

FOVER
FOI Section/Regulation s44 Issue Ombudsman's or regulator's statutory bars
line to take:
N.B. Our line has changed -- see IT Summary Cubelli v IC and Wrightington, Wigan and Leigh NHS Foundation Trust (EA/2011/0183, 30 May 2012). This new position will be reflected in new guidance at which time this LTT will be withdrawn.

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 purposes of any specific investigation it is carrying out. This provision should
Certain regulators statutory bars include "gateway" to disclosure which may be applied at the regulators discretion. 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
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 exact wording of the statutory bar in question. Where it is permissible for a
Further 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 under the Data Protection Act. The application of section 44 in relation to
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, will include information sent to the regulator
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 establishing if such a statutory bar applies there should be some focus on the p

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 information is not actually required by the regulator in the cou

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 for the purposes of an investigation at any time. This may include the "follow

With regard to when an investigation starts, in the Information Tribunal decision in Pursar v the ICO and the Local Government Ombudsman the Appellant argued that since the Ombudsman had not investigated the matters complained about, there was no in

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, and that therefore the statutory prohibition does not apply, then

This issue was considered by the Upper Tribunal in O'flann v Gerry Morriarty. The Upper Tribunal considered the statutory construction of both FOIA and the Communications Act 2003 and concluded at paragraph 63 of its decision that

"In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well req

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 in any particular case, it is not for him to question whether that discretion was ap

It should be noted that this reverses the position previously taken by the Commissioner (and the Information Tribunal in Hoyle v ICO and the Civil Aviation Authority) that it is within the Commissioner's power to challenge the exercise of a regulator's discret

"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 unlawful. This was confirmed by the Information Tribunal in the case of Slatts, '

"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 powers conferred on the FSA by statute or by statutory instrument other than the FSMA

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 an FOI request, and when considering whether section 44(3)(a) applies. As it

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 statutory bar in question.

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 that information originally obtained by the Health Services Commissioner in the cou

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 information that would be protected in the hands of the regulator (subject to any excep

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 Ombudsman.
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 statutory bar is limited in this way, then this line will not apply (although other exemptio

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 with the regulator for advice about what information the regulator would consid

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 information has not actually been obtained in the course of or for the purpose of disclosure in any particular case, it is not for him to question whether that discretion was applied correctly or not.

public authority other than the relevant 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 covered by the statutory bar. A regulator's statutory bar should only be considered in relation to any remaining non-personal data.

or that it has required in the course of or for the purposes of any specific investigation it is carrying out. It will not usually include information created by a regulator (unless this reveals the content of information obtained by the regulator), nor information that arises (was the information sent to the regulator, was it provided because the regulator needed it for the purposes of its investigation?).

use of or for the purposes of an investigation the Commissioner considers that the statutory bar will not apply.

view" parts of an investigation such as ensuring that a public authority complies with any steps that the regulator may have ordered.

investigation and no information obtained from other parties 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 determining whether a complaint falls within the scope of the investigation."

the issue arises as to whether or not the Commissioner has the power to challenge the public authority's decision in this respect.

view a view to be taken on the construction 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 in the subject of reasonableness by a court.

applied correctly or not.

tion using a "Wednesbury unreasonableness" test.

where it was considered whether responding to FCI requests 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 FCI request was therefore lawful. The Tribunal found that it was.

and not legislation such as the 2000 Act to which other persons including the FSA are or might be subject. Even if that view were wrong, section 44 on its face makes it clear beyond doubt that disclosure under the 2000 Act is to be ignored for this purpose by virtue of the exemption.

stated above, the Commissioner will take into 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 applies.

use of her investigation continued to be covered by section 15 of the Health Service Commissioners Act 1993 even when it had been passed into the hands of a third party.

provisions or exercise of regulatory discretion), being unprotected just because it is also held by a third party.

view – such as section 41 – may be relevant).

information to be covered by the statutory bar.

ses of an investigation the Commissioner considers that the statutory bar will not apply.

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is provided in the course of general correspondence and is not related to a specific investigation.

Its powers and if so whether there are reasons, for example that the individual should pursue another route for redress, why the statutory body should not take up the issue. Even though a formal decision not to investigate was taken, there still needed to be, a

art of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act."

bural commented at paragraph 38 of its decision that :

ltiue of the dispensing words "otherwise than under this Act"