

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2012

Public Authority: The Information Commissioner

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 ("FOIA"), he is under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this Notice (although this right may be restricted by the appellate body in certain circumstances). For the sake of clarity, in this notice the term "ICO" is used to denote the Information Commissioner dealing with the *request*, and the term "Commissioner" denotes the Information Commissioner dealing with the *complaint*.

Decision (including any steps ordered)

1. The complainant requested information from the ICO contained in a case file of an investigation into the unauthorised accessing of her medical records by an employee of a health body. The ICO disclosed some information but withheld information contained in a report provided to it by the health body which related to the employee and the action taken by the health body in relation to that employee. The information was withheld under sections 40(2) and 44.
2. The Commissioner's decision is that the ICO has correctly applied sections 40(2) and 44 to the withheld information. He therefore does not require the ICO to take any steps to ensure compliance with the legislation.

Request and response

3. On 20 December 2011, the complainant wrote to ICO and requested information about its investigation into a possible breach of the Data Protection Act ("DPA") concerning the unauthorised accessing of her medical notes and records.
4. The letter was received by the ICO on 23 December 2011. The ICO wrote back to the complainant on 4 January 2012 to clarify the scope of the request. It asked for confirmation as to whether the complainant was requesting all of the information held by the ICO under specific case reference number concerning the investigation of the unauthorised accessing of her medical records.
5. The complainant wrote back on 10 January 2012 and confirmed that the information she was seeking was that held under the specific case reference number. In particular, she wished to ascertain the identity of the person involved and details of the disciplinary action taken against that person.
6. The ICO responded on 8 February 2012. It provided some information within the scope of the request. It withheld some information contained in a report provided to the ICO by a health body about the unauthorised accessing of personal data of patients by one of its employees. The report contained information about the employee concerned, provided details about their unauthorised accessing of personal data and what action was taken in relation to the employee. This information was withheld under sections 40(2) and 44.
7. The ICO explained that, in relation to the application of section 40(2), it would not be fair to release information about the individual concerned as it considered there is a general expectation of confidentiality surrounding personal data regarding workplace investigations and disciplinary proceedings. In relation to the application of section 44, the ICO explained that it did not have lawful authority to disclose the information withheld under this section of the Act as it was provided to the ICO in confidence and its disclosure, without that lawful authority, is prohibited by section 59 of the DPA.
8. The complainant requested an internal review on 22 March 2012. The ICO sent the outcome of the internal review on 11 April 2012. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way the request for information had been handled. Specifically, she complained about the ICO's decision to rely on exemptions to withhold information contained in the report provided to the ICO by the health body.
10. The Commissioner considered whether the ICO was entitled to rely on sections 40(2) and 44 to withhold information contained in the report.

Reasons for decision

Section 40(2) – Personal information

11. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
12. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the DPA. This is an absolute exemption, and is therefore not subject to a public interest test.
13. The ICO has sought to rely upon this exemption to withhold parts of a report compiled by a health body dealing with unauthorised accessing of medical records by an employee of that body. The information withheld under section 40(2) includes details of the investigation that was carried out by the health body and details of what disciplinary action was subsequently taken against the employee. The ICO argued that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA.

Does the withheld information constitute personal data?

14. In order to establish whether this exemption has been correctly applied the Commissioner first considered whether the withheld information is the personal data of a third party, namely the health body's employee.

15. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
16. The withheld information does not contain the name the relevant employee. However, the ICO explained how it would be possible to identify the individual concerned from the withheld information if it were to be disclosed. The Commissioner accepts that this is the case and that it therefore clearly relates to an identifiable individual and is also about that individual. Therefore, the Commissioner is satisfied that this information is the personal data of a third party, namely the relevant employee.

Does the withheld information constitute sensitive personal data?

17. The ICO argued that the investigation to which the report related centred on the unlawful obtaining of personal data by the employee. This is a criminal offence under Section 55(1) of the DPA. It therefore concluded that the withheld information was sensitive personal data concerning the employee as defined in the DPA.
18. "Sensitive personal data" is defined in section 2 of the DPA as personal data which falls into one of the categories set out in that section.
19. The withheld information comprises parts of a report created in response to complaints made under the DPA concerning the possible commission of a criminal offence by the employee. The Commissioner accepts that the disclosure of this information would allow the employee to be identified. He is therefore satisfied that it meets the definition of sensitive personal data under section 2(g) of the DPA as it is:

"...personal data consisting of information as to-

.....

