

FOI/EIR FOI Section/Regulation s44 Issue Ombudsman's or regulator's statutory bars

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 This new position will be reflected in new guidance at which time this LTT will be withdrawn.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 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 purposes of an investigation the Commissioner considers that the statutory bar will not apply.

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 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 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 exact wording of the statutory bar in question. Where it is permissible for a 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.

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 under the Data Protection Act. The application of section 44 in relation to a regulator's statutory bar should only 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, 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. It will not usually include information created by a regulator (unless this reveals the content of information obtained by the regulator), nor information that is provided in the course of general correspondence and is not related to a specific investigation.

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 process (was the information sent to the 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 information is not actually required by the regulator in the course of or for the purposes of an investigation 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 for the purposes of an investigation at any time. This may include the "follow up" parts of an investigation such as 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 Ombudsman had not investigated the matters complained about, there was no 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 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, and was an investigation to establish what steps were appropriate. In the course of this investigation there was the 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 were "information obtained ...for the purpose of an investigation" And accordingly the appeal fails on this ground." The Commissioner 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, and that therefore the statutory prohibition does not apply, then the issue arises as to whether or not 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 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 complaint to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well require 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 of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise 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 in any particular case, it is not for him 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 within the Commissioner's power to challenge the exercise of a regulator's discretion using a "Wednesbury 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 unlawful. This was confirmed by the Information Tribunal in the case of *Slann*, where it was considered whether responding to FOI 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 FOI request was therefore lawful. The Tribunal commented at paragraph 38 of its decision that :

"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 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 dispensing words "otherwise than under this 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 an FOI request, and when considering whether section 44(1)(a) applies . As 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.

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 course 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.

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 exceptions or exercise of regulatory discretion), 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 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 exemptions – such as section 41 – may be 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 with the regulator for advice about what information the regulator would consider to be covered by the statutory bar.

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 course of its investigations, and with allowing the regulator to exercise any powers (to disclose information in certain 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 either:

- 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 the purposes of the regulator's investigation. In this situation, the public authority should be advised to consider section 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 statutory bar (it remains the responsibility of the public authority to identify and claim appropriate exemptions) just that if this 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 conclude that a regulator's statutory bar covers information that the regulator itself might potentially disclose (by virtue of 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 which afford the regulator considerable control over the use and disclosure of information.

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 Request under the Data Protection Act. The application of section 44 FOIA in relation to a regulator's statutory bar should only be 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 officers should refer to the legal briefing notes section of the knowledge base.

Source Details

GS,

IT,

High Court,

Upper Tribunal

Hoyte / Civil Aviation Authority (05 March 2008)

Slann / FSA (11 July 2006)

Ofcom / Morrissey (22 March 2011)

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 LA

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