Mr & Mrs [redacted] Percival

[redacted]

2 August 2016

**Case Reference Number RFA0582445**

Dear Mr & Mrs Percival

I write further to my email of 2 August regarding your data protection concern with the Ministry of Justice (HMCTS) and relevant Judges ("MoJ (HMCTS)").

I must apologise for the delay in concluding your case you but am pleased to confirm that we have now completed our assessment which is explained in detail below.

I note that you are still concerned that you have not received the meta data from Judge [redacted] computer. As I understand it, some of the requested information has been provided. However, please find below our detailed explanation and assessment of your case.

When we last wrote to you, we explained that our aim is to improve information rights practices. We do this by taking an overview of all concerns that are raised about an organisation with a view to improving its compliance with the Data Protection Act ('the DPA').

We also explained that depending on the circumstances, we may give an organisation advice about handling personal information, provide guidance, or ask it to review its procedures.

**Concern raised with us**

You are concerned that the MoJ (HMCTS) and related Judges have failed to disclose *all* of the personal data you requested in response to your original subject access request ("SAR") of 29 April 2014.

You are concerned that you have not been provided with copies of Judges' notes from Employment Tribunal proceedings in 2013, including notes from Judge [redacted]; Judge [redacted] and [redacted] Judge [redacted].

You are also concerned that personal data was destroyed by panel members involved in your case before the specified retention guidelines and that you received the personal data of a panel member (including his home address and telephone number) in error.

In addition, you are concerned that panel members were authorised to take notes from the proceedings home.

In this case, the matters raised that are relevant to the DPA relate to the fifth, sixth and seventh data protection principles.

The fifth data protection principle states that personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

It would be impractical for the DPA to be able to give specific retention periods for every type of organisation that must comply with the DPA. Therefore the fifth principle means in practice that once it is no longer necessary for a data controller to retain data collected for a particular purpose, they should take the appropriate steps to dispose of it.

The DPA does not define how long is 'necessary'. However the fifth principle implies that only in exceptional circumstances should data be kept indefinitely. In order to comply with the principle, the data controller should have a system for the removal of different categories of data from their system after certain periods. E.g. when a statutory period for holding certain data has come to an end.

The sixth data protection principle states that personal data shall be processed in accordance with the rights of data subjects under the Act.

The seventh data protection principle states that appropriate technical and organisational measures shall be taken against the unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

**Our view**

As you are aware we have written to the MoJ (HMCTS) about this matter and have now received its response. On the basis of all of the information provided by you and the MoJ (HMCTS), we have decided that it is unlikely

that the MoJ (HMCTS) has complied with the requirements of the DPA in this case. Therefore, it is our view that there is now action required by the MoJ (HMCTS).

Subject Access Requests

The MoJ (HMCTS) has confirmed that the SARs in question were dated/referenced as follows:

DPA-90661 (29 April 2014):

The MoJ (HMCTS) logged and acknowledged your SAR to it on 7 May 2014 and responded on 4 June 2015 stating that Judge [redacted] does not consider the handwritten notes of evidence to be data under the DPA and that the information would not be provided in this instance. It also advised that the lay members [redacted] and [redacted] 'no longer hold their notes from the February 2013 hearing'.

DPA-93216 (8 September 2014):

You pursued your request further with the MoJ (HMCTS) on 13 June 2014 and 18 August 2014 (acknowledged as a SAR on 8 September). On 22 September 2014 the MoJ (HMCTS) confirmed that it held the data in question, including Judge [redacted] handwritten notes. Some of the requested information was provided, excluding the Judges notes.

DPA-97404 (6 May 2015):

This relates to your request of 20 March 2015 (and 28 April 2015) to include 'metadata of the [redacted] Office notes passed to [redacted]'. Some of the requested information appears to have been provided on 27 May 2015.

