

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 November 2009

Public Authority: NHS Information Centre
Address: 1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

Summary

The complainant requested information from an entry on the national register that was established under the National Registration Act 1939. Specifically he asked for information relating to a particular address, and the records of the people listed there. The public authority confirmed that it held information relevant to the request, but withheld it under sections 22, 40 and 41. During the course of the Commissioner's investigation the public authority informed him that it was no longer relying upon sections 22 and 41, and was only relying upon sections 40(2) and 40(3)(a)(i). It also informed him that some of the withheld information related to deceased people. After investigating the case the Commissioner decided that the information relating to deceased people should be disclosed to the complainant. However, he also decided that the information relating to living individuals should be withheld under sections 40(2) and 40(3)(a)(i). The Commissioner also found that the NHSIC failed to meet the requirements of sections 1(1)(b), 10(1) and 17(1)(b).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant contacted the NHS Information Centre (the "NHSIC") on 23 January 2009 and made the following request under the Act:

“Please supply...details of the residents of [address redacted] from the 1939 National Registration. Please be aware I am not asking for National Health Service patient records or National Health Service numbers but the information collected under the 1939 National Registration. The information collected did not contain any sensitive facts; the 1939 National Registration required the following particulars –

1. Names.
2. Sex.
3. Age.
4. Occupation, profession, trade or employment.
5. Residence.
6. Condition as to marriage.
7. Membership of Naval, Military or Air Force Reserves or Auxiliary Forces or of Civil Defence Services or Reserves.”

For ease of reference the 1939 national registration will be referred to as the “1939 Register” throughout the rest of this Notice.

3. By way of background the 1939 Register was carried out under the National Registration Act 1939 (the “Registration Act”). The Registration Act became law on 5 September 1939 as an emergency measure at the start of World War II. It established a National Register which began operating on 29 September 1939 and a system of identity cards. It was repealed on 22 May 1952. It required the population of the United Kingdom, Northern Ireland and the Isle of Man to provide certain information (as detailed in the complainant’s request above). The 1939 Register listed individuals who were at specific addresses at the time of the enumeration. Owing to the wartime situation it was not possible to conduct a national census in 1941, and the 1939 Register was used for this purpose. However, it is clear that the 1939 Register was not conducted under the Census Act 1920 (the “Census Act”). Furthermore there is no evidence that following the repeal of the Registration Act, the 1939 Register was brought under the Census Act.
4. The NHSIC responded to the complainant in an email dated 20 February 2009. It refused to provide the requested information, and stating that it believed that it was exempt under sections 22, 40 and 41. It also made reference to the Human Rights Act 1998 (the “HRA”), and stated that it believed that the disclosure of the withheld information would be in breach of Article 8 of the HRA. It informed the complainant of his right to request an internal review, and his right to complain to the Commissioner.
5. The complainant requested an internal review in an email dated 1 April 2009.
6. The NHSIC carried out an internal review, and responded on 5 May 2009. It confirmed that it held information relating to those people who were at the address cited in the request at the time of the enumeration. However, it refused to provide the requested information. It stated that it believed that the information was exempt under sections 40(2) and 40(3) of the Act – arguing that disclosure would be in breach of the 1st, 2nd and 6th principles of the Data Protection Act

1998 (the “DPA”). It also referred to a duty of confidentiality – although it did not cite section 41. It again stated that it believed that the disclosure of the withheld information would be in breach of Article 8 of the HRA. Finally it did not make any reference to section 22. The NHSIC informed the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

7. On 12 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the NHSIC was correct to withhold the information he had requested.

Chronology

8. The Commissioner wrote to the NHSIC on 17 August 2009, and asked to be provided with a copy of the withheld information. He noted its use of sections 22, 40 and 41, together with its references to the HRA. He asked it to clarify which exemptions it was relying upon, and to provide its submissions to support its use of the exemptions. In relation to section 40, he noted the age of the withheld information, and asked whether the NHSIC was aware if any of the individuals identified in this information were deceased. He pointed out that section 40 would not provide an exemption for information relating to any individual if there was clear evidence they were deceased at the time of the request.
9. The NHSIC responded in a letter dated 16 September 2009, and provided a copy of the withheld information. It informed the Commissioner that it was only relying upon section 40 to withhold the information in question. It provided further arguments to support its use of this exemption, and specifically why it believed that disclosure would breach the 1st and 2nd principle of the DPA. It also informed the Commissioner that it no longer believed that disclosure would be in breach of the 6th principle of the DPA. It also confirmed that some of the individuals identified in the withheld information were deceased. It should be pointed out that the NHSIC did not offer any alternate arguments in relation to the information relating to deceased people, and clearly stated that the only exemption it was relying upon was section 40.

