

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2021

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
30 Millbank
Westminster
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested the Parliamentary and Health Service Ombudsman (PHSO) to provide all documents of any kind which contain any mention of the term 'functus officio' for the period 1 August 2016 to 1 February 2018. The PHSO refused to disclose the requested information, citing sections 40(2), 42(1) and 44(1)(a) of the FOIA.
2. The Commissioner's decision is that the PHSO is entitled to refuse to disclose the requested information in accordance with one or more of the exemptions cited; sections 40(2), 42(1) and 44(1)(a) of the FOIA.
3. The Commissioner does not require any further action to be taken in this case.

Request and response

4. This notice concerns a refined request the complainant made to the PHSO on 7 June 2019. The complainant requested information in the following terms:

"...would you please provide all documents of any kind, including emails, notes, etc, which contain any mention of the term 'functus officio', only from your record management system so no cross referencing necessary, for the period 1 August 2016 to 1 February 2018 (18 months), that have not previously been produced for FOI FDN-275088."

5. The PHSO responded on 27 June 2019. It stated that in accordance with section 10(3) of the FOIA it was extending the time for compliance by a further 20 working days to consider the public interest test under section 42 of the FOIA.
6. The PHSO responded further on 1 August 2019. It stated that with the exception of copies of case law which would engage section 21 of the FOIA, it is refusing to disclose the requested information in accordance with section 40(2), 42(1) and 44(1)(a).
7. The complainant requested an internal review on 23 August 2019.
8. The PHSO carried out an internal review and notified the complainant of its findings on 14 October 2019. It upheld its application of sections 40(2), 42(1) and 44(1)(a) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 16 January 2020 to complain about the way his request for information had been handled. He stated that he requested information about communications regarding the legal principle of *functus officio*. He advised that it is known that this principle, which states that an arbitrator cannot review his own decisions, has been much discussed at the PHSO. He considers it is a matter of public interest to understand how the PHSO regards its position in relation to the legal principle. The complainant therefore disagrees with the application of sections 40(2), 42(1) and 44(1)(a) of the FOIA and believes the withheld information should be disclosed.
10. The Commissioner considers the scope of her investigation to be to determine whether or not the PHSO is entitled to rely on sections 40(2), 42(1) and 44(1)(a) of the FOIA to withhold the requested information.

Reasons for decision

11. The Commissioner has reviewed the withheld information and she is satisfied that it is all exempt from disclosure in accordance with one or more of the exemptions cited by the PHSO. She will now explain why.

Section 40 personal information

12. Section 40(2) of the 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.

13. 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').
14. 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 section 40 of the FOIA cannot apply.
15. 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?

16. Section 3(2) of the DPA defines personal data as:

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a number of complaints brought to the PHSO. The withheld information either directly refers to the complainants or contains information from which those complainants could be identified, from either that information alone or a combination of the withheld information and other information otherwise available. She is satisfied that the

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

information withheld under this exemption both relates to and identifies the complainants concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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

Would disclosure contravene principle (a)?

23. Article 5(1)(a) of the GDPR states that:

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

24. 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 if to do so would be lawful, fair and transparent.
25. 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

26. The Commissioner considers that the lawful basis most applicable is basis 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".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) 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

27. In considering the application of Article 6(1)(f) 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 disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
28. 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

29. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The complainant considers there is a legitimate interest in understanding more closely how the PHSO applies the legal principle of *functus officio* in the cases brought to it. He confirmed that *functus officio* states:
- "once an arbitrator renders a decision regarding the issues submitted, he lacks any power to re-examine that decision"
31. He stated that there has been considerable debate within the PHSO about whether the PHSO can lawfully review and re-open investigations after a final decision is made. Every year many hundreds of complainants request reviews of the decision the PHSO has made. He

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

argued that if the PHSO was considered to be acting unlawfully, or even potentially unlawfully, by reviewing these decisions, then it would be betraying the trust of the members of the public who come to it in the hope of resolving their complaints with public bodies.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or 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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner is not aware of any alternative, less intrusive measures which would make the disclosure of the requested information unnecessary. She accepts there is a legitimate interest in disclosure of the withheld information and these legitimate interests cannot be addressed by less intrusive means.

