

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2019

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

Decision (including any steps ordered)

1. The complainant requested a current list of the full names of Magistrates who are currently members of a named Bench.
2. The Commissioner's decision is that the Ministry of Justice was not entitled to cite section 40(2) (Personal information) FOIA to refuse the request.
3. The Commissioner therefore requires the Ministry of Justice to disclose to the complainant the full names of the Magistrates who, at the date of the information request, were members of the named Bench.
4. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 May 2019, the complainant wrote to the Ministry of Justice (MOJ) (via the What Do They Know website) and requested information in the following terms:

Would you please provide me with the current list of Magistrates names, (Full Names), that are registered to act within [name of county redacted]. I see that there are 1035 listed magistrates. Please provide first names and surnames for each Magistrate and not just a list of surnames.

6. On 21 May 2019, MOJ responded saying that the requested information was held and that it had already disclosed the relevant Magistrates' surnames. It said that their full names were, however, exempt from disclosure by virtue of section 40(2) FOIA.
7. On 19 June 2019, following an internal review, MOJ wrote again to the complainant. MOJ said again that disclosing the full names of the magistrates would be unlawful by virtue of section 40(2) FOIA. However MOJ did disclose the initial letters of the magistrates' names in addition to their surnames.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2019 to complain about the way his request for information had been handled. He said that some past, similar requests to MOJ had led to full disclosures being made.
9. The Commissioner considered the application by MOJ of the section 40(2) FOIA exemption. During her investigation she requested representations from MOJ and the complainant and had regard for their responses. She reviewed a sample of the withheld information. She also noted the outcome of some previous similar requests to MOJ and the published reports of the judgment in the case of *Felixstowe (R v Felixstowe Justices, ex parte Leigh and another [1987] 1 All ER 551)*.

Reasons for decision

Section 40 personal information

10. Section 40(2) 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(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then the section 40 FOIA exemption cannot apply.
13. 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 DP principles.

Is the information personal data?

14. Section 3(2) DPA defines personal data as:

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. 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.
18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the relevant Magistrates. She is satisfied that their full names both relate to, and identify them, sufficiently. This information therefore falls within the definition of 'personal data' in section 3(2) DPA.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

19. However, the fact that the withheld information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

22. In the case of a FOIA request, the personal data is processed when it is disclosed in response to a request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

24. Article 6(1) of the 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"* lawful bases for processing listed in the Article applies.
25. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f) which states:

"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". "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- *"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

26. In considering the application of Article 6(1)(f) of the 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 disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subject.
27. The Commissioner considers that the test of 'necessity' under part (ii) must be met before the balancing test under part (iii) is applied.

Legitimate interests

28. In considering any legitimate interests in disclosure of the requested information under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
29. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. In this matter, the complainant said:
- "requests by other people for lists of Magistrates full names have been successful, and rightly so, refusal to satisfy my request seems to be disingenuous.
Also, Magistrates work for a public authority and the supply of their names should be a simple matter of public record.
There is a right to know who sits in judgement, and denial of that right is unlawful unwarranted and inimical to the proper administration of justice, further that there is no such person known to Law as 'the anonymous JP (Justice of the Peace)'."*
31. During the Commissioner's investigation, the complainant did not provide her with any additional reasons in support of disclosure of full
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names. He did not furnish the Commissioner with any further reasons to explain why the surname and initials information already disclosed was not sufficient, either for his own purposes or for the public good.

32. MOJ told the Commissioner that there was no evidence of a legitimate interest being pursued by the complainant. No reasons had been given to explain why the information had been requested or why the MOJ's disclosure of Magistrates' surnames and initials was not sufficient. Therefore, MOJ said, disclosure was not necessary to meet the interests of the requester since no reasons had been provided to explain why there was a more compelling public interest in its disclosure.
33. The Commissioner noted that, in *Felixstowe*, Watson L J said in judgment:

"However, whilst some forms of protection against intrusion into privacy are available and often used where necessary, I do not see how in principle there can be any justification for a policy, the purpose of which is to keep secret the names of justices both when they are sitting and afterwards. Collective responsibility is not, in my judgment, a good and sufficient reason to defeat the principle which I believe to be that where open justice prevails so shall those who do justice be known.

