

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 October 2012

**Public Authority:** The National Archives  
**Address:** Kew  
Richmond  
Surrey  
TW9 4DU

#### Decision (including any steps)

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1. The complainant requested a copy of a file held by the public authority; other related queries were answered. The file was initially withheld under section 40(2) of the FOIA. During the Information Commissioner's investigation the public authority released more of the file, the remaining redactions again being withheld under section 40(2). The Information Commissioner finds that, where cited, section 40(2) is engaged and that disclosure of the information would breach the Data Protection Act 1998 (the "DPA").
2. Although it has agreed to disclose further information the public authority has not yet made this available. Therefore, the Information Commissioner formally requires it to take the following steps to ensure compliance with the legislation:
  - disclose the information, as agreed, and advise the complainant when it is available.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Information Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

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4. The request concerns a file held by the public authority. Its website has the file descriptor "Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS): Medical information of named individuals submitted in accordance with disability benefit claims", and states that it contains the following information:

*Scope and content: Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS): Medical information of named individuals submitted in accordance with disability benefit claims. Sensitive personal data which is closed in compliance with the Data Protection Act 1998.*

*Covering dates: 1984 Jan 01 - 1993 Dec 31*

## Request and response

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5. On 29 September 2011 the complainant wrote to the public authority and requested a copy of its file reference BN 141/1. She also made the following enquiries about that file:

*"Why was this file closed for such an unusually long time (1 January 2072)?*

*Given its inherently unusual nature, why was it deemed necessary to even consider such an extended closure period in the first place?*

*When was this decision taken?*

*Has the decision been reviewed since then and, if so, when and by whom?*

*Why was that particular time period (78 years) selected?*

*Which ministry is now responsible for that decision (DoHealth / DWP / other)?*

*Was any professional legal / medical / other specialist advice taken in coming to that decision? If so, what was the advice and who gave it?*

*If the reason for closure was to protect personal details of patients and / or claimants why can the file not simply be redacted and then released?*

*Have there been any other requests for this file to be made public and if so, how many, when and by whom?"*

6. The public authority responded on 14 October 2011. It stated:

*"The file BN 141/1 does not contain general research or medical reports on Myalgic Encephalomyelitis. It was transferred to The National Archives from the Department of Work and Pensions, and as such it relates to the benefit claims submitted by named sufferers. As the detailed information in this file relates to individuals benefit claims it includes information about their personal circumstances, which required them to make such claims, in this instance these circumstances relate to an assessment of their health. The file is thus made up of medical information about named and living individuals who suffered from ME, including how it affected their everyday lives. This includes correspondence with medical professionals who gave advice on their situation only.*

*This medical advice was used to supplement disputes over benefit claims made to the government, and the file contains specific information about these claims for benefit payments. Medical information relating to individuals who are still considered to be alive is classed as sensitive personal data under section 2(e) of the Data Protection Act, 1998. The release of this information would be unfair as it would be highly likely to cause the individuals concerned damage and distress and they would also have no expectation that it would be open to public scrutiny during their lifetime. The release of this information would be a breach of the first principle of the data Protection Act, 1998".*

7. When asking for an internal review the complainant stated:

*"Why can the file not simply be redacted to remove any identifying information regarding claims/patients and then released?"*

8. Following its internal review the public authority maintained its position. It further stated:

*"The majority of the file is made up of medical information and details of benefit claims relating to named individuals. This file is about specific cases and not government policy meaning that the*

*level of redaction required to remove the names and personal details of individuals, whose personal data is exempt ... would be so great that any remaining information would be rendered meaningless and without context".*

9. During the course of the Information Commissioner's investigation the public authority agreed to revisit the file. It liaised with the originating Department and over two thirds of the file was made available. The remainder was redacted citing the exemption at section 40(2). The complainant was invited to withdraw her complaint at this stage but declined.

## **Scope of the case**

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10. On 21 December 2011 the Information Commissioner received a complaint from the complainant. She stated:

*"As a matter of public interest, I would like to see the full file BN 141/1 (with appropriate redaction of sensitive personal data) to see whether the correspondence and comments by medical professionals was relevant to formulation of government policy regarding the ME patient group, either at the time and/or subsequently".*

11. The Information Commissioner notes that the complainant did initially state that she was happy for the information to be redacted where it would reveal sensitive personal data. However, when he put it to the complainant that certain types of information would fall into this category, eg *"completed claim forms for attendance allowance, letters from those claimants, and medical reports about those claimants"*, she declined to remove these items from the scope of her complaint.
12. Following lengthy liaison, the public authority and Information Commissioner reached an agreement on what was disclosable under the FOIA; there were no outstanding areas of disagreement.

## **Reasons for decision**

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### **Section 40 – personal information**

13. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.

14. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the DPA. This is an absolute exemption, and is therefore not subject to a public interest test.
15. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller. In this case, the withheld information in question clearly relates to identifiable individuals and is about those individuals. Therefore, the Information Commissioner is satisfied that this information is the personal data of those parties.
16. The vast majority of the withheld information relates to the medical conditions of a small number of patients. As such it is the Information Commissioner's view that this information can clearly be further categorised as being 'sensitive personal data' by virtue of section 2(e) of the DPA.
17. Having accepted that the information requested would constitute the personal data, and mostly the sensitive personal data, of a living individual other than the applicant, the Information Commissioner must next consider whether disclosure would breach one of the data protection principles.
18. The Information Commissioner will first consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that personal data is processed fairly and lawfully. The Information Commissioner has first considered whether the disclosure of the withheld information would be fair.
19. In considering whether disclosure of this information would be fair the Information Commissioner has taken the following factors into account:
  - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - the individual's reasonable expectations of what would happen to their information; and,
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

20. In order to reach a view on whether the disclosure of this information would be fair, the Information Commissioner has placed specific emphasis on the nature of the information itself. He has divided it into categories and has considered each in turn below.