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

34. 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 the 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.
35. In considering this balancing test, the Commissioner has taken 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
36. 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.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

38. The Commissioner considers the complainants will expect the withheld information to remain private and confidential and to not be disclosed to the world at large. Often such complaints will address sensitive and distressing issues. If disclosure took place it would add to the distress and upset of those individuals. It would also be an unwarranted intrusion into the private life of those individuals.
39. The Commissioner notes that the complainant believes some of the complainants have already consented to the disclosure of their personal information in a previous hearing of the First-tier Tribunal. He considers there is therefore no reason to believe their consent to disclosure would not apply to this particular request. The Commissioner disagrees. Each request and set of circumstances must be considered on its own merits and she is of the view that consent is not open ended. A complainant may have agreed to disclosure in relation to one request, based on the circumstances of that request and the circumstances at that time. But that does not automatically mean they will consent to such disclosures in the future. Often complaints brought to the PHSO involve the death or serious health issues of loved ones. Circumstances may have moved on and it is reasonable to assume that for some complainants they will not wish for the matter to be brought to the forefront again. Referring to the tribunal hearing the complainant makes reference to, she understands that the two individuals discussed in that appeal consented to disclosure at the time. These requests concern the personal data of other complainants too; complainants whose consent has not been sought.
40. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
41. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 42 – legal professional privilege

42. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information.

43. The PHSO advised that the withheld information falling within this exemption is either subject to advice privilege or litigation privilege and therefore subject to LPP. The purpose of the withheld information is either the seeking or giving of legal advice about proposed or contemplated litigation or the seeking or giving of legal advice where no litigation is in progress or contemplated. Consequently all the information withheld under this exemption can be categorised as confidential communications with a legal context between client and lawyer made for the dominant purpose of seeking or giving of legal advice, including for litigation purposes.
44. In his submissions to the Commissioner the complainant stated that LPP is waived if the legal advice provided is shared with third parties. He refers to the following statement the PHSO made in response to his information request:

“We consider that it is not in the public interest to disclose into the public domain information which is intended to ensure confidentiality between professional legal advisers and their clients (in this case, the Ombudsman, Complainants and Legal Officers)”
45. He argued from this statement it seems clear that legal advice obtained by the PHSO has been shared with complainants, who would not be regarded as clients under the general principles of legal professional privilege, and therefore LPP has been waived and legal advice should be disclosed.
46. The Commissioner has reviewed the withheld information. She is satisfied that the information withheld under this exemption either constitutes advice privilege or litigation privilege and is therefore subject to LPP. The withheld information is confidential communications between client and lawyer for the dominant purpose of seeking or giving legal advice, some for litigation purposes and some not. For these reasons, the Commissioner is satisfied that section 42 of the FOIA is engaged.
47. With regards to the complainant’s assertion that LPP has been waived, it is the Commissioner’s view that arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under FOIA. This is because under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a FOIA context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

Public interest test

48. The PHSO confirmed that it recognised the public interest in promoting accountability and transparency about decisions made by a public authority and in this respect information held referencing the term

'functus officio' with the potential for this to allow individuals to understand decisions affecting their lives.

49. However, the PHSO felt the public interest rested in maintaining the exemption. It stated that the information withheld under this exemption has been classified LPP. As such, the PHSO must have the ability to speak freely and frankly with legal professionals to obtain appropriate and sound legal advice and this is a fundamental requirement of the English legal system. It argued that LPP protects the confidentiality of communications between client and lawyer. LPP is an important principle, as the First-tier Tribunal found in *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023):

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

50. It also referred to the Upper Tribunal hearing of *DCLG v IC & WR* [2012] UKUT 103. It stated that there is a significant public interest in preserving legal privilege. In this hearing it was confirmed that privilege has great importance to maintaining a fair and proper judicial process.
51. The PHSO considers it is not in the public interest to disclose into the public domain information which is intended to ensure confidentiality between legal adviser and their clients. Disclosure of such information could materially prejudice ongoing or future litigation.
52. The Commissioner acknowledges the public interest in favour of disclosure. It would promote openness, transparency and accountability and enable members of the public to understand more closely how the PHSO regards the legal principle of 'functus officio'. She recognises that the PHSO's approach to 'functus officio' directly affects the way in which it processes the complaints brought to it and therefore it will affect potentially a considerable number of individuals.
53. The complainant believes over the years thousands of people will have applied to the PHSO for their cases to be reviewed. He argued that they have trusted that the PHSO's process is lawful. He considers it is very much in the public interest to be certain that the process is lawful, not just for those who have had their cases reviewed, but also for the public in general who may want to take a complaint to the PHSO in the future and will want to be certain that the process is lawful. The Commissioner agrees there is a public interest in ensuring that the process followed by the PHSO is lawful.
54. However, in this case the Commissioner considers the public interest rests in maintaining the exemption. As the PHSO has rightfully pointed out there is a significant inbuilt public interest in maintaining the important principle of LPP. It is required to maintain a fair and proper

judicial process. There is a strong public interest in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

