

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 March 2014

**Public Authority:** Information Commissioner's Office  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

#### **Decision (including any steps ordered)**

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1. The complainant requested the name of the company and the company director specified in paragraph 4 of the Data Protection Civil Monetary Penalty (CMP) notice issued by the Information Commissioner's Office (ICO) against NHS Surrey on 18 June 2013.
2. The Commissioner's decision is that the ICO has correctly applied section 44(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 13 July 2013, the complainant requested information in the following terms:

*"On 12 July 2013 the ICO issued a "£200,000 Civil Monetary Penalty to NHS Surrey. Paragraph 4 appears to have been carefully written to avoid naming the company who obtained IT equipment from NHS Surrey and then sold them on with hard drives intact, despite assurances that they would be disposed of.*

*I would like to know the name of the company and the name of the company director specified in Paragraph 4 of the CMP Notice."*

5. The ICO responded on 7 August 2013 withholding the requested information under section 44 of the FOIA, relying on the prohibition under section 59 of the Data Protection Act (DPA).
6. On 11 August 2013 the complainant requested an internal review and challenged the ICO's reliance on section 59 of the DPA on the basis that a disclosure could be made with lawful authority. The complainant specifically raised the following:
  - the consent of the data processor did not appear to have been sought (section 59(2)(a));
  - the ICO should disclose the information because it was necessary to do so in order to discharge the Commissioner's function under section 51 of the DPA to promote good practice by data controllers (section 59(2)(c)(i)); and
  - having regard to the rights and freedoms or legitimate interests of any person, the disclosure was necessary in the public interest (section 59(2)(e)).
7. Following an internal review the ICO wrote to the complainant on 9 September 2013. It stated that it had reconsidered the complainant's request and taken into account the facts surrounding the CMP and the circumstances at 13 July 2013. It had also considered the points which the complainant raised. It concluded that it had appropriately relied upon section 44(1)(a) of the FOIA, on the basis of section 59 of the DPA.
8. On the same day the complainant supported his complaint by making points about the conclusions within the internal review. He stated his belief that "*the internal review gave excessive weight to the risk of harm to the interests of a data processor that the Information Commissioner has effectively accused of using personal data inappropriately.*"
9. He also argued that the internal review had ignored the Commissioner's requirement to discharge its functions under section 51 of the DPA (to promote good practice). He also added his concern regarding, "*whether the person or people who – according to the Information Commissioner – sold 1500 computers with authorisation are still offering similar service to other data controllers.*"

## Scope of the case

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10. The complainant contacted the Commissioner on 24 September 2013 to complain about the way his request for information had been handled.

### **Reasons for decision**

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11. Section 44(1)(a) of FOIA states that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited by or under any enactment.
12. In this case the ICO has explained that the enactment in question is section 59 of the DPA. Section 59(1) states the neither the Commissioner nor his staff 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) related to an identified or identifiable individual or business, and
  - (c) is not at the time of disclosure, and has not been available to the public from other sources,unless the disclosure is made with lawful authority.
13. The ICO went on to explain that section 59(2) states that there are five circumstances when the ICO could have lawful authority to disclose this type of information.
14. The circumstances are:
  - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
  - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
  - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of –
    - (i) any functions under this Act, or
    - (ii) any Community obligation,
  - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or

- (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
15. During the investigation of this case the Commissioner requested further information from the ICO before he could make a decision.
  16. The ICO confirmed that section 59(1)(a) is satisfied because the information was provided to the ICO for the purposes of the Information Acts (these consist of the Data Protection Act 1998 and the Freedom of Information Act 2000). The ICO would not have received the information had it not been the regulator of the DPA and had been provided this information as part of the consideration of an alleged breach of that legislation.
  17. It went on to explain that as section 59(1)(b) applies to the 'information Acts' the meaning of the word 'business' must be assessed in the context of those Acts to include public authorities. It therefore concluded that NHS Surrey is an identifiable "business" and section 59(1)(b) is satisfied. The Commissioner is also satisfied that the information requested in this case – the name of the company referred to in the CMP and the name of that company's director – clearly relates to an identifiable individual and business.
  18. It said that in relation to section 59(1)(c), the information has not been disclosed to the public and therefore this does not provide a route to disclosure.
  19. In relation to section 59(2)(a), the ICO has confirmed that it does not have consent to disclose this information and in relation to section 59(2)(b) it maintains that the information was not provided to the ICO for the purpose of being made public. This information was seized by the ICO under a search warrant in the course of carrying out its function as regulator of the DPA.
  20. In relation to section 59(2)(c) the ICO concluded that it is not necessary, in this instance, to disclose this information in order to discharge a function under the information Acts or a Community obligation and therefore this information could be considered "exempt information" in respect of this request.
  21. In relation to section 59(2)(d), the ICO confirmed that a disclosure, in respect of this request, would not be for the purposes of any proceedings.
  22. In relation to section 59(2)(e), it stated that the public interest in disclosure would need to be very high to justify disclosure, not least because disclosure in contravention of section 59 by the ICO may

