Dealing with Information Rights

An agreed set of principles between the Public Services Ombudsman for Wales and the Information Commissioner's Office.

Background

Every citizen has a right to request public information under the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004 (EIR), and request access to their own personal data, by way of a subject access request, under the Data Protection Act 1998 (DPA).

These are important rights. The right of access to public information in appropriate circumstances is key to making public bodies transparent and accountable. The subject access right is a practical expression of the fundamental right of an individual to respect for their private life. It is the Information Commissioner's responsibility to promote and uphold these rights.

These individual rights can, however, be constrained in so far as that is necessary to protect the rights and freedoms of others or on other important public interest grounds. FOIA and DPA therefore provide for the withholding of information where there is a properly applied legislative mechanism for doing so.

The Ombudsman considers complaints of maladministration and service failure against public service providers in Wales under the Public Services Ombudsman (Wales) Act 2005 (PSOW Act). Additionally, the Ombudsman also considers complaints that members of local authorities have breached their Code of Conduct; these powers are set out in the Local Government Act 2000 (LGA) and associated regulations.

The Ombudsman welcomes the rights of access set out in the Freedom of Information Act 2000, Data Protection Act 1998 and the Environmental Information Regulations 2004. At the same time the PSOW Act specifies that investigations must be conducted in private and there are restrictions imposed on the disclosure of information obtained in deciding whether to begin, or in the course of an investigation[1]. The Ombudsman also carries out Code of Conduct investigations in private, and the LGA contains specific restrictions on the disclosure of information obtained during such an investigation. The restrictions were imposed to ensure that the Ombudsman is able to carry out his statutory function efficiently and act as a necessary counterbalance to the wide powers of the Ombudsman to obtain information.

[1] The PSOW Act includes other listed circumstances in which information has been obtained, which are also subject to restrictions on disclosure.

The Information Commissioner and the Ombudsman recognise the complementary nature of their complaints handling functions and they are mindful of their experience of the provisions which allow the sharing of information between the two organisations, where it appears that the information relates to matters where the Information Commissioner or the Ombudsman has jurisdiction to enforce[2]. The Information Commissioner and the Ombudsman consider that this experience, as enshrined in statute, supports mutual co-operation between each other whilst the clarity afforded by the wording in the statue respects the unique responsibilities and particularities of each.

This set of general principles has been drawn up to reflect the relative jurisdictions of the Ombudsman and the Information Commissioner's Office (ICO), and the interaction between the relevant legislation that comes into play when dealing with information rights. These interactions can be complex and this paper is not a comprehensive set of technical instructions but instead gives some context and agreed approaches to handling information requests.

The legislative context

Section 3 of the PSOW Act requires that any action taken in respect of the alternative resolution of a complaint must be in private. Where the Ombudsman investigates a complaint, section 13(2) of the PSOW Act specifies that the investigation must be conducted in private. Section 34X sets out the limited purposes for which information obtained by the Ombudsman in the discharge of these functions can be disclosed. In reference to Code of Conduct complaints, the restrictions are set out at section 63 of the LGA..

Members of the public can request information from public authorities under FOIA. Where there is an FOI request relating to an Ombudsman's investigation then consideration has to be given to the operation of section 44 of FOIA. Section 44 provides that information is exempt information if any other enactment prohibits its disclosure.

Requests for an individual's own data, as opposed to public information or information relating to someone else, are made under the DPA. The application of the DPA and its interaction with both section 34X of the PSOW Act and section 63 of the LGA is different to that of the FOIA. Section 27(5) of the DPA overrides the statutory bars in the PSOW Act and LGA. This means that personal data can only be withheld where a relevant DPA exemption applies.

This does not mean, however, that all personal data has to be released under the provisions of the DPA as a matter of course. Section 31(4) of the DPA allows the Ombudsman to deny access to personal data to the extent that providing access to that personal data would be likely to prejudice the proper discharge of his statutory functions.

