

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2021

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
30 Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant requested the qualifications of the legal advisor who (he believed) had advised the caseworker dealing with a previous complaint he had made. The Parliamentary and Health Services Ombudsman ("the PHSO") denied holding any information within the scope of the request.
2. The Commissioner's decision is that if the PHSO held any information related to the request it would be the complainant's own personal data. The Commissioner has therefore applied section 40(5A) of the FOIA herself proactively to prevent the disclosure of personal data that would result from confirming or denying that information was held. As the PHSO failed to issue its response within 20 working days it also breached section 17(1) of the FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 16 November 2020, the complainant wrote to the PHSO and, referring to his earlier complaint to that body, requested information in the following terms:

"I would have expected the case worker and manager who conducted the management overview and review of our complaint against the investigation, to have consulted a colleague with

relevant professional qualifications necessary to make those legal judgements.

"I would like to ask what were the professional qualifications of the person who made those legal judgements?"

5. The PHSO responded on 7 January 2021. It stated that, as no legal advice had been sought in relation to the complainant's complaint, no information was held.
6. The complainant disputed this position, arguing that the level of sophistication in the complaint response provided to him by the PHSO indicated the involvement of a legal advisor.
7. Following an internal review the PHSO wrote to the complainant on 10 February 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner 1 March 2021 to complain about the way his request for information had been handled.
9. The Commissioner wrote to the complainant on 15 July 2021, outlining her preliminary view of his complaint. She noted that the PHSO had provided, in its initial response and internal review, a clear rationale as to why it did not hold the requested information. She also pointed out that the PHSO's stance was not inconsistent with that of other regulators – including herself – where experienced case officers are able to resolve complaints and apply both statute and case law to resolve individual complaints – without the need for professional legal advice.
10. However, the Commissioner also noted that because any information that the PHSO held would be the complainant's own personal data anyway, there would be little value in him pursuing the matter under FOIA – as the only decision notice she would be able to issue would be one considering whether 40(5A) of the FOIA was applicable. She noted that a decision notice on a similar matter had recently upheld by the First Tier Tribunal.
11. The complainant, did not reject the Commissioner's analysis outright, but did ask to have a decision notice. He also made various comments about the importance of the information and the PHSO's handling of his complaint which are referred to (where relevant) below.
12. As the Commissioner is also the regulator of data protection legislation, she considers that she is obligated to step in and apply section 40 of the

FOIA herself, proactively, where she considers it necessary in order to prevent accidental disclosure of personal data, under the FOIA, to the world at large. In this case, the Commissioner does consider it necessary to apply section 40(5A) proactively - for reasons explained below.

13. Given her experience and expertise in applying data protection legislation, the Commissioner did not consider it necessary to seek formal submissions from the PHSO. However, she did make the PHSO aware of her intention to issue such a decision notice and asked it to let her know if there was anything it wished to add. The PHSO acknowledged the correspondence and stated that it had nothing to add.
14. For the avoidance of doubt, the Commissioner makes no formal finding as to whether the PHSO does or does not hold information within the scope of this request. Her only focus is whether the PHSO was obliged to inform the complainant of any relevant information it held.

Reasons for decision

15. Section 40(1) of the FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

16. Section 40(5A) of the FOIA states that:

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

17. Section 2(2) of the Data Protection Act 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual."

18. The Commissioner considers that any information that the PHSO held within the scope of the request would indisputably be the complainant's own personal data.
19. The request is ostensibly about the qualifications of a member of the PHSO's staff. However, the complainant has not asked about a member of staff at random. The wording of the request makes clear that the information relates to an individual who (the complainant believes) provided legal advice in respect of his earlier complaint.

20. The request the complainant has made is based on the premise that he previously made a complaint to the PHSO. If he had not made a complaint, the PHSO would be unable to identify which staff member's qualifications the complainant was seeking. The request also relates to the procedural handling of his complaint to the PHSO.
21. Therefore, in confirming or denying that it holds relevant information, the PHSO is confirming the premise of the request – it is confirming that it previously dealt with a complaint submitted by the complainant. The request therefore relates to information on a decision made about the complainant, the complainant is clearly linked to that information and is identifiable via the request that he submitted. Therefore any information the PHSO held (if indeed it did hold any) would be the complainant's own personal data – although it may also be the personal data of others too.
22. The Commissioner notes that the First Tier Tribunal in *Kenneth Heywood v Information Commissioner* (EA/2021/0031P) recently upheld a decision notice in which she had proactively applied section 40(5A) of the FOIA in respect of a personal data premise-based request.¹
23. In correspondence with the Commissioner, the complainant outlined his concerns about the way that the PHSO had dealt with his complaint and noted that his request had been aimed at establishing the process the PHSO had followed. Whilst the Commissioner recognises that the complainant has concerns, it only reinforces her view that the complainant has made a request for his own personal data.
24. The complainant obviously knows whether or not he made a complaint to the PHSO – and the PHSO will also know. However, the world at large does not know and responses provided under the FOIA are considered to be provided to the world at large – not just to the individual who made the request.
25. In this particular case, the complainant and the PHSO communicated by private email so the likelihood of harm is extremely low – however, the correct response under the FOIA is not determined by the likelihood of harm, or the complainant's wishes to obtain the information.

1

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20\(EA-2021-0031\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20(EA-2021-0031)%20Dismissed.pdf)

26. The Commissioner therefore considers that the PHSO could not confirm or deny holding information within the scope of this request without disclosing personal information relating to the complainant. It should therefore have relied on section 40(5A) for the FOIA to neither confirm nor deny holding information.
27. As section 40(5A) is an absolute exemption, there is no requirement for the Commissioner to consider the balance of the public interest.

Procedural matters

28. Section 17 of the FOIA requires a public authority to inform a complainant, within 20 working days, of any exemptions it wishes to apply either to withhold information, or to neither confirm nor deny holding information.
29. In this case, the PHSO did not respond within 20 working days and, when it did, did not rely on an exemption when it ought to have done. The Commissioner therefore considers that the PHSO breached section 17(1) of the FOIA in responding to this request.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
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