest.
36. Accordingly, he finds that the JAC was entitled to rely on section 36(2)(c) of FOIA to refuse to disclose the requested information within the scope of Q1 and Q2 of the request.

### **Section 40 personal information**

37. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022124/ic-181733-r3t0.pdf>

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

38. The JAC considers that this section applies to information within the scope of Q3 of the request.
39. 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 because an individual is capable of being identified from apparently anonymised information.
40. The Commissioner considered a similar request for information in case reference IC-181735-D3P8<sup>3</sup>. The decision notice in that case was issued on 14 September 2022.
41. The request for information in that case was for information relating to the number of individuals who applied for a judicial position, in respect of various selection exercises, and the number of individuals who were interviewed.
42. The Commissioner's decision in that case was that the JAC was entitled to withhold the information by virtue of section 40(2).
43. The withheld information in this case comprises information relating to how the candidates who were appointed to a senior judicial position, in a given year, scored in the selection exercise.
44. The JAC told the Commissioner:

"... if a request is made for information and the total figure amounts to 10 people or fewer, the JAC must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of our statutory obligations under the General Data Protection Regulation and/or the Data Protection Act 2018. The JAC believe that the release of this information would risk identification of the individuals concerned. For this reason, the JAC has chosen not to provide a figure where the data reflects a pool of less than ten individuals".

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4021776/ic-181735-d3p8.pdf>

45. The complainant disputes that the information cannot be provided. They told the Commissioner:

“There is no logic at all as to why the information [...] should not be provided by the JAC. The JAC provides no information about how less than 10 candidates might be identified but 10 or more candidates would not.... This response is, therefore, inadequate”.

46. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
47. He has reached that conclusion on the basis that the focus of the information is the individuals who were appointed, and how they were scored, and that such information is clearly linked to them.
48. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of the judicial role concerned and of the candidates who were appointed.
49. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between this case and IC-181735-D3P8 is such that he is able to reach the same decision without the need for further analysis.
50. Accordingly, the Commissioner has decided that the JAC was entitled to withhold the information under section 40(2), by way of section 40(3A) (a).



## Right of appeal

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51. 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: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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