



Steven Dickinson

Policy Delivery knowledgebase About Contact team

ICON > Policy Delivery knowledgebase > **CWAN016**

FOI POLICY INTERNAL KNOWLEDGE BASE		
FoI or EIR	Section/Regulation	Issue
FOI EIR	S40 R13	Considering whether disclosure of personal data would be lawful
<p>Summary:</p> <ul style="list-style-type: none"> It is only necessary to consider lawfulness if disclosure would be fair and meet a Schedule 2/3 condition. Disclosure is not lawful if it would breach statute or common law, a duty of confidence or an enforceable contractual agreement. Case officers should assume that disclosure would be lawful unless there is some evidence in the case to suggest it may not be The Commissioner does not agree with the Tribunal's finding in relation to compromise agreements in Gibson EA/2010/0095 		
<p>Further Information:</p> <p>Consider fairness and Schedule conditions first In s40 cases, if it is decided that disclosing personal data would be fair and meet a Schedule 2 condition (and a Schedule 3 condition if relevant), case officers should then decide whether the disclosure would be lawful. If they have already found that disclosure would not be fair or would not meet a Schedule 2/3 condition, then the personal data is exempt and they do not need to consider lawfulness.</p> <p>The meaning of 'lawful' Our guidance document on personal information explains what is meant by 'lawful': " "Lawful" refers to statute law and common law, whether criminal or civil. This includes industry-specific legislation or regulations. Furthermore, a disclosure that would breach an implied or explicit duty of confidence or an enforceable contractual agreement would also be unlawful." (para 114)</p> <p>The guidance also explains that a disclosure that would breach the right to privacy in Article 8 of the Human Rights Act would also be unlawful, but if that is the case it is likely that the disclosure would already have been found to be unfair.</p> <p>Assessing whether disclosure would be lawful Case officers should assume that disclosure would be lawful unless there is some evidence in the case to suggest it may not be. This evidence would be that:</p> <ul style="list-style-type: none"> issues of breach of confidence or a contractual term or of other law have arisen in our consideration of fairness/ schedules, or the PA has suggested it would be a breach of confidence or of a contractual term or unlawful in another way. They may have suggested this specifically in the context of s40 or, if not, they may have claimed s41 or s44; if either of these exemptions are claimed there may be issues of lawfulness in relation to s40. If the case is EIR then claims of r12(5) (d), (e) or (f) may raise breach of confidence issues relevant to lawfulness under r13. <p>Case officers are not required to proactively investigate areas of law that we do not regulate in order to look for a potential breach. However, there may be cases in which the PA has not claimed s40 but as regulator we consider it may be engaged. In such a case if disclosure would be fair and satisfy Schedule conditions then we should seek the PA's view on lawfulness.</p> <p>Case officers will need to consider carefully any arguments about lawfulness put forward by the PA, and obtain legal advice if necessary.</p> <p>Compromise agreements Case officers should be aware of one particular case which complainants may cite when arguing that breaching a duty of confidence or contractual agreement is not sufficient to render a disclosure unlawful. In <i>Gibson v IC and Craven District Council EA/2010/0095</i> the First Tier Tribunal found that, despite of the existence of a confidentiality clause, it would be lawful to disclose some parts of a compromise agreement. The Commissioner disagrees with the Tribunal's findings in this case because he remains satisfied that, because of the nature of the information in question, it was truly confidential and therefore to disclose the information would both breach an explicit duty of confidence and an enforceable contractual agreement. Even if the Commissioner agreed with the Tribunal on the facts of the case, he would not accept that the <i>Gibson</i> decision could be read as establishing a general rule that disclosure in breach of a duty of confidence or an enforceable contractual agreement would be lawful.</p> <p>In other words, despite <i>Gibson</i>, the Commissioner's view remains that a disclosure in breach of a duty of confidence or an enforceable contractual agreement would be unlawful.</p> <p>It should be noted that in <i>Gibson</i>, as in other such cases, the compromise agreement would have been jointly created between the public authority and the employee. Therefore s41 would not have been applicable because the Commissioner would not have accepted that the information was provided to the public authority by a third party. In such cases case officers should be prepared to consider arguments presented in respect to confidentiality when analysing both fairness and lawfulness under s40.</p>		
Source of Casework Advice Note	Policy Delivery	Details
Related Casework Advice Notes		
Related Documents	ICO guidance: Personal information	
Contact: CW		
Date: 10/07/2013		Reference number: CWAN 016

- Information Commissioner's Office intranet