Analysis

Exemptions

Section 40(2)

10. The NHSIC has relied upon section 40(2) and section 40(3)(a)(i) in order to withhold the information in question, stating that it believes that disclosure would be in breach of the 1st and 2nd principle of the DPA.
11. Section 40(2) provides an exemption for information which is the personal data 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 condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. As stated above, in this case the NHSIC has stated that it believes that the disclosure of the information would be in breach of the 1st and 2nd principle of the DPA.
13. In order to establish whether this exemption has been applied correctly the Commissioner has first looked at whether the withheld information constitutes the personal data of third parties.
14. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

It is important to note that information relating to a deceased person is not the personal data of that person. The Commissioner notes that information about a deceased person may, in certain circumstances, be the personal data of another, living, individual. However, this has not been argued in this case.

15. In this case some of the withheld information relates to deceased individuals. Therefore this information does not fall under the definition of personal data (as set out above). As such, section 40(2) and section 40(3)(a)(i) does not provide any exemption from disclosure in relation to this information. As noted at paragraph 9 above) the NHSIC has not cited any alternative exemptions in relation to this information.
16. However, some of the withheld information relates to living individuals. In regard to this information the Commissioner notes that it shows:
 - names,
 - sex,
 - age,

- occupation, profession, trade or employment,
- residence,
- condition as to marriage, and
- membership of Naval, Military or Air Force Reserves or Auxiliary Forces or of Civil Defence Services or Reserves.

The Commissioner is satisfied that living individuals are identifiable from this information, and as such he believes that this information does constitute the personal data of third parties, i.e. those individuals listed in the 1939 Register and falling under the scope of the request that the NHSIC has informed him are still alive.

17. The Commissioner has gone on to consider whether the release of this information would be in breach of the data protection principles. He has first considered whether the disclosure of the withheld information – which the Commissioner believes is personal data – would be in breach of the 1st principle of the DPA.
18. The 1st principle of the DPA requires that personal data is processed fairly and lawfully and must not be processed unless at least one of the conditions for processing in Schedule 2 of the DPA is satisfied. The Commissioner has initially considered whether the disclosure of this information would be unfair.
19. In considering whether the disclosure would be unfair the Commissioner has first considered the nature of the withheld information. This information records personal details of individuals – as detailed in the request – throughout the United Kingdom, Northern Ireland and the Isle of Man, and also shows where they were on a particular time and date (i.e. where they were recorded when the enumeration took place). The Commissioner believes that this information relates to individuals' personal and private lives. The Commissioner also notes that individuals were compelled to provide this information.
20. The Commissioner has gone on to consider the purposes for which the information was gathered. The 1939 Register was compiled at the outbreak of World War II as an emergency measure, and was used for several purposes during that period. The NHSIC has informed the Commissioner that it was compiled for:
 - issuing of national identity cards,
 - issuing food and clothing ration books,
 - identifying children eligible for evacuation from areas vulnerable for bombing, and
 - identifying adults eligible for call up into the Armed Forces.
21. During the course of the investigation the Commissioner asked the NHSIC whether it had any information about any promise of confidentiality that was given to individuals at the time the information was obtained. Owing to the age of the information the NHSIC has not been able to provide any such information, although it has referred to the Commissioner to the purposes for obtaining the information, as outlined in the previous paragraph.

22. Although the NHSIC has not been able to provide any information about any promise of confidentiality given when the information was obtained, the Commissioner notes that the Registration Act contained a provision prohibiting the disclosure of information obtained under that Act other than for one of its purposes. Specifically, section 8(2) of the Registration Act states that:

“(2) If any person-

- (a) being a person employed for the purposes of this Act, publishes or communicates to any person, otherwise than in the ordinary course of such employment, any information acquired by him in the course of the employment; or
- (b) having possession of any information which to his knowledge has been disclosed in contravention of this Act, publishes or communicates that information to any other person;

he shall be guilty of an offence under this Act:

Provided that nothing in this subsection shall apply to any publication or communication of information made-

- (i) for the purpose of any criminal proceedings; or
- (ii) to any person authorised by the appropriate Minister or the Registrar-General.”

