

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 March 2014

**Public Authority:** Department of Health  
**Address:** Richmond House  
79 Whitehall  
London, SW1A 2NS

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the forfeited pensions under the NHS Pension Scheme Regulations. The Department of Health refused to disclose the information, citing section 40(2) (third party personal data) of the FOIA as its basis for doing so.
2. Following an internal review, the Department disclosed some of the previously withheld information but maintained its position on the remainder.
3. The Commissioner's decision is that the Department of Health is correct to withhold the information under section 40(2). The Commissioner does not require the public authority to take any further action.

#### Request and response

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4. On 24 October 2013, the complainant wrote to DoH and requested information in the following terms:  
*"Please would you let me know in writing if you hold information of the following description: Information concerning: Cases where pensions have been forfeited, in whole or in part, under the NHS Pension Scheme Regulations 1995 and 2008."*
5. The DoH responded on 24 November 2013 and refused to provide the requested information, citing section 40(2) of the FOIA as its basis for doing so.

6. Following an internal review the DoH wrote to the complainant on 20 December 2013. It revised its position and provided information relating to 10 individuals. However, it refused to disclose all the information relating to an 11<sup>th</sup> individual and again cited section 40(2).

## Scope of the case

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7. The complainant contacted the Commissioner on 9 January 2014 to complain about the way his request for information had been handled. Specifically, that DoH had withheld the information relating to an 11<sup>th</sup> individual.
8. The Commissioner considers the scope of this case to be to determine if the DoH has correctly applied section 40(2) of the FOIA to the withheld information.

## Reasons for decision

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9. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*"Any information to which a request for information relates is also exempt information if—*

- (a) it constitutes personal data which do not fall within subsection (1), and*  
*(b) either the first or the second condition below is satisfied."*

Section 40(3)(a)(i) of the Act states that:

*"The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"*

## **Is the requested information personal data?**

10. Personal data is defined at section 1(1) of the DPA as: "personal data means data which relate to a living individual who can be identified-

*(a) from those data,*

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

11. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: "*Determining what is personal data*"<sup>1</sup>.

12. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

*(i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*

*(ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*

13. The Commissioner notes that the information withheld under this exemption is the details of one individual whose personal benefits were partially forfeited following a criminal conviction.

14. The Commissioner recognises that in many cases, individuals cannot be identified even from a very small number of statistics. However, in this case, the DoH considers that disclosure of any of the withheld information could lead to the identification of the individual, in combination with information already released in relation to the nature of the crimes and the time period specified.

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

15. The Commissioner accepts that the withheld information is personal data, as it relates to a living individual who could be identified from it. He has therefore gone on to consider whether disclosure of the information would breach any of the principles of the DPA. The DoH considers that disclosure of the requested information would breach the first principle of Data Protection Act 1998 (‘the DPA’).

***Would disclosure contravene the first data protection principle?***

16. The first data protection principle requires that the processing of personal data be fair and lawful and,
- 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 met.*
17. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

***Would disclosure be fair?***

18. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.*
  - b. Consequences of disclosure.*
  - c. The legitimate interests of the public*

***The reasonable expectations of the data subject***

19. The Commissioner’s guidance<sup>2</sup> regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party’s public or private life. Although

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<sup>2</sup>[http://www.ico.gov.uk/~//media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx)

the guidance acknowledges that there are no hard and fast rules it states that:

*"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*

20. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
21. In this case the Commissioner notes that the information withheld under this exemption is the name and details of the offence.
22. The Commissioner considers that the requested information relates partly to the data subject's professional life and partly to their personal life. However, the very nature of the information falls within the category of sensitive personal data as defined by section 2 of the DPA, and as such tends to hold a greater expectation of confidentiality than non-sensitive personal data.
23. The Commissioner is mindful that information regarding disciplinary proceedings and criminal convictions would not normally be disclosed into the public domain. He is therefore satisfied that the data subject would reasonably expect that information which would identify them as being a convicted criminal would remain confidential.

### ***Consequences of disclosure***

24. The Commissioner's guidance states that:

*"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."*

25. The Commissioner acknowledges that the information provides details of inappropriate conduct and criminal convictions, which in some cases, has been considered worthy of dismissal and as confirmed in paragraph 22 of this notice, falls within the definition of sensitive personal data.

The consequences of disclosure into the public domain are therefore likely to cause greater distress to the data subject than the disclosure of non-sensitive information.

26. The Commissioner considers that further dissemination of this information into the wider public domain could cause serious harm to the data subject given the nature of the offences. The Commissioner is also mindful that the potential personal social embarrassment caused to the individual by disclosure would not be insignificant.
27. The Commissioner acknowledges that the individual has already been through the legal process. Additional distress as a result of a wider disclosure of their identity does not therefore appear to the Commissioner, as either proportionate or justified.

### ***The legitimate public interest in disclosure***

28. Notwithstanding the data subject's reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
29. The Commissioner notes that the individual was employed in a position of care. He therefore considers that in addition to the broad general principles of accountability and transparency of public sector organisations, there may be a legitimate public interest in the disclosure of the identity of the individual in question.
30. The Commissioner also considers that disclosure would cause significant damage and distress to the individuals who are the subject of the concerns raised (data subjects). The Commissioner does not therefore consider that the legitimate public interest in this case would outweigh the interests of the data subjects.
31. Given the age of the individual and the passage of time the Commissioner considers that there would no possibility of the individual being employed in a similar role. The Commissioner also considers that disclosure would cause significant damage and distress to the individual concerned.
32. In weighing up the balance between the reasonable expectations of the data subject and the consequences of disclosure of this (sensitive) personal information, against the legitimate public interest in disclosure, the Commissioner considers that the balance is weighted significantly in favour of non-disclosure. The Commissioner does not therefore consider that the legitimate public interest in this case would outweigh the interests of the data subjects. He is therefore satisfied that DoH

appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

## Right of appeal

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33. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**