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Access to Personal Data under the UK Freedom of Information Act 2000
A round up of decisions of the Information Commissioner and the Information Tribunal

The UK Freedom of Information Act 2000 (FOI) gives access to all recorded information held by public sector organisations. Where information about individuals is requested an exemption exists under section 40. A number of recent decisions of the Information Commissioner's Office (ICO) and the Information Tribunal have shed light on the application of this exemption.

Pursuant to section 40, if a person asks to see their own information there is an absolute exemption to disclosure. This is not say that he/she will not get the information; only that the request must be treated by the public authority as a subject access request under section 7 of the Data Protection Act 1998 (DPA).

If an FOI request is made for personal information about a third party, the public authority must ask itself, would disclosure of this information breach one of the DPA principles? If the answer is yes, then FOI provides an absolute exemption to disclosure. The main DPA principle to be considered is the first one; information must be processed fairly and lawfully and the processing must be justified in accordance with schedule 2 (and schedule 3 in the case of sensitive personal data) of the Act. If, whilst the public authority is considering the request, the data subject serves a section 10 DPA notice on the public authority (asking it to stop processing his/her data) then the FOI section 40 exemption can still be used to exempt disclosure. However, in this case, it becomes a qualified exemption, meaning that the public interest in disclosure must be considered.

Many public authorities have received requests for information about their staff. Here it is important to distinguish between professional personal information and private personal information. In a decision involving Calderdale Council (24/11/05), ICO ruled that the names of officers who had been on a recruitment trip to Australia should be disclosed to the applicant. Whilst the names were considered to be personal data it was felt that it was fair and lawful to disclose them considering the nature of the officers' role, the amount of public money spent and the responsibility given to them to carry out the task.

In a similar decision involving the Department for Education and Skills (DfES), (4/1/06) it was argued that minutes of senior management meetings which would identify civil servants involved in the meetings were exempt as personal information. ICO decided that it was not unfair to disclose their identities especially considering their seniority and the fact that it would merely identify them as having attended a meeting or given professional advice.

The above decisions have to be contrasted with an ICO ruling in relation to a request made to the Information Commissioner (10/10/06) for the private home addresses of all his salaried staff. It was decided that this was truly personal information which was exempt under section 40.

The more senior a member of staff is, the more the public have a right to know what they do and how much they get paid for doing it. In a decision involving Corby Borough Council (25/8/05), the complainant

requested details of the total amount of money paid to the former Temporary Finance Officer employed by the Council. ICO ordered disclosure stating:

“...it has been recognised for some time that individuals occupying senior posts within public authorities are likely to be subject to greater levels of scrutiny than those in more junior roles. This helps to ensure accountability of those individuals for their actions. We are satisfied that the Former Temporary Finance Officer could not have reasonably expected that the requested information would remain confidential. Disclosure of the requested information should inform the ongoing debate on this issue and help to ensure that processes are implemented by the Council to avoid similar problems in the future.”

The expectation of privacy of the individual and the circumstances giving rise to the creation of the information being requested are also relevant when considering FOI requests. In a decision involving City and County of Swansea (2/10/2006), the council refused to disclose the cash pay off figure, which was part of a compromise agreement, for the former Chief Executive (Vivienne Sugar). This was on the basis that the withheld information was personal information and that disclosure would breach the DPA principles (section 40). The Commissioner agreed with this approach. He took account of the fact that Mrs Sugar had entered into a compromise agreement which contained a confidentiality clause.

What is for certain is that public authorities will henceforth find it very difficult to keep employees' expenses information secret. The public has a right to know how public money is being spent. In a decision involving the House of Commons (22/2/06) the complainant requested a breakdown of the travel expenses claimed by individual MPs for the most recent year for which figures were available in the following four categories: rail travel, road travel, air travel and bicycle. An aggregate figure for travel expenses for each MP is already published but this figure is not broken down into different categories of transport. The House of Commons withheld the information on the basis of section 40. ICO found that the requested information was personal information which could be disclosed without contravening any of the principles of the DPA and, consequently, that the exemption did not apply. The Information Tribunal recently (16/1/07) upheld the Commissioner's decision.

In a decision involving the BBC (11/12/06), the complainant asked the BBC how much its staging of the Children in Need charity appeal programme cost in 2005; how much of the money raised was spent on televising the appeal and how much individual presenters and other personalities including Terry Wogan, Eamon Holmes and Natasha Kaplinsky were paid. The complainant also requested a list of all music acts which were paid for their services on the night.

