

Neil Wilby  
request-695002-e5e77f41@whatdotheyknow.com

data.access@justice.gov.uk

Date: 25 November 2020

Dear Mr Wilby,

**Freedom of Information Act ("FOIA") Outcome of Internal Review – 201028041**

Thank you for your internal review request dated 28 October 2020, regarding FOIA request ref. 200929007 in which you asked the Ministry of Justice (MoJ) for the following information:

**'Please disclose, by way of the Freedom of Information Act, all judgments of Lady Justice Carr DBE (as she is now) where she was the Nominated Judge in complaints made against other judges or Recorders. The relevant period is 1st September, 2019 until 31st August, 2020'**

As you know, the MoJ responded to your request by letter of 21 October 2020. Your request was denied under section 44(1)(a) of the FOIA (disclosure prohibited by another enactment: section 139 of the Constitutional Reform Act 2005 ("CRA")).

In your request for an internal review, you stated:

**Please treat this communication as a request for an internal review of the decision not to disclose the requested information under your ref 200929007.**

**The grounds for complaint are that:**

- 1. You have provided no evidence that either the complainant or the Recorder in question have been contacted for consent to disclose. I am aware that the complainant would not object.**
- 2. Sections 139 (3) and (4) of the Constitutional Reform Act, viewed through the lens of a journalist not a lawyer, do not appear to be applicable in this case and unless either of the parties objects then the requested information should fall for disclosure.**

The purpose of an internal review is to assess how your FOIA request was handled and to determine whether the original decision was correct. This is an independent review. I was not involved in the decision communicated to you on 21 October.

## **Statutory deadline**

The statutory deadline for responding to your FOIA request was 27 October. The MoJ's response was, therefore, provided within the statutory deadline.

## **Outcome**

Having reviewed the response to your original request and considered your request for an internal review, I am not satisfied that your original request was dealt with correctly.

While it was correct to regard the information requested by you as falling within the scope of section 139 of the CRA, the MoJ did not, in my assessment, follow the correct process in reaching a decision that the information is exempt from disclosure under section 44(1)(a) of the FOIA.

Section 139(1) of the CRA provides that confidential information may not be disclosed without "lawful authority". Section 139(4) sets out the criteria for what constitutes lawful authority. Section 139(4)(a) provides that information may be lawfully disclosed with the consent of each person who is the subject of the information (subject to subsection 5).

For the avoidance of any doubt, I am satisfied that Lady Justice Carr was the proper authority from whom to seek such consent before making a decision about the lawfulness of disclosure in this instance. As such, before deciding that the MoJ did not have lawful authority to disclose the requested information to you, steps should have been taken to invite Lady Justice Carr to consider consenting to its disclosure.

To remedy this error, I can confirm that Lady Justice Carr was invited to consider consenting to the disclosure of the information to you. She declined to give consent. Therefore, your original request for disclosure has been reconsidered and is refused on the basis that the requested information is exempt from disclosure under section 44(1)(a) of the FOIA (disclosure prohibited by another enactment: section 139 of the CRA).

The MoJ's previous reply also stated that the information requested by you is exempt from disclosure under section 40(2) of the FOIA because it contains the personal data of judicial office-holders and complainants.

In my assessment, this decision was partially incorrect because, as communicated to you, it gave the impression that the information you had requested was exempt from disclosure under section 40(2) in its entirety.

Section 40(2) provides an exemption under the FOIA where information constitutes the personal data of anyone other than the requester and its disclosure would contravene any of the "data protection principles."

Had the information not been exempt from disclosure under section 44(1)(a), it would have been necessary for the MoJ to consider whether it was possible to release the information to you in redacted form. This would have required an exercise to assess the information to establish a) which parts of the information constituted personal data and b) whether those parts which did not constitute personal data could lawfully be released to you. In considering (b), it would have been necessary to decide whether a determined person might be able to

identify the individuals whose personal details had been redacted by comparing the remaining information with information from other sources. However, as the information you have requested is exempt from disclosure under section 44(1)(a) of the FOIA, no such exercise is necessary.

## **Appeal Rights**

If you are not satisfied with this response you have the right to apply to the Information Commissioner's Office (ICO). The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if she considers that we have handled it incorrectly.

You can contact the ICO at the following address:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

<https://ico.org.uk/Global/contact-us>

Yours sincerely,

**Simon Parsons**

Judicial Conduct Investigations Office