*Medical information about individuals*

21. The withheld medical-related information is contained in a variety of documents. There are medical opinions, including reports compiled by both individuals concerned and medical staff, minutes and letters. Within each item, redaction has generally been limited to dates, locations, reference numbers, unique identifiers and doctor's / specialist's details, although data in some forms and reports has been withheld in its entirety. This is to limit the possibility of identification of the individuals concerned - it is important to stress that where there is redaction of doctor's / specialist's information, this is to protect possible identification of the individual not the medical staff.
22. As can be demonstrated by its nature, the requested information necessarily consists of medical data about individuals. The public authority has explained that it would not normally expect sensitive information to be found within policy files such as this. It explained to the Information Commissioner:

*"Our intention and main concern is to protect those people who were unwittingly caught up in this collection of papers on what should essentially be a policy file, whose cases were considered outside the context in which the information was originally collected – e.g. the benefit forms were completed by individuals pursuing a claim for financial support. These forms would normally exist and be held on a personnel file relating to that individual and their claim. If considered within the normal context in which this information would be found, there would be a reasonable expectation that this information would not be released into the wider public domain. It is unfair to these individuals to disclose personal and indeed sensitive personal details just because their case has been selected by the authority to highlight a specific issue".*

23. The Information Commissioner agrees that, in view of the sensitivity of the information, none of the individuals would expect that their personal data would be held within this type of file. In order to reach a view on whether the disclosure of this information would be fair, the Information Commissioner has placed specific emphasis on the nature of the information itself. The requested information includes sensitive medical details about individuals which have been provided by those

individuals, their representatives and medical staff. He accepts that disclosure of the information would cause considerable distress should the individuals concerned be identified and also finds that the individuals would have no expectation that such information would be disclosed.

24. The individuals who could be identified from the disclosure of this information would have no expectation that their information would be disclosed in these circumstances. There is an inherent confidentiality in medical information and patients would have no expectation that their information would be disclosed, particularly given the level of detail included in some of the descriptions.
25. Having liaised with the public authority to ensure that the maximum amount of information is made available, the Information Commissioner also concludes that there is sufficient information to inform the public but that further disclosure would have a negative effect on the individuals concerned.
26. Finally, the Information Commissioner notes there is a legitimate interest in the public understanding how policy surrounding ME has been formulated. He recognises that knowing how individuals suffering from the condition have been dealt with and that more in-depth knowledge would assist the public's understanding. However, releasing information that could lead to identification of individuals would prejudice the rights and freedoms of those individuals and the Information Commissioner accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information.
27. The Information Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the remaining information should be withheld.

*The name and address of a member of the public*

28. There are two copies of a letter from a member of the public to an MP. The main content of the letter has been released but the individual's details have been redacted. Again the Information Commissioner considers that the individual concerned would have no expectation that his details would be disclosed to the public, in part as he has revealed his own medical condition within the correspondence. Accordingly such disclosure is likely to cause unwarranted distress. As above, the Information Commissioner has liaised with the public authority to ensure that the maximum amount of information is made available, but

he concludes that disclosure of the name and address of the individual would have a negative and unwarranted effect on the individual concerned and he finds that disclosure of the letter itself is sufficient to satisfy the public's legitimate interest in the subject matter.

29. The Information Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the remaining information should be withheld.

*The names and addresses of two doctors*

30. There are letters from, and one response to, two doctors. The main content of the letters has been released but the details of an individual have been redacted. Again, the Information Commissioner considers that the individual concerned would have no expectation that their details would be disclosed to the public. Both letters appear to have been written from private home addresses and there is no clear indication that either letter has been written in a 'professional' capacity. One letter refers to the doctor suffering from the condition himself.

31. Accordingly the Information Commissioner believes that disclosure of the names and addresses may cause unwarranted distress. As above, he liaised with the public authority to ensure that the maximum amount of information is made available, but he concludes that disclosure of the name and address of the individual would have a negative effect on the individual concerned. Furthermore, the Information Commissioner finds that disclosure of the body of the correspondence itself is sufficient to satisfy the public's legitimate interest in the subject matter.

32. The Information Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. Therefore, section 40(2) is engaged and the remaining information should be withheld.

*A personal letter seeking legal advice*

33. There is also one letter which has been withheld in full. It is written in a personal capacity and seeks legal advice (it is not possible to disclose any further detail about this without revealing its content). The Information Commissioner considers that the individual would have no reasonable expectation that it would be disclosed. Whilst he believes that disclosure is not very likely to cause distress as the correspondence is now several years old, he can see no legitimate



public interest which is sufficient to justify any negative impact to the data subject's rights and freedoms.

34. The Information Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the remaining information should be withheld.

*Conclusion*

35. Taking all these factors into account, and bearing in mind his findings about the reasonable expectations of the individuals concerned, the Information Commissioner considers that the disclosure of this information would be unfair and in breach of the first principle of the DPA. Therefore his decision is that the public authority correctly relied upon sections 40(2) with 40(3)(a)(i) to withhold this information.

## Right of appeal

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36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any notice of appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**