



Steven Dickinson

Policy Delivery knowledgebase About Contact team

ICON > Policy Delivery knowledgebase > **FOI knowledgebase**

FOI/EIR	FOI	Section/Regulation	s44	Issue	Ombudsman's or regulator's
Line to take:					

N.B. *Our line has changed - see IT Summary Cubells v IC and Wrightington, Wigan and Leigh NHS Foundation Trust (EA/2011/0183; 30 May 2012). This new position will be reflected in the next update.*

The Commissioner's view is that information "obtained by" or "provided to" a regulator, will include information sent to the regulator that it has required in the course of or for the acceptable for public authorities to forward irrelevant information to a regulator in order to afford it the protection of a statutory bar. Where information has not actually been obtained by the regulator, it will not be included.

Certain regulators statutory bars include "gateways" to disclosure which may be applied at the regulators discretion. Whilst it may be appropriate for the Commissioner to take in not for him to question whether that discretion was applied correctly or not.

Whether or not it will be permissible for an ombudsman's or regulator's statutory bar to be claimed by another public authority, or just by the regulator itself will depend upon the regulator to claim such a statutory bar, then ideally the public authority should have consulted with the relevant regulator for advice about what information the regulator would consider to be relevant.

Where requested information is likely to constitute the personal data of the applicant, then the Commissioner will consider the request first and foremost as a Subject Access Request. Where the information is not personal data, it will be considered in relation to any remaining non-personal data.

Further Information:

Interpretation of information "obtained by" or "provided to"

A number of regulators statutory prohibitions refer to information "obtained by" or "provided to" a regulator or ombudsman. The Commissioner's view is that information "obtained by" or "provided to" a regulator or ombudsman, will include information sent to the regulator that it has required in the course of or for the acceptable for public authorities to forward irrelevant information to a regulator in order to afford it the protection of a statutory bar. Where information has not actually been obtained by the regulator, it will not be included.

The Commissioner's view is that statutory bars that are worded in this way attach to the information itself, by virtue of the **process** of providing the information. Therefore, when a regulator, was it provided because the regulator needed it for the purposes of its investigation?.

This should not however be taken to mean it will be acceptable for public authorities to forward irrelevant information to a regulator in order to afford it the protection of a statutory bar. Where the Commissioner considers that the statutory bar will not apply.

When does an investigation start and end

Where the statutory provisions do not refer specifically to ongoing investigations, the Commissioner considers that they can apply to information which has been sent to a regulator ensuring that a public authority complies with any steps that the regulator may have ordered.

With regard to when an investigation starts, in the Information Tribunal decision in *Purser v the ICO and the Local Government Ombudsman* the Appellant argued that since the ICO was not a party to the investigation and thus the exemption could not apply. The Tribunal rejected this argument and found that "A necessary part of any investigation by a statutory body is the determination of whether the information should be disclosed. Even though a formal decision not to investigate was taken, there still needed to be a generation of information and analysis derived from the material supplied and the legal framework of the Ombudsman. The Tribunal was satisfied that these actions and processes would endorse this view."

Exceptions within the statutory prohibition

Most regulators' statutory prohibitions include exceptions which allow for information to be disclosed in certain circumstances. In cases where a complainant argues that an exception applies, the Commissioner has the power to challenge the public authority's decision in this respect.

This issue was considered by the Upper Tribunal in *Ofcom v Gerry Morrissey*. The Upper Tribunal considered the statutory construction of both FOIA and the Communications Act 2003.

"In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complaint to a public authority has been denied on the basis of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking the questions which might be asked if powers available to it under the 2003 Act."

This establishes that whilst it may be appropriate for the Commissioner to take into account whether or not (as a matter of fact) the regulator exercised its discretion to disclose information, it is not for the Commissioner to question whether that discretion was applied correctly or not.

It should be noted that this reverses the position previously taken by the Commissioner (and the Information Tribunal in *Hoyte v ICO and the Civil Aviation Authority*) that it is a "unreasonableness" test.

"Otherwise than under this Act"

Section 44 provides that :

- Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - is prohibited by or under any enactment

The Commissioner considers that the "otherwise than under this Act" provision means that the Act should not be used as a justification for a disclosure which would otherwise be refused if the information was a public function of the FSA as envisaged by section 349(5)(a) of the Financial Services and Markets Act 2000, and whether disclosure in response to an FOI request would be a public function of the FSA.

