

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 08 May 2017

Public Authority: Parliamentary and Health Service Ombudsman
Address: 29th Floor
Millbank Tower
London, SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested the parts of his complaint file that can be released under FOIA. Parliamentary and Health Service Ombudsman (PHSO) relied on the exemptions section 40 (the information is personal data) and section 44 (prohibitions on disclosure) to withhold the information. In particular the PHSO cited the statutory prohibition on disclosure created by the Parliamentary Commissioner Act 1967 (PCA). The Commissioner's decision is that the PHSO has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

Request and response

2. On 29 April 2016 the complainant made the following request for information about a 2015 complaint. This followed a request for information made on 14 March 2016 where the PHSO responded with the personal data of the complainant.

*'This is a Freedom of Information Request for a copy of all information you hold (**that can be released under the Freedom of Information Act 2000 (FOIA)**) in respect of a 2015 complaint you handled regarding; the Information Commissioner's Office, [redacted name of doctor and Trust]; [redacted name of files].*

***To assist you;** I simply wish to obtain (via the FOIA) a copy of the recorded information you hold (other than my personal data) that falls within the criteria of this FOI request...*

Please note I am not requesting any of my personal data. Please do not handle this request as a Subject Access Request.

If the Ombudsman does not hold recorded information that falls within the criteria of this FOI request then please respond in the way the FOIA states.'

3. On 5 May 2016 the PHSO responded and explained that:

'information disclosed under the Freedom of Information Act 2000 is considered to be in the public domain and available to anyone. The information you have requested is from your complaint files and almost all of it consists of personal data belonging to you and third party individuals, as a result the information would be exempt from the Freedom of Information Act 2000 under section 40(1), 40(2) and 44 of the Act.'

4. On 5 May 2016, the complainant queried this response:

'Please confirm or deny whether you hold the information I have requested in my Freedom of Information request... appears to be saying (by use of the word 'almost') there is some information fitting criteria of my FOI request (that is not personal data) then I am puzzled why I have not yet received a copy.'

5. On 6 May 2016 the PHSO responded and explained that:

'In line with section 1 of the Freedom of Information Act 2000, I can confirm we do hold the information you have asked for. However the information is from your complaint file and therefore it is exempt from public disclosure under section 44 FOIA. The information also contains personal data belonging to you and third parties, therefore the exemptions at section 40(1) FOIA and 40(2) FOIA also apply...

Please be assured that you have received all the information you are entitled to see – we would not be able to release anything more under the FOIA.'

6. On 10 May 2016, the complainant queried whether redaction would be possible:

'Another organisation... that I submitted a FOI request to is redacting personal data from the information they hold in order that they can then send me a copy of the redacted information I have requested under the FOIA.

Please inform me if you will do the same - that is redact the personal data (that you say prevents you from providing my FOI requested information) from the information you hold fitting the criteria of my 14/03/16 request, and then send me a copy of the redacted information I have requested under the FOIA.'

7. On 16 May 2016 the PHSO responded:

'I am sorry that we are unable to provide the information you have requested under FOI – please refer to my email for the explanation. Also as explained before, we would be happy to process your request under subject access.

If you are dissatisfied with the outcome of your FOI request, you can ask for an internal review and a senior member of staff will look into your complaint.'

8. On 1 July 2016 the complainant requested an internal review:

'This is a request for an internal review regarding your handling of my 29/04/16 FOI to which you gave the ref: FDN 256437.

My concerns are;

**. Your 05 May 2016, 06 May 2016, 16 May 2016 responses all repeatedly went on about processing my 29/04/16 FOI request under the Data Protection Act (DPA) even though I repeatedly told you I was not requesting my personal data...*

**. I do not accept that there is, as you claim, no data that can be released to me under the Freedom of Information Act.'*

9. On 26 August 2016 the PHSO provided the outcome of the internal review. The PHSO confirmed

'that the exemptions applied and our explanations in respect of those exemptions under the FOIA 2000 were correct.'

Scope of the case

10. On 16 October 2016 the complainant contacted the Information Commissioner. He argued that

'I do not accept PHSO's decisions that there is no data that can be released under the FOIA 2000...

The PHSO documentation (paper/digital) that they use to record and document the complaints they have handled will not start off as totally blank, there will already be some information on at least some of the documentation (paper/digital) they use such as, as a bare minimum, titles etc.

PHSO's internal systems for documenting complaints submitted for overall auditing and management purposes are likely to have information that can be released under the FOIA.

PHSO's 26/08/16 response to my internal review request states that my 29/04/16 FOI; 'sought disclosure of information from your complaint files', actually what I specifically requested was broader than what the PHSO state I requested, for my 29/04/16 FOI stated the following: -

'This is a Freedom of Information Request for a copy of all information you hold (that can be released under the Freedom of Information Act 2000 (FOIA) in respect of a 2015 complaint ...'

PHSO did not answer my 10/05/16 emailed question specifically asking PHSO could it not redact any information that was exempt and not able to be released under the FOIA.

