

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 12 July 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from the Legal Aid Agency (LAA) relating to the qualifications of a specific individual. LAA is an executive agency of the Ministry of Justice (MOJ).
2. The Commissioner's decision is that MOJ correctly applied section 40(5B) FOIA in its initial response to neither confirm nor deny (NCND) that it held information within the scope of the request. He also finds MOJ was entitled to rely on section 21.
3. However, the Commissioner finds MOJ breached section 17(1) FOIA as it took longer than 20 working days to inform the complainant that it was relying on an exemption.
4. As a substantive response has now been provided the Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

5. On 17 September 2021, the complainant wrote to the LAA and requested information in the following terms:

"please confirm whether you have any legal qualifications and if so what they are as well as providing me with full details of the code of conduct or similar which you are supposed to abide by in your employment as well as details of the legal authority under which you are purporting to restrict my contact with the LAA."

6. The MOJ responded on 15 December 2021 and cited section 21(1) with regard to the code of conduct and section 40(5B) FOIA to neither confirm nor deny (NCND) that the other requested information was held.
7. In their request for an internal review the complainant stated: "This is a request for an internal review based on your reliance on the exemptions being misconceived and misapplied." Following an internal review the MOJ wrote to the complainant on 18 January 2022 and maintained its position.

Scope of the case

8. The complainant first contacted the Commissioner on 26 October 2021 to complain that they had not received a response to their request. Following intervention by the Commissioner, MOJ provided a response. The Commissioner accepted the complaint for investigation on 11 March 2022.

Reasons for decision

Section 21 – information reasonably accessible

9. Section 21(1) FOIA provides:
 - (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
10. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.
11. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.

12. In the Commissioner's guidance for section 21¹ of the FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible 'to the applicant'. Unlike consideration of most other exemptions in the FOIA, this allows the public authority to take the individual circumstances of the applicant into account.
13. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
14. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty.
15. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
16. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*², states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant.
17. At paragraph 113 of the decision the Tribunal stated:

'The reasons are that in section 21 the word "reasonably" qualifies the "accessible" and in the majority's view, "reasonably accessible" applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere.'

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

18. The Commissioner followed the link provided to the complainant to access the Code of Conduct applicable to members of the Civil Service: <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code> to establish what information was available.
19. Having reviewed the information available it is clear that it answers the second part of the request, and that is reasonably accessible. Therefore, the Commissioner finds that MOJ is entitled to cite section 21(1) in response to that part of the request.

Section 40 – Personal data

20. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.
21. Therefore, for MOJ to be entitled to rely on section 40(5B) FOIA to refuse to confirm or deny whether they hold information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

22. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. In this case, the request relates to the qualifications of a specific individual, whose name is known to the complainant. Information of this type relates to an identified individual, is about them and has them as its main focus. Therefore it is categorised as personal data.

Would confirmation or denial contravene one of the data protection principles?

26. The fact that confirming or denying whether the requested information is held would reveal the personal data of a specific individual does not automatically prevent the MOJ from refusing to confirm whether or not they hold the information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (Principle (a)) which states:

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

27. In the case of an 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 – or as in this case the public authority should only confirm whether or not they hold the requested information – if to do so would be lawful (ie, it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair and be transparent.

“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”.

28. In considering the application of Article 6(1)(f)³ of the GDPR in the context of a request for information under the 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 confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

³ 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”. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:- “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”.

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

29. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, 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.
31. 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. However, the more personal or more trivial the interest, the less likely it is that such an interest will outweigh the rights of the data subject in the balancing test.
32. In this case, the complainant has not specifically addressed a legitimate interest as the request was made in the context of on-going correspondence with the LAA. However, it appears to the Commissioner that this is the requestor's own interest rather than for wider societal benefits.

Necessity test

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures; so, confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner is aware that there is nothing in the public domain about the named individual.
35. He is therefore satisfied that disclosure would be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was held.

Balance of legitimate interests and the data subject's interests

36. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's

interests, fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject (the named individual) would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

37. The Commissioner is satisfied that the data subject would have no reasonable expectation that MOJ would confirm or deny whether it held the information that has been requested in this case.
38. He is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subject.
39. He has therefore weighed this against the legitimate interests in disclosure in this case.
40. The Commissioner considers that there is some legitimate interest in disclosing whether individuals maintain appropriate standards whilst in a position of trust. He also considers that there is some legitimate interest in the public being able to scrutinise whether the individuals they are dealing with meet the standards expected.
41. However, while he considers there is a legitimate interest in maintaining public confidence, in this particular case he sees no legitimate interest in knowing the qualifications of one specific individual.
42. The Commissioner is not persuaded that confirming or denying under the FOIA whether MOJ has received any complaints, or the nature of those complaints, would provide any additional scrutiny..
43. The Commissioner has considered his decision alongside a number of previous decision notices which have been issued in similar circumstances, and alongside the decision of the First-tier Tribunal in *Foster v Information Commissioner and General Medical Council* EA/2016/02492.
44. Based on the circumstances of this case, and in line with the decisions above, the Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subject's fundamental rights and freedoms.
45. He has therefore determined that confirming whether or not the requested information is held would not be lawful.

Fairness/Transparency

46. Given the conclusion the Commissioner has reached above on lawfulness, which included considerations of fairness, the Commissioner does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.
47. The Commissioner has determined that the public authority was correct to refuse the request on the basis of section 40(5B)(a)(i) of FOIA.

Procedural matters

48. Section 17 (1) provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time limit for compliance, citing the relevant exemption(s).
49. In this case the request was submitted on 17 September 2021 and the MOJ's initial response dated 15 December 2021 stated that the information was exempt by virtue of section 40(5B) and section 21.
50. In view of the above, the Commissioner finds that MOJ breached regulation 17(1) as it took longer than 20 working days to inform the complainant that it was relying on an exemption.

Right of appeal

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

Website: 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.

Signed

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF