

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 January 2014

**Public Authority:** Public Services Ombudsman for Wales

**Address:** 1 Ffordd yr Hen Gae

Pencoed

Bridgend

CF35 5LJ

### Decision (including any steps ordered)

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1. The complainant requested information in respect of two documents which the Public Service Ombudsman for Wales ('the PSOW') had previously refused to provide in response to a subject access request. The PSOW refused to disclose them by virtue of section 40(2) and section 44(1) of the FOIA. The Commissioner's decision is that the PSOW correctly relied on section 40(2) of the FOIA in relation to these documents. The Commissioner requires no steps to be taken.

### Request and response

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2. On 4 March 2013, the complainant wrote to the PSOW and requested the following information in respect of two documents which the PSOW had refused to provide as part of his subject access request on the basis that they did not contain his personal information, but that of a third party:

*"Are you able to clarify from whom the two documents are from...? Perhaps you would indicate the nature of the two papers you have referred to in this matter?"*

3. The PSOW responded on 2 April 2013. It stated that:

*"...we are unable to provide any further information as to the content of the two documents, or the individual to whom the letters were addressed."*

4. Following an internal review the PSOW wrote to the complainant on 9 May 2013. It stated that:

*"...the documents would also be considered exempt under sections 40 and 44 of the FOI Act."*

### **Scope of the case**

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5. The complainant contacted the Commissioner 10 May 2013 to complain about the way his request for information had been handled.
6. As the Commissioner has concluded that the PSOW was correct to withhold the disputed information by virtue of section 40(2) of the FOIA he has not gone on to consider the PSOW's reliance on section 44 of the FOIA.

### **Reasons for decision**

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#### **Section 40(2)**

7. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles.
8. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

#### **Is the requested information personal data?**

9. Personal data is defined at section 1(1) of the DPA as:

*"personal data means data which relate to a living individual who can be identified-*

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

10. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.<sup>1</sup>
11. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
  - (i) *"Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*
  - (ii) *"Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*
12. The Commissioner notes that the information withheld under this exemption is two letters addressed to a particular individual (the "data subject"). The first contains the data subject's medical information whilst the second is less explicit. He also notes that neither letter contains personal information relating to the complainant.
13. Having considered the information, the Commissioner is satisfied that the information does contain information which constitutes personal information as described above. The Commissioner is also satisfied that the information in letter one constitutes sensitive personal data, as defined in section 2 of the DPA which includes a provision for the physical or mental health or condition of the data subject.
14. As the Commissioner is satisfied that the information constitutes personal information, he has therefore gone on to consider whether disclosure would breach any of the data protection principles. The PSOW considers that disclosure of the requested information would breach the first principle of Data Protection Act 1998 (the DPA).

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

**Would disclosure contravene the first data protection principle?**

15. The first data protection principle requires that the processing of personal data be fair and lawful and,
- a. at least one of the conditions in schedule 2 is met, and
  - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
16. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

*Would disclosure be fair?*

17. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.
  - b. Consequences of disclosure.
  - c. The legitimate interests of the public

*The reasonable expectations of the data subjects*

18. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.<sup>2</sup> Although the guidance acknowledges that there are no hard and fast rules it states that:

*"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*

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<sup>2</sup>[http://www.ico.gov.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_speci alist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx)

19. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
20. As referred to in paragraph 12 of this notice, the Commissioner notes that the information withheld under this exemption is two letters addressed to the data subject, with letter one explicitly regarding health matters.
21. The Commissioner has considered the reasonable expectations of the individual named in the letters and notes that it relates to their private life. The Commissioner considers that the reasonable expectations of the data subject would be that the information is not disclosed to the public.
22. Additionally, given that the information in letter one constitutes sensitive personal data, the Commissioner considers it would not be within the reasonable expectations of the data subject that this information would be disclosed into the public domain.

#### *Consequences of disclosure*

23. The Commissioner has considered the consequences of disclosure of the information and considers that the data subject may experience distress at the disclosure of such personal information, particularly, but not restricted to, the sensitive personal information contained in letter one.

#### *The legitimate public interest in disclosure*

24. Notwithstanding the data subject's reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
25. Although the broad general principles of accountability and transparency of public sector organisations may be applicable in this case, the PSOW has stated that it is not aware of any specific legitimate interest the public may have in accessing the disputed information and the Commissioner concurs with this view.
26. In weighing up the balance between the reasonable expectations of the data subject and the consequences of disclosure of this (sensitive) personal information against the legitimate public interest in disclosure, the Commissioner considers that the balance is weighted significantly in favour of non-disclosure. He is therefore satisfied that the PSOW

appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

27. As stated in paragraph 6 of this notice, as the Commissioner is satisfied that section 40(2) of the FOIA is engaged, he has not gone on to consider PSOW's reliance on section 44(1).

## Right of appeal

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28. 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)

29. 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.
30. 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 .....**

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