I am also concerned that the PHSO repeatedly went on and on about subject access requests even though I had (many times) clearly told them that I was not requesting my personal data as a Subject Access Request (SAR).'

11. The Commissioner notes that the complainant is aware of the content of the files, that he does not dispute that there is personal information within those files and only seeks the information that can be released under FOIA.
12. Therefore, the Commissioner considers the scope of her investigation to be to determine whether PHSO has correctly applied section 44 to withhold the information. If section 44 has been incorrectly applied by PHSO then the Commissioner will go on to consider section 40.

Reasons for decision

13. Section 44 is an absolute exemption, which means that 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.
14. 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.

15. PHSO explained that the complainant requested information relating to two complaints he made to PHSO and asked that this be provided to him under the provisions of FOIA rather than under section 7 of the Data Protection Act (DPA). This insistence on the processing of the request under FOIA meant that PHSO had to refuse the request entirely because all the information is exempt under section 44.
16. PHSO stated that the relevant legislation, from which PHSO draws its powers for its parliamentary jurisdiction, is the Parliamentary Commissioner Act 1967 (PCA).
17. The PCA contains at section 11 its provision for the secrecy of information. Section 11(2) of the PCA sets out the circumstances under which information obtained by the Parliamentary Commissioner for the purposes of an investigation can be disclosed:

(2) 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 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 officers 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.

(2A) Where the Commissioner also holds office as the Health Service Commissioner for England and a person initiates a complaint to him in his capacity as the Health Service Commissioner for England which relates partly to a matter with respect to which that person has previously initiated a complaint under this Act, or subsequently initiates

such a complaint, information obtained by the Commissioner or his officers in the course of or for the purposes of investigating the complaint under this Act may be disclosed for the purposes of his carrying out his functions in relation to the other complaint.

18. The Commissioner recognises that this legislation prohibits disclosure of information obtained during an investigation. The Commissioner also notes the provision of privacy at section 7(2) of the PCA 'Every investigation under this Act shall be conducted in private'.
(<http://www.legislation.gov.uk/ukpga/1967/13>)

19. PHSO also referred to section 11(5) of the PCA which allows PHSO to disclose information to the Information Commissioner for the purposes of a FOIA complaint, but there is no provision which allows the disclosure of information gathered during the course of an investigation to the wider world under FOIA:

11(5) Information obtained from the Information Commissioner by virtue of section 76(1) of the Freedom of Information Act 2000 shall be treated for the purposes of subsection (2) of this section as obtained for the purposes of an investigation under this Act and, in relation to such information, the reference in paragraph (a) of that subsection to the investigation shall have effect as a reference to any investigation.

20. Therefore, the PHSO considered all of the information requested to be prohibited by virtue of prohibitions contained within the PCA legislation.

21. Following the Commissioner's own guidance (<https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>) and the binding decision of the Upper Tribunal in 2011 (Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC), she will not question or examine the reasonableness of the authority's decision. The Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.

22. Section 44 is an absolute exemption and so it is not necessary to set out public interest test considerations here.

23. The Commissioner notes the extensive and considered correspondence from the complainant. In particular, she notes that the complainant has requested

- all information you hold (that can be released under the Freedom of Information Act 2000 (FOIA) in respect of a 2015 complaint you handled. E.g. PHSO correspondence in respect of their handling of my complaint. PHSO consulting expert advice to ascertain the

validity of my very serious concerns in respect of the original complaint in 2015

- whether the personal information could be redacted
 - whether the PHSO documentation used to record and document the complaints handled holds some information as it 'will not start off as totally blank'
 - that the Commissioner take into account the relevant history which demonstrates there is a strong Public Interest argument involved in respect of my FOI which covers my 2016 complaint to the PHSO about the ICO's handling of my data protection complaint.
24. The FOIA is generally considered applicant blind and that information is disclosed as if to the wider world, not to a particular person.
25. The Commissioner has viewed all the documentation provided by both the complainant and the PHSO and has considered and reviewed the historical background surrounding the 2015 complaint. However, she is satisfied that all of the information requested is exempt information under FOIA as its disclosure is prohibited by section 11 of the PCA (provision for the secrecy of information).
26. In conclusion, the Commissioner's decision is that PHSO has correctly applied section 44(1)(a) to withhold all the requested information in this case and she has therefore not gone on to consider the application of the other exemptions at 40(1) and 40(2).

Other Matters

27. The Commissioner is concerned that the initial responses to the FOIA request (dated 5, 6 and 16 May 2016) did not provide a full and adequate refusal of the request under section 17. The Commissioner understands that the exchange of correspondence between the PHSO and the complainant sought clarification, but the Commissioner considers that the initial FOIA request clearly requested information under FOIA (not DPA), that an explanation of section 44 might have been helpful to the complainant and that the appeal for an internal review could have been offered before the third letter to the complainant on 16 May 2016.
28. In summary, the Commissioner would expect that in the future the PHSO will ensure that requests for information are dealt with in a way which would not conflict with any of the provisions of the FOIA.

Right of appeal

29. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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

Pamela Clements
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