On the basis that the MoJ (HMCTS) did not provide all the information you are entitled to and in addition (in the latter case) did not appear to meet the statutory timescale of 40 calendar days, it is the ICO's view that it has not fulfilled its obligations under the sixth data protection principle and is therefore unlikely to have complied with the requirements of the DPA.

**Withheld Data**

The MoJ has argued that the judicial notes which have been withheld are not 'data' for the purposes of the DPA - specifically that the notes are not part of a relevant filing system and that even if they are, they should not be provided:

*"if such notes are held by an administrative officer or on a computer system operated by an administrative body for the judge, tribunal or panel member, they are held on behalf of the judge, tribunal or panel member and remain under the sole control of the judge, tribunal or panel member. No person has a right of access to them. They must never be disclosed or provided to any person".*

Is the Information 'Data'?

Section 1(1) of the DPA set outs the definition of 'data' as follows:

*'"data" means information which—*

*(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
*(b) is recorded with the intention that it should be processed by means of such equipment,*
*(c) is recorded as part of a relevant filing system, or*
*(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;'*

Relevant filing system is defined as 'any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible'.

The ICO accepts that in the majority of cases, handwritten judicial notes, recorded in a judge's notebook and retained by the judge are unlikely to form part of a structured filing system and therefore, will not fall within the definition of 'data'.

However, where the handwritten notes have been added to the court file it is very likely that the information is recorded as part of a relevant filing system. We assume that court files will be structured according to the specific case, which will include reference to the data subject; this means the information relating to the data subject is readily accessible (you). If so, the handwritten notes in the court files will be 'data' for the purposes of the DPA.

Who is the data controller?

The MoJ (HMCTS) has explained that it is not the data controller in this instance as the notes were written by another data controller (the Judge).

It is well established that judges are data controllers for personal data where processing is undertaken in a judicial capacity. As highlighted above, in some cases personal information in judges' notes will not fall under the scope of the definition of relevant filing system and therefore may not be 'data' for the purposes of the DPA.

In relation to 'pure' judicial personal data at one end of the spectrum (e.g. a judge's personal notes for a case held on a laptop), it is likely that the judge alone determines the purposes for which and the manner in which any personal data are processed and so is the sole data controller in relation to those data.

There will be a range of data in relation to which both the MoJ (HMCTS) and the Judge have powers to determine the purpose for and the manner in which they are processed and in relation to which both may qualify as data controllers. The identity of the data controller may change over time as once a case is closed and the judge no longer holds the personal data, he is no longer a data controller in respect of that personal data. The MoJ (HMCTS), by contrast, as the responsible body for archiving the files, etc. would continue to be a data controller.

In cases where a judge's handwritten notes have been added to the court file, the MoJ will become the data controller for the information. The purpose of a court file is for administration of justice (maintaining a record of the proceedings and collation of evidence and other information relevant to a specific case), and to serve as a historical/archived record. The MoJ decides how the documents contained in the court file are structured, managed and accessed for these purposes. In effect, the MoJ is determining the purposes for which and the manner in which all of the personal data contained within the data is processed. The fact that another data controller originally produced the personal data doesn't affect this.

Therefore it is the ICO's view that access to all of the information contained within the court file, including the handwritten notes should be provided to you, subject to s7(4) and s8(2) or unless an exemption applies.

The High Court in R v Parole Board CO/1523/2013

We have sought advice from our Policy team regarding this case and it is the ICO's view that it is difficult to see how the case quoted by the Judge really impacts upon the decision the MoJ (HMCTS) had to make.

In short, the case illustrates that notes can be made up of both notes that are the record of proceedings and notes made to prepare to reach a

reasoned decision. Therefore, it is the ICO's view that MoJ (HMCTS) decision should not be influenced by this case.

However, the ICO has considered this judgement previously and believes that our approach is consistent with the findings (outlined above). The ICO position recognises the distinction between informal (handwritten) notes (which will not be data for the purposes for the DPA) and where notes are added to the court file, and thus become part of the formal or official record (and thus fall within the definition of data explained above).