(g) the commission or alleged commission by him of any offence".

20. The fact that the information constitutes personal data, or sensitive personal data, does not automatically exclude it from disclosure. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
21. Having accepted that the requested information constitutes the sensitive personal data of a living individual, the Commissioner then considered whether disclosure would breach one of the data protection principles.

Would disclosure breach one of the Data Protection principles?

22. The Commissioner has gone on to consider whether the disclosure of this information would be a breach of the first principle of the DPA. The first data protection principle requires that:
- (i) any disclosure of information is fair and lawful; and
 - (ii) at least one of the conditions in schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
23. The Commissioner initially considered whether the disclosure of the withheld information would be fair. In doing this he took into account the following factors:
- (i) the individual's reasonable expectations of what would happen to their information;
 - (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned; and
 - (iii) whether the legitimate interests of the public were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

(i) Expectations of the individual concerned

24. The information withheld under section 40(2) relates to the investigation of, and subsequent disciplinary action against, an employee of the health body in relation to unauthorised accessing of medical records. The Commissioner is satisfied that the disclosure of this information would allow the individual concerned to be identified.
25. Disclosure of information under the FOIA is disclosure to the public at large and not just to the complainant. The Commissioner recognises that people have a reasonable expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that it will respect confidentiality.
26. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, he considers that certain types of information should generally not be disclosed even though such information relates to an employee's professional life, and not their personal life. One of those types of information is information that relates to disciplinary/personnel matters, and his general view is that

this type of information should remain private. He considers that information relating to an internal investigation and subsequent disciplinary action will carry a strong general expectation of privacy.

27. The Commissioner is satisfied that the employee in this case would have had a reasonable expectation that that information relating to the investigation into this matter by their employer and the subsequent disciplinary action that was proposed, and taken, would not be disclosed where such disclosure would allow them to be identified.

(ii) Consequences of disclosure

28. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion into the privacy of the individual but could potentially cause an unnecessary and unjustified adverse effect.

(iii) General principles of accountability and transparency

29. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
30. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
31. The complainant argued that it was in the public interest to reveal the identity of healthcare professionals who access private medical records of adults and children without authorisation or medical inclination. She pointed out that the behaviour of the individual in this case constituted a criminal offence under the DPA and the Computer Misuse Act and that she was firmly of the belief that she had a right to know the identity of the individual concerned given that she was the injured party. The complainant explained that she was eager to ascertain the identity of the individual involved in order to allow her to take all appropriate steps to prevent the disclosure of such confidential material into the public domain.
32. The Commissioner is aware that the complainant has a particular, and understandable, interest in knowing the identity of the person who accessed her medical records and in satisfying herself that

appropriate disciplinary action has been taken by the employer. However he is not able under FOIA to base his decision on her personal interest in disclosure. He has to consider whether the interests of the public as a whole justify the disclosure of the information.

33. He is also mindful that disclosure under FOIA is to the world at large. Therefore the impact of disclosure could significantly impact on the life of the person concerned.
34. The Commissioner considers that there is a legitimate interest in openness and accountability. In the circumstances of this case he considers that there is a valid interest in ensuring that the health body has investigated the issue properly and that it has subsequently taken appropriate steps in relation to the employee concerned.
35. However, the Commissioner considers that the public's interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the employee concerned. The Commissioner accepts the ICO's contention that the individual would have a strong expectation of privacy and confidentiality concerning the details of disciplinary matters. The Commissioner also notes that there is no suggestion that the identity of the employee or any of the withheld information has been placed in the public domain.
36. Taking into account the above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subject, the employee, to privacy. This decision has been informed by his consideration of the reasonable expectations of the employee and the possible consequences of disclosure, as detailed above.
37. The Commissioner has therefore concluded that it would be unfair to disclose the withheld information as this would breach the first data protection principle. As he has determined that it would be unfair to disclose the requested information, it has not been necessary for him to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 3 of the DPA are met. He therefore upholds the ICO's application of section 40(2).

Section 44 – Prohibitions on disclosure

38. Some of the information that was not disclosed was withheld section 44(1)(a) of FOIA which provides that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it–

(a) is prohibited by or under any enactment”.