constitute a criminal offence (under section 59(3) of the DPA). It confirmed that it considered that disclosure was not necessary in the public interest on the facts of this particular request. It further stated that it considers that there is a strong public interest in information being provided in confidence to the ICO, to enable it to carry out its statutory duty with information being provided remaining confidential and not being disclosed without lawful authority.

23. In support of its position the ICO considered that the public interest here does not take it to the threshold which is laid down by statute and which is fundamental to the confidentiality of the ICO's investigatory procedures.
24. In the internal review the ICO also explained the specific circumstances of the data processor at the time the request – that litigation between the controller and processor was ongoing and that the processor had gone into administration and had ceased trading.

### **Conclusion**

25. Firstly, the Commissioner has followed the binding case law from the Upper Tribunal in the case of *Ofcom v Gerry Morrissey and the Information Commissioner GIA/605/2010*. Case considered the application of section 44 FOIA. The Upper Tribunal found (at §60) that when read together the FoI Act and the Communications Act did not extend the Commissioner's role to testing the reasonableness of Ofcom's decision not to publish the full statistics requested. At §63 the Upper Tribunal says;

*"In short the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of the FoI. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act"*

26. This establishes that whilst it may be appropriate for the Commissioner to take into account whether or not (as a matter of fact) a public authority exercised its discretion to disclose in any particular case, it is not for him to question whether that discretion was applied correctly or not.

27. In this case the Commissioner finds that the ICO had engaged the relevant provisions of section 59(1) and that the ICO had clearly decided that the lawful authority provisions in section 59(2) did not apply, the Commissioner is not required to question the reasoning.
28. The complainant has made some valid points about the way ICO should have used its discretion to dis-apply section 59 but the Commissioner cannot question that discretion in this decision notice.
29. However, for completeness the Commissioner has considered the challenge that the various lawful authority provisions in section 59(2) were engaged.
30. Under section 59(2)(a) the Commissioner accepts that consent had not been provided and there was no requirement for the ICO to seek consent.
31. The Commissioner also finds that disclosure at the time of request was not necessary under section 59(2)(c). Whilst there is a case that disclosure may have provided information to data controllers, related to the ICO's good practice functions, its use was limited and disclosure was not proportionate to the general and specific harm that would have been caused by breaching confidentiality. The Commissioner finds that the general weight that should be accorded to protecting any confidential information that has been obtained by a regulator is strong; also noting that the information was also obtained relatively recently. He also notes the arguments the ICO made in the internal review about general guidance the ICO issued, as an alternative to disclosure, as part of the ICO's functions to provide guidance about selecting data processors. The Commissioner also notes that disclosure in breach of section 59 DPA may be a criminal offence.
32. The Commissioner has considered the public interest provision under section 59(2)(e). In *Lamb v Information Commissioner EA/2010/108* at §18 the Tribunal noted that the public interest test in DPA 59(2)(e) is different to the PIT in FOIA s2(2)(b):

*"Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."*
33. This supports the approach taken by the ICO, set out in paragraph 22 above. The test is not simply a public test in reverse of FOIA – the public interest factors must be compelling, for example revealing clear

evidence wrong doing, serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare. While there is no express definition of what is meant by 'necessary' in subsection 59(2)(e) DPA it does not appear to mean that the disclosure must be 'absolutely essential' but that any disclosure must be a proportionate response to a specific public interest.

34. Whilst the Commissioner accepts the complainant has made valid public interest points in favour of disclosure they are not compelling points in favour. He finds disclosure would be disproportionate to meet this public interest, in particular informing the public about any risks to the public from the data processor continuing in business.
35. The Commissioner considers, in light of the arguments and submissions presented by the ICO and the complainant, that section 44(1)(a) of the FOIA was applied correctly in this case as the information requested is exempt from disclosure.

## **Right of appeal**

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36. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

37. 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.

38. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**