The Commissioner decided that the exemptions under sections 40 (personal data) and 43 (commercial interests) of the Act, which were submitted by the BBC, did not exempt the information from disclosure. He gave weight to the fact that these were public figures benefitting from public money and the public interest in knowing that charitable donations were spent wisely. He also stressed that there had been a number of press stories about the pay of BBC figures and some had even publically discussed their salaries.

Thus far we have considered cases involving disclosure of personal information about public sector employees or officials. ICO seems to be much more loathed to disclose information about Jo Public.

Certainly it can be argued that he/she has a greater expectation of privacy when it comes to public authorities disclosing their information.

In a decision involving Avon & Somerset Constabulary (22/2/06) the complainant requested copies of documents relating to the trial of Jeremy Thorpe, the former Liberal Party Leader who was acquitted in 1979 of conspiring with three others to hire a hitman to murder Norman Scott. The scope of the initial request was then narrowed to a copy of the Senior Investigating Officer's report and the police authority considered the information to be exempt from disclosure under section 30 (investigations and proceedings conducted by public authorities), section 40 (personal information) and section 38 (health and safety). ICO was satisfied that some of the requested information constituted personal data relating to living individuals and that its disclosure would be unfair and involve contravention of the first DPA principle. It gave weight to the fact that those involved were found not guilty by the court and the fact that their reputations would suffer. He also considered that those who cooperated with the police during the investigation had a legitimate expectation that their details would not be disclosed except in the proceedings.

Many requests received by public authorities will be about information received from third parties in an employment or complaint context. Again the balance at present seems to be in favour of the privacy of the individual.

In the decision reached by ICO involving the Civil Aviation Authority (18/10/05), the CAA was informed by a third party (the informant) that the complainant was ill and therefore expressed concern about his fitness to fly. The complainant requested copies of all the relevant correspondence held by the CAA and specifically asked for the name and address of the informant. The CAA refused to disclose the information citing the exemption relating to personal information. ICO decided that personal data relating to the informant could not be disclosed without breaching the first DPA principle. A further decision along the same lines involves The Standards Board for England (1/8/2005) where the complainant requested information relating to the investigation of a complaint about him.

Local authorities hold lots of third party personal information as part of their statutory duties. This is often the subject of FOI requests. In a recent decision involving Braintree District Council (03/01/2007), the complainant made a request for a list of addresses of council properties owned by the public authority. This was refused under section 40 of the Act on the grounds that the information in question constituted personal data of which the applicant was not the subject and that disclosure of that information would constitute a breach of one of the data protection principles. ICO considered that no such breach would occur and that it was not correct, therefore to rely upon the exemption.

ICO considered whether there would be any unfairness to the subjects of the data. Although he accepted that there would be unfairness to individuals if they were publicly identified as members of a vulnerable group, for instance asylum seekers, benefit recipients or women who have left violent partners, he did not consider that there would be any general unfairness to individuals in being identified as council tenants. In taking this view, he was mindful of the low inherent sensitivity of the data and that in practice the fact that a particular property is or is not owned by the council will be generally known to neighbours or because it is part of a known council housing estate. However, the Commissioner was willing to accept that there may be

particular properties which are not generally known to be owned by the council, the disclosure of the addresses of which might result in unfairness to some individuals. If for instance, the council had housed some vulnerable individuals at a secret location and this fact could be inferred from the address, then the Commissioner would accept that this information could be withheld.

The Information Tribunal has shown its agreement to ICO's approach when deciding on cases under section 40. In *A v Information Commissioner (11/7/06)*, it ruled that it would be unfair under the first DPA principle to disclose the names of teachers who were mentioned in a letter by a head teacher to Powys Council asking for additional funding to support a child. The Tribunal decided that it would be unfair to the teachers and this outweighed any perceived unfairness to the child.

From the above decision made by ICO so far, it seems that when faced with a request for personal information about third parties under FOI, public authorities must consider the following factors:

- What is the role, capacity and seniority of the subject(s) of the request?
- Is the information about their public life or their private life?
- In what circumstances was the information gathered or created?
- What was the subject told about how his/her personal data would be disclosed?
- What is their reasonable expectation as to the way their information is going to be treated by the public authority?
- What harm would be caused to them if the information was disclosed?

There is no blanket exemption for requests for third party personal information. Each request will have to be examined on its own merits and the provisions of the Act applied. Public sector employees, officials and those whose personal information is held by public sector organisations can no longer expect total confidentiality. This seems to be the price of freedom of information.

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Please see episode 5 (March 2007) of Ibrahim Hasan's Freedom of Information Podcast for the latest ICO decisions covering access to:

- Dead peoples' data
- ASBO information
- Medical records
- Salaries and wages information