

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

### **Decision notice**

**Date:** 5 March 2018

**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 judicial conduct inquiries. The Ministry of Justice (MoJ) refused to confirm or deny whether it held the requested information and cited the exemption provided by section 44(2) (statutory prohibitions to disclosure) of the FOIA.
2. The Commissioner's decision is that the MoJ cited section 44(2) incorrectly and so it is now required to confirm or deny whether it holds the information requested by the complainant.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation.
  - Write to the complainant with confirmation or denial as to whether recorded information falling within the scope of his request is held. In relation to any information that is held, this should either be disclosed or the complainant should be provided with a notice setting out the grounds under the FOIA for refusing to disclose this information.
4. The MoJ must take these steps 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 5 July 2017 the complainant wrote to the MoJ and requested information in the following terms:

*"Details of the number of Conduct Inquiries from January 2012 to Date where the Chairman of the Conduct Hearing has forwarded his/her recommendation to the Lord Chief Justice & The Lord Chancellor on the disposal to finalise the matter. I have chosen 2012 as this is the earliest year disciplinary statements are published on the JCIO website.*

- 1. The number of cases where the Lord Chief Justice & The Lord Chancellor has accepted the Advisory Committee conduct hearing recommendations;*
  - 2. The number of cases where the Lord Chief Justice & The Lord Chancellor has rejected the Advisory Committee conduct hearing recommendations and increased the recommended disciplinary action;*
  - 3. The number of cases where the Lord Chief Justice & The Lord Chancellor has rejected the Advisory Committee conduct hearing recommendations and decided to remove the magistrate from office despite the recommendation by the conduct hearing;*
  - 4. Information on how many magistrates have been removed from office despite the Advisory Committee conduct hearing not recommending dismissal".*
6. The original request also included parts 5 to 8, but those requests are not included within the scope of this notice.
7. The MoJ responded on 28 July 2017 and refused to confirm or deny whether it held the requested information, citing the exemption provided by section 44(2) (statutory prohibitions to disclosure) of the FOIA.
8. The complainant responded on 31 July 2017 and requested an internal review. The MoJ failed to respond with the outcome of the internal review within a reasonable period.

## Scope of the case

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9. The complainant contacted the Commissioner on 27 September 2017 to complain, at that stage, about both the refusal of his information request and the failure by the MoJ to respond to his request for an internal review.

10. The Commissioner contacted the complainant on 24 November 2017 to ascertain whether he had received the outcome of the internal review by that time and, if he had not, whether he wished the Commissioner to commence with an investigation without waiting any longer for the MoJ to complete the review. The complainant confirmed both that he had not received the outcome of the internal review and that he did wish the Commissioner to commence an investigation.

## Reasons for decision

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### Section 44

11. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny where to do so would be prohibited by an enactment, or would be incompatible with an EU obligation, or would be in contempt of court. In this case the position of the MoJ is that provision of the confirmation or denial would be prohibited by an enactment; the Constitutional Reform Act 2005 (CRA).
12. The matter for the Commissioner to consider here is whether the MoJ was prohibited by the CRA from confirming or denying whether it held the information requested by the complainant. If it was, the exemption was engaged and the MoJ was not obliged to comply with the complainant's information request.
13. The reasoning of the MoJ was that provision of the confirmation or denial was prohibited by section 139(5) of the CRA, which states that:

*"An opinion or other information given by one identified or identifiable individual (A) about another (B)—*

*(a) is information that relates to both;*

*(b) must not be disclosed to B without A's consent."*
14. The MoJ stated that *"the information requested relates to individuals expressing opinions about other individuals, i.e. the Lord Chief Justice's and the Lord Chancellor's opinions on a judicial office holder's alleged misconduct and what they consider is the appropriate disciplinary action."* The MoJ did not, however, address the issue of identifiability.
15. Section 139(5) of the CRA refers to *"identified or identifiable"* individuals. The complainant's request was for numerical information covering a period of several years. Whilst the reasoning of the MoJ suggested that the (A) as referred to in section 139(5) of the CRA would be the Lord Chief Justice or the Lord Chancellor, it gave no reasoning

about how (B) would be identifiable from a confirmation or denial given in response to the complainant's information request.

16. Without considering further whether section 139(5) does provide a statutory bar to disclosure under the FOIA, the failure by the MoJ to address the identifiability point means that the Commissioner does not accept that it applies in this case. The MoJ gave no reasoning as to how confirmation or denial in response to the complainant's information request could be linked to identifiable individuals other than the Lord Chief Justice or the Lord Chancellor.
17. In the absence of such reasoning, the Commissioner does not accept that giving the confirmation or denial in response to the complainant's request would amount to a disclosure of an opinion or other information given by one individual about another identified or identifiable individual. Provision of the confirmation or denial would not, therefore, amount to a contravention of section 139(5) of the CRA and so the conclusion of the Commissioner is that the exemption provided by section 44(2) of the FOIA is not engaged. At paragraph 3 above the MoJ is now required to respond to the complainant with a fresh response to his information request.

## **Other matters**

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18. The Commissioner's approach to internal reviews is that they should be completed within a maximum of 40 working days. The MoJ failed to meet this timescale in this case and it must ensure that it has systems in place to ensure that internal reviews are carried out promptly. In this case a thorough internal review may have revealed the sizeable gap in the MoJ's reasoning, which may have led to a reconsidered response to the request and resulted in this decision notice not being necessary.
19. A separate record has been made of the failure by the MoJ to carry out an internal review promptly in this case. This issue may be revisited should evidence from other cases suggest that this is necessary.

## Right of appeal

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20. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

21. 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.
22. 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 .....**

**Ben Tomes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**