I would regard and I believe the general public likewise would regard a policy such as that maintained by the Felixstowe justices and their clerk to be inimical to the proper administration of justice and an unwarranted and an unlawful obstruction to the right to know who sits in judgment. There is, in my view, no such person known to the law as the anonymous JP."
34. During the Commissioner's investigation, MOJ told her that the disclosure of surnames and initials, rather than the full names of Magistrates, provided a reasonable compromise between openness and protecting the safety and privacy of individual Magistrates. MOJ said that the name and initial identified a Magistrate sufficiently without exposing them to the risk of identity theft or being stalked.
35. The Commissioner noted that the office of JP or Magistrate is a public office. She saw that the swearing in of individual Magistrates and many of the duties that attach to their office are generally conducted in public and have been for centuries. She also noted that giving the full name of an individual provides greater certainty of identification; the full name 'John Smith' is more certainly attributable to an individual Magistrate than 'J Smith'.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or an absolute necessity. Accordingly, the test is one of reasonable necessity

and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

37. The Commissioner has been guided by the observations of the court in *Felixstowe* that “*where open justice prevails so shall those who do justice be known*”. She saw the need for there to be openness, transparency and accountability on the part of those who fulfil public office and who carry out judicial functions. She accepted the importance of ensuring that, where justice is done, it is also seen to be done.
38. The Commissioner has noted that there have been two recent MOJ precedent cases and that MOJ had previously disclosed to two other requestors the same information for two other Benches which is now being withheld from the complainant. One disclosure was in 2015 the other in 2018. She noted, however, that both information requests had been decided before the GDPR and the DPA came into force in May 2018. She considered whether that made a difference to her decision in this matter but decided that it did not since the essential factors in her decision did not differ significantly between the pre- and post- GDPR regimes.

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

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner takes into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individuals expressed concern about disclosure; and
 - the reasonable expectations of the individuals.
41. In the Commissioner's view, a key issue is whether the individuals 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, whether the information

relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. MOJ told the Commissioner that members of the relevant Bench of Magistrates had not been asked to consent to disclosure of their full names beyond the general expectation of openness and transparency that accompanies their office. MOJ added that it had not sought consent from individual Magistrates as to do so would have been time consuming and costly.
44. In her investigation, the Commissioner saw that MOJ had previously disclosed the same information for two other Benches, to two other requestors. MOJ told the Commissioner that it was not able to say if any harm had come to any individuals as a result of these earlier disclosures but confirmed to the Commissioner that none had been reported to it.
45. The Commissioner saw that the Court in *Felixstowe* had considered concerns about the safety of Magistrates and Judges but had ruled that open justice and the inherently public nature of judicial office took precedence over them. Moreover, she has seen no evidence that past precedent disclosures had resulted in harm to the named Magistrates.
46. Accordingly the Commissioner decided that there is a legitimate interest in identifying accurately the holders of the public office of Magistrate. She also decided that disclosure of full names, rather than surnames either alone or together with initials, is necessary to achieve that legitimate interest.
47. The Commissioner noted that MOJ had not thought it necessary to seek the consent of individual Magistrates to disclosure. She considered that the public nature of judicial office and the reasonable requirements of open justice meant that consent to disclosure was implicit when an individual accepted appointment to the public office of Magistrate.
48. Based on the above factors, the Commissioner determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and that disclosure of the information requested would be lawful.

Fairness and transparency

49. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under DP principle (a).

50. In relation to fairness, the Commissioner considers that, since disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
51. The requirement for transparency is met because, as a public authority, MOJ is subject to FOIA.
52. The Commissioner therefore decided that MOJ had failed to demonstrate that the exemption at section 40(2) FOIA is engaged and must disclose the full names of the relevant Magistrates to the complainant.

Other matters

53. The Commissioner noted that, in its internal review letter of 19 June 2019, MOJ told the complainant incorrectly that: "*The processing of personal data must be fair and lawful*". More accurately, Article 5(1)(a) GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*", ie processing must be lawful, fair and transparent.

Right of appeal

54. 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@justice.gov.uk

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

55. 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.
56. 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

Dr Roy Wernham
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