[2] Section 76(1) of the Freedom of Information Act 2000 and section 34X(2)(j) of the PSOW Act

The Ombudsman has explained that if information from a complaint file is released under the DPA (when Ombudsman's legislation makes clear that the Ombudsman's investigations are undertaken in private and information should only be disclosed in very limited circumstances), the bodies investigated are likely to be less inclined to give all the information the Ombudsman needs in order to carry out his statutory functions effectively.

Parliament accepted that there was a clear public interest behind the statutory bar – this led directly to the passing of section 31(4) of the DPA, and the existence of the statutory bar is a relevant factor in determining whether personal information should be released. In effect, section 31(4) helps the Ombudsman to carry out his functions in a manner that encourages people to provide him with the information he needs in order to investigate the complaints put to him.

However, the existence of the 'likely to prejudice' test makes clear that this exemption does not operate as a blanket application covering all personal data in all Ombudsman's investigations, and the exemption applies only in any case to the extent to which disclosure of the personal information to the data subject would be likely to prejudice the proper discharge of his functions.

The Ombudsman must, therefore, balance his duty to operate openly and transparently, with his duty to act within the legislation that governs his work and to protect the privacy of personal and other information given to the Ombudsman in confidence.

How the Ombudsman will handle information requests

The Ombudsman will process information requests in line with the requirements of the FOIA, EIR and DPA while at the same time protecting information which should remain private, in line with the legislation that governs the Ombudsman's work. In order to achieve this balance, the Ombudsman will take a three-step approach and consider all of the legislative requirements when handling information requests. Those three steps are:

- Disclosure under the PSOW Act and/or LGA.
- Disclosure under the FOIA (or EIR).
- Disclosure under the DPA.

The Annexes to these principles set out both how the Ombudsman will handle information requests in line with the relevant legislation and what the ICO will take into account when considering a complaint's rights and the application of FOIA, EIR or DPA.

Signed

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Nick Bennett
Public Services Ombudsman for Wales

Christopher Graham
Information Commissioner

8 February 2016

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Date

Annex A

Disclosure by the Ombudsman under the PSOW Act and/or LGA

The Ombudsman will consider whether the information requested can be released under his own legislation taking into account the following provisions:

- Section 3(3) of the PSOW Act, which states that an action taken in respect of the alternative resolution of a complaint must be in private, and section 13(2) which states that an investigation must be conducted in private.

- Section 34X(2) of the PSOW Act which prevents information obtained by the Ombudsman or his officers in the circumstances set out in section 34X(1) from being disclosed, unless disclosure is for one or more limited purposes. The most relevant of those purposes are likely to be for the purposes of deciding whether to begin an investigation; for the purposes of an investigation; and, for the purposes of a statement or a report made in relation to a complaint or an investigation).

- Section 63(1) of the LGA which sets out the restrictions on the disclosure of information obtained during the course of a Code of Conduct investigation.

Under the provisions of the legislation that governs the Ombudsman's work, therefore, the information that can be disclosed about his investigations is limited. In practice, this means that information obtained in deciding whether to begin, or in the course of an investigation under the PSOW Act, or information obtained during the course of an investigation under the LGA, will be released when doing so is for the purposes of that investigation (for example, to make enquiries of the body complained about) or for the investigation report/decision letter. This ensures that a complainant sees the information (both personal and non-personal) which is material to the decision to enable the complainant to make representations about findings and recommendations (if any). This information may well go beyond the information that a requestor would be entitled to under the FOIA, DPA and EIR and may include, for example, information subject to legal privilege. Any information which has been obtained but which is not material to the Ombudsman investigation, report/decision letter will not be disclosed to the complainant.

Annex B

Disclosure by the Ombudsman under the Freedom of Information Act 2000 or Environmental Information Regulations 2004.

The Ombudsman will also consider whether the information requested can be released under FOIA (or the EIR).

Section 44(1) (a) of FOIA exempts information from release if its disclosure is prohibited under any other enactment. Therefore, any information obtained by the Ombudsman in deciding whether to begin, or in the course of an investigation under the PSOW Act, or any information obtained during the course of an investigation under the LGA, and which falls, therefore, within the statutory bars at section 34X of the PSOW Act, or section 63(1) of the LGA, is exempt from disclosure under FOIA. This exemption is absolute - that is, it cannot be overridden whatever the public interest may be in any case in releasing the material concerned.