55. In the First-tier Tribunal hearing of *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006), the tribunal explained the balance of factors to consider when assessing the public interest. It stated:

“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

56. In this case, while the Commissioner accepts there is a public interest in understanding more closely the PHSO’s approach to ‘*functus officio*’ and ensuring that the processes it has in place are lawful, she does not consider these are sufficient to outweigh the strong public interest arguments in favour of maintaining LPP and the ability of the PHSO to seek and obtain candid and full legal advice when this is needed. For these reasons the Commissioner has concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Section 44 – prohibitions on disclosure

57. Section 44(1)(a) of the FOIA provides that information is exempt information if its disclosure is prohibited by or under any enactment. It is an absolute exemption so the public interest balance does not apply.

58. The PHSO argued that the relevant legislation specifies that investigations must be conducted in private and that information obtained for the purposes of an investigation may only be disclosed in certain circumstances as set out in section 11(2) of the Parliamentary Commissioners Act (PCA) 1967 and Section 15(1) of the Health Service Commissioners Act (HSC) 1993.

59. The PHSO said that the information withheld under this exemption is communications from complainants to the PHSO about their complaint cases. It is therefore exempt under section 44(1)(a) of the FOIA by virtue of section 11(2) of the PCA and section 15(1) of the HSC.

60. In his submissions to the Commissioner the complainant stated that Section 11(2) of the PCA and Section 15(1) of the HSC states:

“Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed...”

61. He confirmed that the PHSO has tried to claim:

“Any communications between a complainant and the PHSO by their very nature are either in the course of or for the purposes of an investigation”

He stated that clearly this is not correct. He argued that there can be many communications between a complainant and the PHSO after an investigation has been completed that are not made in the course of or for the purposes of an investigation. Once an investigation has been completed and the final decision made then any subsequent communication is by definition not in the course of or for the purposes of an investigation and should be disclosed.

62. The prohibition relied on is section 11(2) of the PCA which provided, at the relevant time:

“(2) Information obtained by the Commissioner or his offices in the course of or for the purposes of an investigation under this Act shall not be disclosed except –

(a) for the purposes of the investigation and of any report to be made thereon under this Act;

(aa) for the purposes of a matter which is being investigated by the Health Service Commissioner for England or a Local Commissioner (or both);

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or

(c) for the purposes of any proceedings under section 9 of this Act; and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the the course of an investigation under this Act.”

63. Section 15 of the HSC is the equivalent provision for the PHSO’s other office.

64. The Commissioner has reviewed all the withheld information under this exemption and she is satisfied that it falls within the definition of section 11(2) of the PCA. It is information obtained in the course of or for the purposes of an investigation. She does not agree with the complainant that simply because a document was created after an investigation is concluded it does not contain information obtained for the purposes of that investigation. The withheld information contains and discusses

information obtained during and for the purposes of that investigation; information which was obtained prior to the investigation being concluded.

65. The Commissioner is therefore satisfied that the disclosure of the information withheld under this exemption is prohibited under an enactment and section 44(1)(a) of the FOIA is engaged. Again, as this is an absolute exemption, there is no public interest test to carry out.
66. Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision. This is not something for the Commissioner or the First-tier Tribunal to decide. If there is a statutory prohibition on disclosure and the authority had decided that it is not disapplied by a gateway, the Commissioner will accept that section 44(1)(a) applies. This position was established by the binding decision of the Upper Tribunal in the case of *Ofcom v Gerry Morrissey* and the IC, 2011 UKUT 116 AAC.

Other matters

67. The Commissioner notes that a small amount of the withheld information is the complainant's own personal data. The PHSO has checked its records and confirmed that it has no record of processing a subject access request for the complainant in the last three years. The Commissioner suggests the PHSO engages with the complainant to see if he requires access to this information and if he does, proceed to process a subject access request in accordance with the Data Protection Act.

Right of appeal

68. 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

69. 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.
70. 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

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