

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2015

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the identity of the certificate provider who signed a Lasting Power of Attorney document. The Ministry of Justice (MoJ) refused the request, relying on section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that MoJ was not obliged to confirm or deny if the requested information was held under section 40(5)(b)(i) of FOIA. The Commissioner requires no steps to be taken as a result of this decision.

Background

3. The Office of the Public Guardian (OPG) is an executive agency of the Ministry of Justice (MoJ) and falls within its remit for the purposes of FOIA. MoJ is therefore the appropriate public authority in this case.
4. OPG protects people in England and Wales who may not have the mental capacity to make certain decisions for themselves, such as about their health and finance¹.

¹ <https://www.gov.uk/government/organisations/office-of-the-public-guardian>

5. OPG supports the Public Guardian in carrying out the legal functions of the Mental Capacity Act 2005. OPG has several responsibilities including registering Lasting Power of Attorneys (LPAs). LPAs are described as follows on www.gov.uk²:

"A lasting power of attorney (LPA) is a legal document that lets you (the 'donor') appoint one or more people (known as 'attorneys') to help you make decisions or make decisions on your behalf".

6. By way of background to the request in this case, MoJ told the Commissioner:

"Certificate providers sign the LPA to confirm that the donor is not making the LPA under duress, that they understand the implications of it and have the capacity to actually make the LPA. A certificate provider can be an individual acting in a professional capacity or a lay person who has known the donor for at least 2 years".

7. OPG's guidance '*The Office Of the Public Guardian Registers*'³ explains that the registers are three databases set up by OPG under the Mental Capacity Act 2005. One of them, the register of Lasting Powers of Attorney, holds information about registered LPAs.
8. The guidance explains what information the registers contain and how to apply for a search of them. It also states that while the Data Protection Act normally applies to information held by OPG, it does not apply to the information that can be accessed in a 'first tier' search of the registers.
9. The guidance explains how to apply for a 'second tier' search if additional information is required to that provided from a first tier search.

² <https://www.gov.uk/power-of-attorney/overview>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397043/LPA109_Office_of_the_Public_Guardian_Registers_guidance.pdf

Request and response

10. On 7 July 2015, the complainant wrote to OPG and requested information in the following terms:

"Will you please provide in accordance with the Freedom of Information Act the names of the certificate providers relating to Lasting Power of Attorney for my Aunt [name redacted] as I believe it is in the public interest for you to do so".

11. OPG responded on 7 July 2015. It explained that it was unable to release the names of the certificate providers as this information is the personal information of another individual and subject to the provisions of the Data Protection Act 1998 (DPA). Accordingly it told him that his request would be considered exempt from disclosure under the fairness principle of the DPA.
12. The Commissioner understands that no FOIA exemptions were applied as the response was provided using OPG's 'business as usual' correspondence process.
13. Following further correspondence, OPG wrote to the complainant on 9 July 2015, maintaining its position.
14. As a result of the Commissioner's intervention, MoJ wrote to the complainant on 13 August 2015, confirming that it had now handled his request under the FOIA. MoJ confirmed that it holds the requested information but refused to provide it, citing section 40(2) of FOIA (personal information). On a discretionary basis, it advised that *"the certificate provider acted in a professional capacity"*.
15. The Commissioner has used his discretion to accept the case without the need for an internal review.

Scope of the case

16. The complainant first contacted the Commissioner on 9 July 2015 to complain about the way his request for information had been handled. He subsequently confirmed that he remained dissatisfied with MoJ's handling of his request for information. He told the Commissioner:

"If members of a family or the general public are to have reliance and trust in a system which is meant to protect vulnerable adults then I will contend that the process should be open and transparent".

17. He explained that he wanted to know who had verified that his relative had capacity to understand the implications of signing a LPA form.
18. The Commissioner has investigated MoJ's approach to this request. He has considered whether, in the circumstances, it would have been appropriate for MoJ to have neither confirmed nor denied that it held the specific information that had been requested.

