

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 November 2019

**Public Authority:** Parliamentary and Health Service Ombudsman  
**Address:** City Gate  
47 – 51 Mosley Street  
Manchester  
M2 3HQ

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of a final decision to a complaint. The Parliamentary and Health Service Ombudsman (PHSO) refused the request under section 40(2) and section 44(1)(a) of the FOIA.
2. The Commissioner's decision is that the PHSO has correctly applied section 44(1)(a) of the FOIA on the basis that the requested information is prohibited from disclosure under section 11(2) of the Parliamentary Commissioners Act (PCA) 1967<sup>1</sup>.
3. The Commissioner does not require the PHSO to take any further steps.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/1967/13/contents>

## Request and response

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4. On 1 July 2019, the complainant wrote to the PHSO and requested information in the following terms:

*'I appeal your decision to decline my Request. The information is public information. Any personal details like a name or address can be redacted. It is disproportionate to withhold the public information on the basis of private information that can be redacted'*

5. The PHSO responded on 24 June 2019. It confirmed that it held information relevant to the request but refused the request under section 40(2) and section 44(1)(a) of the FOIA.
6. With regard to section 44(1)(a), the PHSO stated that they were prohibited from disclosing a copy of their final decision by section 11(2) of the PCA.
7. Following an internal review the PHSO wrote to the complainant on 29 July 2019. It maintained its position with regard to the request.

## Scope of the case

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8. The complainant contacted the Commissioner on 17 August 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine whether PHSO has correctly applied section 44(1)(a) to the withheld information. If the Commissioner finds section 44(1)(a) has been incorrectly applied by the PHSO then she will go on to consider the application of section 40(2) to the withheld information.

## Reasons for decision

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10. *Section 44 of the FOIA states that:*

*(1) 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,*

*(b) is incompatible with any Community obligation, or*

*(c) would constitute or be punishable as a contempt of court.*

11. Section 44 is an absolute exemption. If information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to a public interest test.
12. The PHSO stated that the relevant legislation from which it draws its parliamentary jurisdiction is the Parliamentary Commissioners Act 1967 and the relevant exemption lies at section 11(2) – Provision for secrecy of information.
13. Section 11 of the PCA, headed 'Provision for secrecy of information' states at subsection (2) that information obtained by the Commissioner or his officers 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 officer 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 course of an investigation under this Act.*
14. The Commissioner recognises that this legislation prohibits disclosure of information obtained during an investigation. She also acknowledges the provision of privacy at section 7(2) of the PCA 'Every investigation under this Act shall be conducted in private'.
15. The complainant in this case is seeking a copy of a "final decision" in a complaint submitted to the PHSO. The PHSO explained to the Commissioner that this final decision is communicated to complainants and named organisations/individuals as part of a final investigation report following an investigation process.

16. The PHSO consider the final decision to be information obtained in the course of, or for the purposes of, an investigation into a complaint. In this case, the PHSO explain that the complaint was '*parliamentary in nature*' and so a copy of the final decision is prohibited from disclosure under section 11(2) of the Parliamentary Act 1967.
17. The PHSO explained that, in line with their usual practices, they have published a case summary of this complaint which includes the complaint outcome.
18. The PHSO makes reference to exemptions outlined in section 11(2) of the PCA but did not consider any of these exemptions or gateways to dis-apply the prohibition in this particular case. Subject to the Commissioner's published guidance, in cases when there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway then the Commissioner will accept that section 44(1)(a) applies<sup>2</sup>.
19. On the basis of the PHSO's submissions in this case, the Commissioner is satisfied that a copy of the final decision in this case is information obtained in the course of, and for the purpose of, their own investigations.
20. The Commissioner's decision is that the withheld information is exempt from disclosure under section 44(1)(a) of the FOIA. This is an absolute exemption and so the Commissioner is not required to consider the PHSO's application of section 40 to the withheld information.

## **Other Matters**

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21. In further correspondence with the Commissioner the PHSO confirmed that the complaint in this instance may contain the personal data of the complainant (in addition to third party personal data).
22. In light of this, the Commissioner has advised the PHSO to revisit the request and handle it as a Subject Access Request (SAR) in line with the provisions laid out in the Data Protection Act 2018 (DPA).

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

## Right of appeal

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23. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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 .....**

**Mr Phillip Angell  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**