In terms of considering an information request under the EIR, the Ombudsman will consider each case carefully taking into account any relevant exceptions (most notably section 12(4)(e) and section 12(5)(d)). (There are no 'absolute' exceptions in the EIR and the public interest will always need to be considered).

Information Commissioner's considerations under FOIA and EIR

If an individual exercises their rights to approach the Information Commissioner then the Information Commissioner will consider the complaint. Where information has not been released under the FOIA an appropriate refusal notice will have been issued and the Ombudsman will be prepared to explain its position to the ICO with that in mind.

The Information Commissioner will consider the nature of the request and the reasons for refusal, and take into account the application of section 44 of FOIA where appropriate.

Information obtained by the Ombudsman for the purposes of or during the course of an investigation is caught by the statutory bar and cannot be disclosed for purposes other than that set out in the legislation.

Information held by a public authority which emanates from the Ombudsman (that is, information that has been obtained by the Ombudsman for the purposes of or during the course of an investigation) is again caught by that Ombudsman's statutory bar and cannot be disclosed.

Information created by a public authority for the purposes of an investigation by the Ombudsman is also caught by the Ombudsman's statutory bar.

Information which is held by a public authority for the purposes of its own functions and is not caught by the provisions above, but which has been shared with the Ombudsman during the course of or for the purposes of an investigation, does not fall within the statutory bar and should therefore be disclosed or withheld by that public authority under a different provision in the FOIA.

Disclosure by the Ombudsman under the Data Protection Act 1998 (DPA)

The Ombudsman will also consider individual rights under the Data Protection Act taking into account any relevant exemption.

It is noted that any information on an Ombudsman investigation file could be personal information, but not all information on an investigation file will necessarily fall into this category.

As set out above, the need to protect the privacy of the investigation and ensure the efficient and effective exercise of his statutory functions, means that the Ombudsman will take decisions on disclosure under the DPA in light of the existence of an intention behind section 3, section 13 and section 34X of the PSOW Act, section 63 of the LGA, and section 7, section 27(5) and section 31(4) of the DPA.

This does not mean that the Ombudsman does or will adopt a blanket approach to considering individual requests for information under the DPA or to applying section 31(4) of the DPA. Instead, the Ombudsman will consider carefully each individual case in order to ascertain whether there is a particular reason, in that case, for overriding the individual's right of access by maintaining the statutory bar and withholding personal information (not already disclosed for the purposes of his investigation).

If the Ombudsman concludes that section 31(4) of the DPA is applicable, the Ombudsman will need to be specific in identifying/describing the classes/categories of documents that are, in its view, exempt from disclosure and then explain why section 31(4) is applicable to those classes of documents. Careful consideration to identify personal data will need to be carried out to satisfy the requirements of the subject access provisions under both the DPA and the Ombudsman's legislation, but the Ombudsman does not need to adopt a document by document or line by line explanation to the ICO.

Information Commissioner's considerations under the Data Protection Act 1998 (DPA)

Where an individual seeks an assessment from the ICO following a subject access request (or indeed any other alleged non-compliant processing), under section 42 of the DPA, the ICO will be considering the application of the Act and adherence to the data protection principles.

It is therefore important to make sure that enough information is provided with regard to the application of section 31 when withholding personal data. It should be remembered that the ICO, when carrying out an assessment, is considering if the principles of the Act are being applied and whether ultimately a breach of the Act is likely or unlikely. This may stop short of actually defining which pieces of personal data (if any) should be released but any explanation, both to the complainant and the ICO, will need to be sufficiently detailed to allow the

assessment to be carried out from an informed point of view. As the application of section 31(4) of the DPA effectively curtails what would otherwise be the rights of individuals under the Act, the ICO needs to be satisfied that where this exception is relied upon, it is supported by reasonable argument rather than by the application of a blanket approach so that all parties are aware of the extent to which disclosure would be likely to prejudice to statutory functions.