Reasons for decision

Section 40 Personal information

19. In its submissions to the Commissioner, MoJ explained that it was refusing the request under the exemption in section 40(2) of FOIA which provides that information is exempt if it constitutes the personal data of someone other than the applicant and disclosure would contravene any of the data protection principles or section 10 of the DPA.
20. However, in this case the Commissioner has exercised his discretion to consider an exemption that was not relied upon by the MoJ. He has considered whether, in the circumstances, it would have been more appropriate for MoJ to have neither confirmed nor denied whether it held the requested information.
21. Accordingly, the analysis below considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
22. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

23. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA) If it is not personal data, then section 40 cannot apply.
24. The DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

25. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. MoJ told the Commissioner that it considers that the name of the certificate provider - the requested information in this case - is directly the personal data of the certificate provider and indirectly the personal data of the donor. It explained that in the context of an LPA, the certificate provider is inextricably linked to the donor as by signing the declaration they are confirming that, at that time, the donor understood the terms of the LPA and had the capacity to make it.
27. The Commissioner considers that context is important here. In his guidance '*Determining what is personal data*'⁴ he acknowledges that there are circumstances where the same information is personal data about two or more individuals. One of the examples he cites is where the content of the information is about one individual but it is processed in order to learn/record/decide something about another individual.
28. In this case, the Commissioner accepts that the name of the certificate provider is the personal information of that individual (for example because it comprises their name and their opinion). However, in the context of a request such as the one in this case he considers that it is processed in order to learn/record/decide something about another individual, namely the capacity of the donor to make a LPA.
29. In this case, the complainant has requested details about a LPA involving an individual who is named in his request. Details about the LPA would be significant to the named individual and, since it would be known who the information relates to, the individual would be

⁴ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

identifiable from it. The Commissioner is therefore satisfied that the information is personal data.

Is the information sensitive personal data

30. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant category in this instance is:

(e) his physical or mental health or condition.

31. In this case, given that the request relates to information about a legal document that records an individual's ability to make decisions for themselves – their mental capacity - the Commissioner is satisfied that the requested information falls under sub-section 2(e) in relation to the named individual.

32. Having accepted that the request is for the personal data, including the sensitive personal data, of living individuals other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.

33. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

34. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

35. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

36. The Commissioner has first considered whether disclosure would be fair.

37. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
38. The Commissioner recognises that people have an instinctive expectation that MoJ, in its role as a responsible data controller, will not disclose certain information about them and that they will respect their confidentiality. In that respect, MoJ explained that the process of signing an LPA would be handled confidentially with the individuals involved and provided to the OPG to process in line with the expectations and rights of those individuals.
39. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
40. In light of the above, the Commissioner considers that information relating to an LPA will carry a strong general expectation of privacy for those parties concerned.
41. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
43. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure could cause damage and distress to any party concerned.
44. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will

carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.

45. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
46. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
47. The Commissioner acknowledges that the LPA process enables people to plan ahead for someone to make certain important decisions for them, should they become unable to do so because they lack mental capacity. With respect to the Public Guardian registers maintained by the OPG, the Commissioner accepts that there is an established process whereby an interested, informed, third party can apply to search those registers.
48. In this case, he accepts that the complainant has been given, , the limited information which would reasonably be expected to be provided as part of a 'first tier' search. However, this was as a result of a successful application to search the register and not a disclosure under the terms of the FOIA.
49. In order to apply to search the register, the complainant needed to provide personal details about his aunt, details which an ordinary member of the public would be unlikely to know. The disclosure was therefore made to him personally and the Commissioner does not consider that it was disclosure to the world at large, as it would be in the case of an application made under the FOIA
50. The process also provides a 'second tier' search. An applicant making a second tier search must explain to OPG why they need the information and why they have been unable to obtain it from the person themselves or from another source. OPG will then consider whether additional information is released to the person making the search.
51. The Commissioner has not been provided with any evidence to show whether the complainant in this case has applied for a 'second tier' search.

52. The Commissioner also notes that there is a mechanism by which someone can report concerns about an attorney to the OPG, for example concerns about decisions that are not in the best interests of the person the attorney is responsible for. That mechanism includes the ability to ask the Court of Protection to appoint a deputy to manage someone's affairs.
53. The Commissioner recognises that the complainant in this case is concerned about the welfare of his relative. The Commissioner accepts that the welfare of vulnerable individuals is a matter of public interest. However, in the Commissioner's view, the legitimate interest is met by OPG's own procedures.
54. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects. He considers these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that confirmation or denial in this case would breach the first data protection principle. He therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.
55. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met.

Other matters

Receiving a request for information

56. It was only as a result of the Commissioner's intervention that the complainant's request for information was responded to under the FOIA.
57. The Commissioner acknowledges that MoJ has advised that, as a result of this case, a review of OPG's processes are underway to ensure that in future similar requests are dealt with under FOIA, as this request should have been. The Commissioner welcomes that approach.

Right of appeal

58. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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
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