





Steven Dickinson

Policy Delivery knowledgebase

About

Contact team

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

FOI/EIR

FOI

Section/Regulation

s44

Issue

ECHR as a statutory prohibition under s44(1) FOIA; in particular Article 8

Line to take:

The European Convention on Human Rights (ECHR), and in particular Article 8, can be a statutory prohibition under s44(1) FOIA, but there will be limited circumstances in which it will be necessary to consider it.

Further Information:

Basis for the view that the ECHR be a statutory prohibition

- Under section 6(1) of the Human Rights Act (HRA), “it is unlawful for a public authority to act in a way which is incompatible with a Convention right” unless the conditions in s6(2) are met.
- Under s7(1) HRA a victim of such an unlawful act may bring legal proceedings against the authority. A person who would be a victim can bring proceedings in respect of a proposed action.
- In order for s44(1) FOIA to be engaged on this basis it would necessary to establish that a proposed disclosure would be incompatible with a Convention right.
- The Commissioner is also bound by s6(1) HRA. It would therefore be unlawful for the Commissioner to order the disclosure of information if it would infringe a Convention right.

Article 8 ECHR as a statutory prohibition

The view that Article 8 can provide a statutory prohibition is based on the plain meaning of the words in the HRA and the ECHR:

- Article 8(1) ECHR says that everyone has the right to privacy i.e. the right to respect for private and family life, home and correspondence.
- Article 8(2) says that public authorities shall not interfere with this right unless certain conditions are met i.e. the interference is in accordance with the law and necessary in a democratic society in pursuit of certain legitimate and specified interests.

On this basis, if disclosing information would be an interference with the right to privacy and it would not be justified in the terms of Article 8(2), then the public authority would be acting unlawfully, because they would be acting in a way which is incompatible with a Convention right. Only the victim of the unlawful act (or the proposed unlawful act) could bring proceedings against the authority.

Note: the contrary view, that Article 8 does not constitute a statutory prohibition, is often based on the decision of the Information Tribunal (as it then was) in *Pauline Bluck v Information Commissioner & Epsom and St Helier University NHS Trust* [EA/2006/0090](#) at §§31-32. We consider that those comments were obiter, as the decision was made on the basis of s41, not s44, and furthermore an Information Tribunal decision is not a binding precedent.

Circumstances in which this could be used

We expect that in practice there will be few FOIA cases in which it is necessary to consider the s44 exemption on this basis. As usage as the primary exemption will be very rare the Commissioner does not currently cover it in external guidance. If the information in question constitutes personal data, then disclosure may contravene DPA principles, in which case it would be exempt under s40(2). If disclosure would or would be likely to endanger the physical or mental health or the safety of any individual then s38 FOIA may be engaged, and there is a weighty public interest in avoiding this danger. Nearly all of the issues covered in the ECHR are essentially reflected in the FOIA exemptions.

However, there may be cases in which the information does not meet the definition of personal data, because it does not identify a specific individual but to disclose it would be an unnecessary interference with the privacy of individuals. For example, if the information showed that one of a group of people living at a particular address was guilty of a sexual offence, but it was not possible to identify the individual concerned, then it would not constitute personal data, but it is conceivable that to disclose that information would impact on the privacy of all the people at that address, because of the likely repercussions. In such a case it is likely that s38 FOIA would be engaged, but if it is not, or if the balance of the PIT is not in favour of the exemption, then it may nevertheless be possible, depending on the circumstances, to show that the information is exempt under s44(1), on the basis that disclosure would be an unnecessary interference with Article 8 rights.

Applying this in practice

As explained above, we consider that in practice this exemption will rarely be used. However, there may be cases where it is put forward by a public authority; alternatively there may be cases where we have good reasons to think that the information should not be disclosed (e.g. the hypothetical example discussed above) and it is not otherwise exempt. In such cases, as a responsible regulator and as a public authority bound by s6 HRA, we should give it consideration.

We should consider the following:

- Would there be an interference with the rights in Article 8(1) of the Convention? There would have to be some cogent evidence that there would be such interference.
- Would it be in accordance with the law (apart from FOIA)?
- Would disclosure meet one of the legitimate aims listed in Article 8(2)? These include the protections of the right and freedoms of others. The right to information under FOIA is such a right.
- Is disclosure necessary to meet this aim? This means, is there a pressing social need for disclosure?
- Is the disclosure proportionate to the aim? Is there another way to meet the aim that would interfere less with the privacy right?

Note that while Article 8 is the ECHR right that is most likely to be relevant in s44(1) cases, public authorities may also cite other Convention rights, for example the right to a fair trial in Article 6.

In any FOIA case where ECHR is being considered as a statutory bar, it is essential to obtain signatory advice.

Source	Details		
Counsel opinion	Counsel opinion (Tim Pitt-Payne) on s41 44 FOIA re deceased 25 09 06		
MoJ guidance	MoJ guidance on s44		
Internal working papers	Article 8 ECHR as a statutory bar under s44(1)(a)FOIA		
Related Lines to Take	Article 8 of the European Convention on Human Rights and section 44 of the Freedom of Information Act 2000		
Related Documents			
Contact			
Date	29/11/2012	CW Policy Reference	CWAN 007

-
- Information Commissioner's Office intranet