Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2014

Public Authority: House of Commons
Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant has requested information about employment tribunal cases involving MPs. The House of Commons ("HoC") refused to comply with this request citing section 14(2) (repeated request). At internal review, it also introduced reliance on section 40 (unfair disclosure of personal data) and section 41 (information provided in confidence) as a basis for refusing to provide this information.

2. The Commissioner's decision is that HoC is not entitled to rely on section 14(2) as a basis for refusing to comply with this request. However, it is entitled to rely on section 40(2) as a basis for refusing to provide the requested information.

3. No steps are required.

Request and response

Background

4. On 1 November 2013, the complainant requested information of the following description:

"Between 1st April 2010 and 1st April 2013, which MPs have been taken to employment tribunals by employees?

Please provide your response in the following format: name of MP, date, reason for complaint, outcome (including size of settlement etc)".

5. On 28 November 2013 HoC responded. It provided some information, namely the numbers of Members of Parliament who had employment tribunal claims made against them by their employees where it had a record about this. It explained "This list may not be exhaustive; other Members may have been taken to tribunal which we are not aware of". It went on to explain that it held information about the name of the MP in question, "the date of the tribunal, the reason for the complaint and in some cases, the outcome". However, it argued that it was exempt from its obligation to provide this by virtue of section 40(2) and section 41.

The request

6. On 28 November 2013, the complainant submitted a refined request for information of the following description:

7. "For each of the five cases mentioned [in the response of 28 November 2013]:

   a) the date of proceedings,

   b) the reason for proceedings,

   c) the outcome of proceedings (where that information is held).

   In isolation or taken as a whole, these pieces of information pose no substantial risk of identification for the members or employees involved".

8. On 29 November 2013, HoC refused to provide the information described in the request of 28 November 2013 citing section 14(2) and it argued that this was a repeated request because it included the information described in the 1 November 2013 request.

9. On the same day, the complainant requested an internal review. He emphasised that the scope of the request had changed such that it was not a repeated request.

10. HoC sent him the outcome of its internal review on 19 December 2013. It upheld use of section 14(2) in relation to the 28 November 2013 request but, at the same time, introduced arguments in support of reliance on section 40(2). It also restated its view that the information described in the earlier request was exempt under section 40(2) and section 41.

Scope of the case

11. The complainant contacted the Commissioner on 10 January 2014 to complain about the way his request for information had been handled.

12. The Commissioner has first considered whether HoC is entitled to rely on section 14(2) as a basis for refusing to comply with the request of 28 November 2013. The Commissioner has also considered whether it is entitled to rely on section 40(2) or section 41 as a basis for refusing to provide the requested information.

Reasons for decision

13. Section 14(2) of the Act states that

> "*Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request for that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request".*

Are the requests made by the same person?

14. The Commissioner notes that the request is made by the same person.

Is the request identical or substantially similar to the previous requests?

15. In this case, there is a crucial difference between the two requests: the complainant refined his request so that it did not include the identity of the MPs within its scope. In the complainant's view, that was sufficient to negate the effect of section 40(2). In other words, he felt that no individuals could be identified from the requested information if the identity of the MPs did not form part of the request. He refined his request having received a refusal to an earlier request on the grounds that individuals could be identified from the information described in that earlier request. Whether he is correct on this point will be discussed later in this notice. However, the Commissioner is satisfied that he made a genuine attempt to refine his request by removing what he considered to be an obstacle to disclosure of the requested information.

16. It would be a serious limitation on the right to know if a public authority, in such circumstances, could claim that a new request, which had been refined to take into account its grounds for refusal of an earlier request, was ineligible for consideration on the basis that is was a repeated

request. It may well be that HoC was entitled to refuse the refined request on broadly similar grounds to the original request. However, HoC remains obliged to make specific arguments in relation to the refined request. It cannot dismiss it as a repeated request simply because it concludes the information in the refined request is exempt for reasons which are broadly similar to its refusal of the original request.

Section 14(2) - Conclusion

17. HoC is not entitled to rely on section 14(2) as a basis for refusing to comply with the request because there is a sufficient difference between the refined request and the initial request – the identity of the MPs is explicitly excluded from the wording of the refined request.

