

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

### **Decision notice**

**Date:** 23 January 2018

**Public Authority:** Parliamentary and Health Service Ombudsman  
**Address:** 29<sup>th</sup> Floor  
Millbank Tower  
London  
SW1P 4QP

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

---

1. The complainant has requested the PHSO to disclose two letters held on his complaint file. The PHSO refused to disclose the requested information citing sections 40 and 44(1)(a) of the FOIA. For section 44(1)(a) of the FOIA the PHSO cited the statutory prohibition on disclosure created by the Parliamentary Commissioner Act 1967.
2. The Commissioner's decision is that the PHSO is entitled to rely on section 44(1)(a) of the FOIA. She therefore does not require any further action to be taken in this case.

#### **Request and response**

---

3. From the documentation the Commissioner has received, it is apparent that the complainant first wrote to the PHSO on 10 September 2017 to request a copy of a letter dated 3 November 2015. On 15 November 2017 the complainant confirmed that he also required access to a letter dated 10 November 2015. Both letters are held on his complaint file relating to a complaint he made against the Land Registry.
4. The PHSO responded on 29 November 2017, refusing to disclose the requested information referring to section 11 of the Parliamentary Commissioner Act 1967 (PCA) and section 31(4) of the Data Protection Act 1998 (DPA).
5. The complainant requested an internal review on 29 November 2017.

6. The PHSO carried out an internal review and notified the complainant of its findings on 9 January 2017. It confirmed that it remained of the opinion that the requested information is exempt from disclosure by virtue of section 11 of the PCA and section 31(4) of the DPA.

## **Scope of the case**

---

7. The complainant contacted the Commissioner on 29 November 2017 to complain about the way his request for information had been handled. At this time no internal review had been carried out by the PHSO. The Commissioner therefore asked for this to be carried out before she would investigate further. The Commissioner was copied into the internal review response and it was evident from the continuing correspondence that the complainant remained dissatisfied. The Commissioner therefore decided at this point to accept the complaint for full investigation.
8. The Commissioner obtained a copy of the withheld information from the PHSO. From this she decided that the request should be handled under the FOIA rather than the DPA, as the withheld information constitutes the personal data of a third party. The Commissioner asked the PHSO to explain why the withheld information cannot be disclosed under the FOIA. The PHSO responded, advising the Commissioner that it wished to rely on sections 40 and 44(1)(a) of the FOIA.
9. The Commissioner considers the scope of this investigation is to determine whether the PHSO is entitled to rely on sections 40 and 44(1)(a) of the FOIA. She will first consider the application of section 44(1)(a).

## **Reasons for decision**

---

10. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.
11. 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.

12. The PHSO stated that the relevant legislation from which it draws its powers for its parliamentary jurisdiction is the PCA. It confirmed that section 11 of the PCA, headed 'Provision for secrecy of information' states at subsection (2) that 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 a matter 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 officer 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.

13. The Commissioner recognises that this legislation prohibits disclosure of information obtained during an investigation. She also acknowledges the provision of privacy at section 7(2) of the PCA '*Every investigation under this Act shall be conducted in private*'.

14. The Commissioner has reviewed the withheld information and discussed the circumstances in which this information was obtained by the PHSO. She is satisfied that the withheld information was obtained by the PHSO during the course of its investigation and therefore the withheld information falls within the prohibition.

15. The PHSO makes reference to exemptions outlined in section 11(2) of the PCA that it can use to dis-apply the prohibition or the gateways available to it should it decide to disclose information in a given context. The Commissioner's view is that it is to the discretion of the PHSO in a given case whether it uses an exemption to dis-apply the prohibition and

16. therefore use this gateway. It is not within the Commissioner's remit to question the use, or not, of the exemption or gateway in a particular case. This is a decision for the PHSO alone. Therefore for these reasons, if the PHSO decides not to use an exemption or gateway to dis-apply the prohibition in a particular case, the prohibition from disclosure under section 44(1)(a) must continue to apply.
17. There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large.
18. The Commissioner's view follows the binding decision of the Upper Tribunal in 2011 (Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC). The Commissioner 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 will not consider whether its decision was reasonable.
19. For the above reasons, the Commissioner has concluded that the requested information is exempt from disclosure under section 44(1)(a) of the FOIA.
20. As the Commissioner is satisfied that the withheld information is exempt from disclosure under section 44(1)(a), there is no need to go on to consider the PHSO's application of section 40 of the FOIA.

### **Procedural matters**

21. The first communication the Commissioner can identify which details the complainant's request for a copy of the letter of 3 November 2015 is dated 10 September 2017. The PHSO should have recognised this to be a valid request for information under the FOIA and processed it as such. As the PHSO did not issue its refusal notice (which addressed this request and the request of 15 November 2017 for a copy of the letter dated 10 November 2015) until 29 November 2017, the Commissioner has found the PHSO in breach of section 10 of the FOIA. This is because section 10 of the FOIA states that a public authority shall respond to a request promptly and in any event no later than 20 working days from receipt and the PHSO did not respond to the request of 10 September 2017 within this timeframe.
22. The Commissioner notes that the PHSO responded to the request of 15 November 2017 within 20 working days. So there is no further breach here.

23. The Commissioner has also recorded a breach of section 17(1)(b) and (c) of the FOIA in this case. This is because the PHSO failed to recognise that the requests were requests for information under the FOIA and therefore failed to specify the exemptions on which it relied under the FOIA for the non-disclosure of the requested information and explain why these applied in its refusal notice.

### **Other matters**

---

24. The Commissioner also notes that the PHSO failed to recognise the complainant's email of 29 November 2017, which expressed his dissatisfaction with the PHSO's decision to refuse the disclosure of the requested information, as a request for an internal review. The internal review was therefore not completed within 20 working days.
25. The section 45 code of practice advises public authorities to carry out an internal review promptly and within 20 working days of receipt. The Commissioner would like to remind the PHSO of the requirements of the code and to regard any future expression of dissatisfaction from an applicant to its initial response as a request for internal review.

## Right of appeal

---

26. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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 .....**

**Samantha Coward  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**