

Third Party Personal Data - The Correct Approach

Section 40 provides an exemption from disclosure of personal data about the requestor as well as that of third parties. With regards to the latter the public authority must show that disclosure would breach of one of the data protection principles (usually the first one).

The recent Tribunal decision in *Bousfield v Information Commissioner and Liverpool Women's NHS Trust (EA/2009/0113)* concerned a refusal of a request for compromise agreements the Trust has entered with doctors that have been paid off or "taken voluntary early retirement". The Tribunal upheld the Trusts refusal (and the Commissioner's decision notice) on grounds of it being personal data Section 40(2). In doing so it reiterated the questions that need to be asked when applying this exemption:

- The first question is whether disclosure of the Disputed Information would amount to fair and lawful processing (First Data Protection Principle). If not, then the information is exempt.
- Fairness is a broad concept, capable of embracing a range of considerations. It should not be considered from the point of view of the data subject alone. Rather, it is necessary to consider also the interests of the data user (here, the Appellant), and where relevant, the wider considerations of accountability and transparency implicit in FOI.
- This does not mean, however, that one starts with the scales evenly balanced. The data subject's interests are clearly paramount. (See the words of Lords Hope and Rodger in *Commons Services Agency v Scottish Information Commissioner*, on the continued primacy of the DPA, notwithstanding the passage and implementation of FOI.)
- If disclosure would amount to fair and lawful processing, then it is necessary to look further to establish whether processing would also meet the conditions in Schedule 2.
- Schedule 2 contains six conditions which are relevant to the processing of any personal data. At least one condition has to be met to allow disclosure. The conditions include whether consent has been given by the data subject, whether processing is "necessary" to comply with a legal obligation, or whether it is "necessary in the interests of justice".
- Often the only relevant condition will be condition 6 which requires that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

- To assess whether condition 6 is satisfied, one must first consider whether there is a legitimate interest in disclosure on the part of the Public Authority, the Appellant or the wider public.
- If there is, the next question is whether disclosure is necessary to meet that legitimate interest. In *Corporate Officer of the House of Commons v Information Commissioner*, “necessary” in the context of condition 6 was taken to reflect the meaning attributed by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a “pressing social need” and the interference should be “both proportionate as to means and fairly balanced as to ends”.
- Even if these two questions are answered in the affirmative, disclosure is only permissible if it is not “unwarranted” by reason of “prejudice to the rights and freedoms or legitimate interests” of the data subject.

Section 40(2) is a complicated exemption. To avoid a challenge public authorities must ensure that they follow a staged process as set out above and in the Information Commissioner’s Guidance note (see www.ico.gov.uk).