18. Having concluded that HoC cannot rely on section 14(2) as a basis for refusing to comply with the request, the Commissioner has considered whether HoC is entitled to refuse to provide the information described in the refined request under section 40(2).

Section 40(2)

19. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.[1]

Does the requested information constitute third party personal data?

20. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question.[2]

21. HoC initially argued that, in effect, because the HoC itself could identify the parties to the employment dispute cases in question (regardless of whether it removed the names of those parties prior to disclosure under FOIA), the information was personal data subject to the requirements of

[1] http://www.legislation.gov.uk/ukpga/1998/29/contents

[2] http://www.ico.org.uk/for_organisations/data_protection/the_guide/~/media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

the DPA. The Commissioner disagrees with this. Just because a public authority holds information as personal data, does not mean that disclosure of sufficiently anonymised data is a breach of the DPA. The Commissioner takes the view that, in these circumstances, at the point of disclosure the information, if sufficiently anonymised, is not personal data.

22. The Commissioner would cite a recent binding decision of the Upper Tribunal in support of his position, namely *Information Commissioner v Magherafelt DC* [2012] UKUT 253 (AAC) (the "Magherafelt case"). [3]

23. In the Magherafelt case, the Upper Tribunal considered, among other issues, the correct interpretation of personal data in s1(1)(b) of the DPA which provides that personal data means data which relate to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come into the possession of the data controller. The Upper Tribunal found that this provision had to be read in conjunction with recital 26 of the EU directive upon which the DPA is based. Recital 26 reads in part:

"Whereas the principles of protection must apply to any information concerning an identified or identifiable person: whereas to determine whether a person is identifiable account should be taken of all means likely to reasonably be used **either by the controller or by any other person to identify the said person;** [the Commissioner's emphasis] whereas the principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable…".

24. As a result, the Upper Tribunal found that the definition of s1(1)(b) of the DPA was widened to the effect that account should be taken of whether people other than the data controller could identify a living individual from the information.

25. When considering the issue of identifiability, the Upper Tribunal considered what additional information was available which, when combined with the information requested in Magherafelt case, would identify individuals. It looked at what information would be available to a motivated intruder, ie someone who had no local knowledge of the events to which the information related, but who was sufficiently motivated to investigate the issues by tracking down and interviewing

[3] http://www.osscsc.gov.uk/judgmentfiles/j3536/[2013]%20AACR%2014ws.doc

those with the local knowledge. This mirrors the approach that the Commissioner has taken in his guidance (see note 2).

26. HoC also argued that information about Employment Tribunals was available online and therefore it would be possible for someone to match an MP to a particular case using requested information even if it did not include the MP's name.

27. The Commissioner noted that, on the contrary, the Tribunal Service did not make such information available online. He put this to HoC when also drawing its attention to the Magherafelt case. He asked for HoC's further submissions.

28. In response, HoC acknowledged that this information was not readily available online but explained that there was a mechanism for members of the public to conduct an electronic search of Employment Tribunal cases at a particular location – it provided evidence of this. While it recognised that this would be a relatively time-consuming task, it asserted that a sufficiently motivated person, such as a journalist, could, using the names of all MPs (publically available information), conduct a search to find if any had been involved in an employment tribunal case. Using the data requested in this case, (in addition to MP names) it would be easier to find the case in question and to exclude, for example, a party to an employment tribunal case whose name matched or was sufficiently similar to an MP's name. It also explained that it had asked the Tribunal Service whether this scenario was feasible and that organisation had acknowledged that it was.

29. In light of the above, the Commissioner has concluded that the requested information could be combined with other freely available information to reinstate identifiers into the requested information. The Commissioner accepts that, even without the requested information, any person could, at any time, sift through the electronic records referred to above and find cases where the party names matched or seemed to match Members of Parliament. However, with information about the date of proceedings, the outcome and the reason for proceedings (where that is held by HoC and disclosed in response to this request), such a search would be more likely to be successful in matching MP names to particular proceedings.