The Commissioner notes the extreme circumstances of national emergency in which this legislation was drafted. He also notes that the Registration Act was repealed in 1952, and therefore this prohibition is no longer on the statute book. However, the Commissioner believes that the fact that the Registration Act contained a prohibition would go towards the individuals concerned believing that their personal information would not be disclosed for purposes other than that for which it was obtained. Therefore he does not believe that it would have been in the reasonable expectations of any of the individuals concerned that this information would be disclosed into the public domain. Whilst the Commissioner also notes that this information was obtained 70 years before the request was made, given the personal nature of the information in question, the Commissioner believes that even at the time of the request it would still not be in the reasonable expectations of any of the individuals concerned for this information to be placed into the public domain. Whilst the purposes the information was used for may have changed over the 70 years, the expectation of non disclosure to the world at large would have remained.

23. In addition to this, the Commissioner also notes that the withheld information would fall under the definition of ‘personal census information’ as set out in the Census Act 1920 (the “Census Act”). Section 8(2) of the Census Act specifies that if the Registrar General, or any person under his control or supplying services to him, discloses any personal census information to another person without lawful authority, he is guilty of an offence – this has previously been

considered in detail by the Commissioner in FS50147944.¹ Whilst the Commissioner is aware that the 1939 Register does not fall under this legislation, he believes that the statutory bar contained therein is indicative of public policy in relation to personal information of this nature.

24. The complainant has argued that the disclosure of the withheld information would not be in breach of the data protection principles, as section 33 of the DPA would apply in this case. This provides an exemption from some of the requirements of the DPA for the processing of personal data for the purposes of research, history and statistics. The Commissioner is not persuaded by this argument. Firstly he would point out that the Act is 'applicant blind', and disclosure under the Act has to be considered as disclosure to the world at large. Therefore he cannot take into consideration the purposes for which the complainant is seeking to obtain this information. Secondly he also notes that section 33 of the DPA does not provide an exemption from the 1st data protection principle.
25. Taking into account the personal and private nature of the withheld information and the reasonable expectations of the individuals concerned, the Commissioner believes that the disclosure of the withheld information – where it relates to living individuals – would be unfair and therefore in breach of the 1st data protection principle. As such the Commissioner believes that this information is exempt from disclosure under section 40(2) and section 40(3)(a)(i).
26. The exemption listed at section 40(2) and section 40(3)(a)(i) is an absolute exemption, and therefore is not subject to a public interest test.
27. The full text of section 40 of the Act can be found in the Legal Annex at the end of this Notice.

Procedural Requirements

28. Section 1(1) of the Act states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

29. Section 10(1) of the Act states that

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

30. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under sections 40(2) and 40(3)(a)(i) the Commissioner

¹ http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50147944.pdf

believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The NHSIC's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the NHSIC also breached section 10(1).

31. The Commissioner has also considered whether the NHSIC has complied with its obligations under section 17(1) of the Act.
32. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
33. In its initial refusal notice and in the internal review the NHSIC informed the complainant that it was relying upon 'section 40(3)' to withhold the information in question. However, it did not refer to the specific sub-section number of the exemption claimed. For this reason the Commissioner believes that the NHSIC did not comply with the requirements of section 17(1)(b) of the Act.
34. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

35. The Commissioner's decision is that the NHSIC dealt with the following elements of the request in accordance with the requirements of the Act:
 - The requested information that relates to living individuals was correctly withheld under section 40(2) and section 40(3)(a)(i).
36. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The NHSIC did not deal with the request for information in accordance with section 1(1)(b) of the Act insofar as it inappropriately relied upon section 40(2) and section 40(3)(a)(i) to withhold some of the requested information – namely that which relates to deceased individuals. In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).
 - The NHSIC also failed to meet the requirements of section 17(1)(b) in that it failed to specify which parts of the exemptions it was seeking to rely upon.

Steps Required

37. The Commissioner requires the NHSIC to take the following steps to ensure compliance with the Act:

The NHSIC should disclose the withheld information which relates to deceased individuals.

38. The NHSIC must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

40. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 9th day of November 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

- (3) Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

- (4) The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on

which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.

(5) Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.

(6) In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) In this section-
 - "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
 - "data subject" has the same meaning as in section 1(1) of that Act;
 - "personal data" has the same meaning as in section 1(1) of that Act.