"The Tribunal respectfully agrees with the FSA when it contends that section 349(5)(a) with its reference to public function is referring to and is directed to functions and processes of the FSA. Even if that view were wrong, section 44 on its face makes it clear beyond doubt that disclosure of information which is a public function of the FSA is not exempt information under the Act"

The Commissioner does not however accept the slightly different argument that purpose specific exceptions to a statutory bar are therefore completely irrelevant in the context of account whether (as a matter of fact) a regulator has exercised its discretion to disclose information for specified purposes, when deciding whether a statutory bar to disclosure ap

Claiming of a regulator's statutory bar by another public authority

Whether or not it will be permissible for an ombudsman's or regulator's statutory bar to be claimed by another public authority will depend upon the exact wording of the statutor

Where the wording of a regulator's statutory bar provides that :

- information "obtained by " or "provided to" a regulator should not (subject to any exceptions within the statute) be disclosed, **and**
- the statutory provisions are not limited to potential disclosures by the regulator

the Commissioner considers that it is not only the regulator that can claim section 44 in respect of the information provided.

He considers that this type of wording is wide enough to allow public authorities who either :

- receive information (that was originally obtained by a regulator for the purposes of its investigation) from a regulator, or
- provide information to a regulator for the purposes of a regulator's investigation

to also claim section 44 in relation to the provided or obtained information.

The Commissioner has formed this view with reference to the case R (on the application of Kay) v Health Service Commissioner ([2008] EWHC 2063 (Admin)). This case found th covered by section 15 of the Health Service Commissioners Act 1993 even when it had been passed into the hands of a third party.

The Commissioner considers that the same principle can also be applied to information held by the original provider, and then passed on to a regulator.

He considers that where statute has been drafted so as to give a regulator significant control over the use and disclosure of information this should not be undermined by inform being unprotected just because it is also held by a third party.

The Commissioner has considered the following statutory bars and has concluded that their wording is wide enough to allow them to be claimed by third party public authorities :

- Section 32(2) of the Local Government Act 1974 which relates to the Local Government Ombudsman
- Section 15 of the Health Service Commissioners Act 1993 and section 11 of the Parliamentary Commissioner Act 1967 which relate to the Parliamentary and Health Service
- Section 63 of the Local Government Act 2000 which relates to the Standards Board for England
- Section 26 of the Public Services Ombudsman for Wales Act 2005.
- Article 19 of The Ombudsman (Northern Ireland) Order 1996

This list is not exhaustive, and case work may identify other "obtained by" "provided to" statutory bars where the provisions are not limited to disclosure by the regulator.

It should be noted, however, that some statutory bars are specific in restricting the statutory prohibitions provisions to disclosures **by the regulator**. If the wording of the statut relevant)

Consultation with the regulator

Where it is permissible for a public authority other than the relevant regulator to claim a regulator's statutory bar, then it will be good practice for the public authority to consult w

The Commissioner considers that this practice is in accordance with affording the regulator significant control over the use and control of information which it receives in the cours circumstances) that it may have been granted.

The Commissioner should therefore normally only proceed to make a decision on a third party public authority's claiming of section 44, in relation to a regulator's statutory bar ei

- where a public authority maintains its reliance on a regulators statutory bar after consultation with the regulator, or
- where a public authority refuses to consult the regulator

Similarly, it may become clear in the course of an ICO investigation, that the information being considered is information that the public authority has forwarded to a regulator for 44, and, if it has not already consulted with the regulator, to do so. This should not be taken to mean that the ICO has a positive duty to look for information covered by any stat becomes apparent we would wish, as a responsible regulator, to allow appropriate consultation and consideration of the statutory bar to take place.

The Commissioner is aware that if a third party public authority refuses to consult with or follow the advice of the appropriate regulator, then there is the potential for the ICO to (an exception to the statutory prohibition) The Commissioner's view is that although on the face of it this may seem contradictory, it is consistent with the drafting of statutes whic

Complaints files, Subject Access requests and regulator's statutory bars

Where requested information is likely to constitute the personal data of the applicant, then caseworkers should consider the request first and foremost as a Subject Access Reque considered in relation to any remaining non -personal data.

Further guidance on the extent to which information in complaints files constitutes the personal data of the complainant is currently in draft.

Specific guidance on individual statutory bars

This line to take gives a general overview of the Commissioner's approach to regulator's statutory bars. However for detailed consideration of individual statutory bars, case office

Source	Details
GS,	Hoyte / Civil Aviation Author 2008)
IT,	Slann / FSA (11 July 2006)
High Court,	Ofcom / Morrissey (22 Marc
Upper Tribunal	Purser / LGO (24 May 2011
Related Lines to Take	
Related Documents	
EA/2007/0101 (Hoyte) , EA/2005/0019 (Slann), GIA/605/2010 (Ofcom), [2008] EWHC 2063 (Admin) (Kay), EA/2010/0188 (Purser)	
Contact	
Date	02/08/2011

-
- [Information Commissioner's Office intranet](#)