30. In summary, the Commissioner disagrees with HoC that it can rely on section 40 because it holds the relevant identifiers itself. The crucial consideration is what could happen to the requested information after it is disclosed without those identifiers. If the relevant MPs could still be identified from the requested information once it is in the public domain (even though obvious identifiers have been removed when it is initially disclosed), it will constitute personal data and the provisions of the DPA

will apply to it. The Commissioner acknowledges that identifying the MPs would be an arduous exercise but he agrees that a sufficiently motivated person might well be prepared to undertake this task, given widespread interest in the activities of MPs and matters arising from their responsibilities in public office.

31. Having concluded that the requested information would not be sufficiently anonymised so as to cease to be the MPs' personal data once in the public domain, the Commissioner must next consider whether disclosure of the requested information would contravene the DPA.

Would disclosure contravene any of the DPA data protection principles?

32. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

> 'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
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> at least one of the conditions in Schedule 2 is met, and
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> in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

33. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:

- whether information of the nature requested is already in the public domain;
- if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

34. Furthermore, notwithstanding the individual in question'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 and legitimate interest in disclosure to the public.

35. Such 'legitimate interests' can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is important to take a proportionate approach. For example, it may still be possible to meet the legitimate interest by only disclosing some of the requested information, rather than viewing the disclosure as an all or nothing matter.

36. As noted above, the Commissioner has accepted that the requested information could be combined with publically available information in order to identify the parties involved in the employment tribunal proceedings in question. As such, the requested information, still constitutes personal data.

37. An important point to note here is that the searches described above would not only yield information about MPs who were involved in employment tribunals but also the other party or parties to the same proceedings. The Commissioner accepts that a search as described above could yield details of parties to employment tribunal cases in any event, even without the requested information. However, the disclosure of the requested information would facilitate a search which focussed on cases related to MPs. A case involving an MP is more likely to attract media attention. If the individual who has brought proceedings against an MP has not chosen to publicise their case, the Commissioner thinks it would be unfair and outside that person's reasonable expectations to make their case more widely known. Employment difficulties and conflicts are not generally matters which individuals regularly publicise. There may, of course, be occasions when they would, for example, if they are part of a group that has taken action together. However, it is not normally the case that a party to an employment dispute would take steps to make that fact more widely known.

38. The Commissioner acknowledges that there is a legitimate interest in the public knowing more about how an MP performs as an employer. The general public expects high standards of MPs in all matters including

how they conduct themselves as employers. MPs are important public figures. They can be directly involved in the preparation of and debate about employment legislation that affects all working people and their employers. If an MP is not operating to the same standards that he or she expects of others, there is a legitimate interest in making this public. However, the Commissioner does not agree that this overrides the legitimate and reasonable expectation that parties to an employment tribunal case would have regarding the extent to which their case is publicised.

39. The Commissioner also notes that MPs are not obliged to bring employment tribunal cases to the attention of the HoC. HoC has an advisory service called the "Personnel Advisory Service" ("PAS") which, according to material that HoC provided to the Commissioner, describes itself as providing "Confidential HR Advice to Members [that is, MPs]". If MPs thought that confidential personnel matters on which they sought advice were likely to be made public, they would be less likely to seek general or specific advice from this source. This is likely to make it more difficult and more costly for an MP to comply with his or her obligations as an employer. As a consequence, there would be a detrimental effect on the MP and his or her employees.

Section 40 - Conclusion

40. In light of the above, the Commissioner has concluded that disclosure of the requested information would contravene the first data protection principle of the DPA. Although the requested information does not include obvious identifiers, those identifiers could be reintroduced from a publically available source. The requested information is therefore personal data and the requirements of the DPA are engaged. It would be unfair to those who were parties to an employment tribunal case for the case to become more widely publicised against their reasonable expectations. It would also make MPs more reluctant to approach the PAS for advice on employment matters if they could not be certain that their details would remain confidential. Disclosure would breach the first data protection principle. As such, the requested information is exempt from disclosure under section 40(2) of the Act.

41. In light of the Commissioner's conclusions regarding section 40(2), he has not gone on to consider whether the information is also exempt under section 41.

Right of appeal

42. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.

44. 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 .....

Graham Smith
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