39. Section 59(1) of the DPA provides that:

‘(1) No person who is or has been the Commissioner, a member of the Commissioner’s staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.’

40. Section 59(2) then goes on to define the only circumstances where the ICO has lawful authority to disclose such information.

(i) Does the withheld information meet the three criteria of section 59(1)?

41. In an earlier decision notice, issued under reference FS50126668, the Commissioner described section 59(1)(a) as referring to “...*all information held by the Commissioner for the purposes of and in relation to investigations that he conducts following complaints about compliance with the legislation over which he has jurisdiction*” (paragraph 21).
42. The Commissioner is satisfied that the information that has been withheld has been furnished to the ICO for the purpose of an investigation under the DPA. The ICO would not have received this information had it not been the regulator of the DPA. It therefore satisfies the requirement found in section 59(1)(a).
43. With regard to section 59(1)(b), the information clearly relates to the health body that provided the report and the employee of that body who accessed the medical records without authority. In relation to section 59(1)(c), the disputed information has not been disclosed to the public.
44. The Commissioner is therefore satisfied that section 59(1) applies to the information that has been withheld under section 44.

(ii) Does the ICO have lawful authority to disclose the withheld information under section 59(2)?

45. As previously noted, section 59(2) provides for a number of situations in which information falling within the description of section 59(1) may be disclosed. The section provides an exhaustive list of situations where the ICO has lawful authority. The Commissioner considered each of these in turn.
46. Section 59(2)(a) provides that the statutory bar will not apply if the ICO has permission from the individuals concerned to disclose the disputed information. The ICO has confirmed that it does not have such permission and so the Commissioner does not consider that this subsection is applicable.
47. Section 59(2)(b) provides that the statutory bar does not apply when the information was provided for the purpose of it being made available to the public under the information Acts. The ICO has confirmed that it was not provided with the information for this purpose and so the Commissioner does not consider that this subsection is applicable.
48. Section 59(2)(c) provides that the statutory bar does not apply if the disclosure was necessary for the ICO to undertake its functions under the information Acts or comply with a community obligation. The ICO has confirmed that it does not believe that such a disclosure is necessary to undertake its functions. Indeed, in its view the disclosure of the information to the public in this case would be likely to inhibit its ability to undertake its functions.
49. In considering the ICO's position in relation to section 59(2)(c), the Commissioner notes the decision of the Upper Tier Tribunal in *OFCOM v Morrissey and the Information Commissioner ([2011] UKUT 116 (AAC)2*). The Tribunal was concerned with the situation where a statutory bar includes gateways to disclosure which may be applied at a regulator's discretion. It made it clear that in such situations it is not for the Commissioner to question whether another regulator applied their discretion under the relevant gateways correctly. The Tribunal confirmed that the correct channel for a person to challenge the use of discretion by a regulator was the administrative court.
50. Consequently it follows that it is not for the Commissioner to question whether the ICO, as the regulator of the information Acts, applied its discretion under section 59(2)(c) correctly. He must therefore defer to the ICO's decision that this subsection is not applicable.

51. Section 59(2)(d) provides that the statutory bar does not apply where the ICO believes that disclosure of the information is necessary for proceedings. The ICO confirmed that it did not believe that the disclosure of the disputed information is necessary for proceedings and so the Commissioner does not consider that this subsection is applicable.

52. Section 59(2)(e) provides that:

“For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest”.

53. The ICO confirmed that it did not consider that disclosure was necessary in the public interest. It should be noted that, when assessing whether disclosure is “necessary in the public interest”, the ICO is not restricted to consider only the factors it would be able to take into account if it was conducting a public interest test under section 2 of the Act. As with section 59(2)(c), the Commissioner does not have the power to consider the way the ICO exercised its discretion. As the ICO does not believe that disclosure is necessary in the public interest, the Commissioner does not consider that this subsection is applicable.

54. As the withheld information satisfies the three criteria in section 59(1) and the Commissioner has no basis to determine that the ICO was incorrect to decide that none of the provisions in section 59(2) provide it with lawful authority for disclosure, it follows that section 44 is applicable. The Commissioner therefore finds that the ICO was correct to withhold information under section 44.

Right of appeal

55. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

56. 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.
57. 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

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