Retention of Panel member notes

I note from the information provided by you that the MoJ (HMCTS) has provided contradictory information with regard to the retention period for panel members' notes. This ranges from three months to 12 months.

However, the MoJ (HMCTS) has confirmed that the agreed retention period for panel members' notes is 60 days from the end of the hearing according to a standards document for Non-Legal Members and Judges.

It has also confirmed that the notes in question were destroyed as follows:

, no specific date of destruction was recorded but the notes were destroyed within guidance provided of 'six months' when the notes were then shredded.

these were destroyed under the 'three month' rule of keeping notes. The documents were shredded at the end of the three month period (unless they are required to be kept as a result of an appeal). The notes were shredded on either "3 or 4 May" (year not provided, but assumed to be 2013).

Whilst there appears to be a stated retention period it is clear that this has not been applied in this case and that there is little consistency amongst panel members. It is clear that the destruction of the notes in question took place outside the stated retention period of 60 days.

However, it is possible that these notes may not fall under the definition of data previously identified and therefore may not be subject to the DPA. It is also unclear who provides the guidance to Non-Legal Members and Judges, therefore it may not fall under the responsibility of the MoJ (HMCTS).

Panel Members taking home notes from the Employment Tribunal

The MoJ (HMCTS) has advised that Non-Legal (Panel) Members (NLMs) are responsible for the safe storage and destruction of their own notes. The notes are not a verbatim record or a record of proceedings. They are notes made to enable the decision making process. The notes were not considered to be personal data.

On this basis, these notes may not fall under the definition of 'data' previously identified.

It is not clear whether a further copy of these notes is retained within the court file. However, I note in a letter to Mr Percival of 7 August 2014, the MoJ (HMCTS) stated that 'notes of evidence (of panel members) are not classed as part of the file, even if they are held within it. This is because the notes remain the property of the Judge who made them, while the file belongs to administration'.

Clearly if the notes are held on the court file, this contradicts the ICO view outlined above as notes held on the file are classed as 'data' under the DPA. As such the notes held on file will be subject to the seventh data protection principle.

Disclosure of Personal Data

[redacted]

**Action required**

We have recommended that the MoJ (HMCTS) reviews your SAR to ensure you are provided with all the withheld information you are entitled to within the scope of your SAR. This includes all the personal information contained within the court file, including the handwritten notes, subject to s7(4) and s8(2) or unless an exemption applies.

We have also recommend that the MoJ (HMCTS) liaise directly with you to provide an expected timescale for the review of your SAR, including the provision of any outstanding 'meta data'.

In addition, we have recommended that the MoJ (HMCTS) confirms to the ICO whether the standardisation of stated retention periods for notes of Non Legal Panel Members falls within its remit.

However, please be aware that although we have made our assessment and concluded that the MoJ should disclose the withheld information to you, this issue remains ongoing with the MoJ (HMCTS) as we continue to liaise with it on this matter.

**Next steps**

Based on the information provided in relation to this concern, the Information Commissioner has decided that further regulatory action is not required at this time.

When deciding whether regulatory action is appropriate, we take into account the organisation's general record of compliance with the DPA. This may include any previous assessments we have made, or any regulatory action we have already taken against the organisation. We may also consider any other information that is in our possession (including information given during the course of our assessments).

However, most organisations want to put things right when they have gone wrong and learn from concerns that are raised with them. We have therefore asked MoJ (HMCTS) to consider the information we have provided during the course of this assessment and take steps to prevent the situation from happening again.

We will keep a record of your concern and take this assessment into account if we receive further concerns about the MoJ (HMCTS). The information we gather from concerns may form the basis for action in the future.

Thank you for bringing this matter to our attention and once again, please accept my apologies for the delay in concluding your case. If you require any further information or explanation, please do not hesitate to contact me on the direct number below.

Yours sincerely

Lead Case Officer
The Information Commissioner's Office
Direct dial number: (Monday-Wednesday)