Personal data in FOIA/ EIRs requests — changes and developments

Damien Welfare, Barrister at Cornerstone Chambers, ***examines the updated position with regard to applying the personal data exemption to information requests — and forecasts how things will change when the new General Data Protection Regulation comes into force***

The tension between the obligation to handle personal data carefully — and in particular to disclose only within the rules in the Data Protection Act 1998 ('DPA') — on the one hand, and to respond to requests in accordance with the Freedom of Information Act 2000 ('FOIA') or the Environmental Information Regulations 2004 ('EIRs'), continues to raise issues for practitioners operating under both regimes.

The questions arise when responding to a request made under FOIA or the EIRs would involve the disclosure of someone's personal data (other than the requester's) — as it very often will.

Background

The core exemption under sections 40(2) and (3)(a)(i) FOIA and Regulations 12(3) and 13(2)(a)(i) of the EIRs apply wherever disclosure would contravene the First Data Protection Principle of the DPA so that it would be unfair to the data subject; unlawful (e.g. the information was received confidentially); or would fail to meet a condition under Schedule 2 DPA (and, for sensitive personal data, also a condition under Schedule 3 DPA).

'Fairness' can involve a range of factors set out at length in the ICO's guidance on section 40, such as the possible consequences for the individual of disclosure, or whether the information relates to their public or private life. It can also include striking a balance between the legitimate interests of the public or the requester in disclosure (on which point, see below) and the rights of the data subject. In other words, the legitimate interest can on occasion outweigh what will undoubtedly be harm to the privacy of the individual, so that disclosure is required.

The two relevant Schedule 2 conditions are the consent of the individual or the 'legitimate interests' condition, which requires a balancing exercise (that disclosure is necessary to meet the legitimate interest in it, except where it is unjustified because of harm to the rights, freedoms, or legitimate interests of the individual generally, the harm to his/her privacy). Again, the condition will be met in some cases, and some disclosures will be warranted notwithstanding the harm caused to the individual.

Three-part test

There is a three-part test to apply in establishing whether the legitimate interests condition is met, and thus whether personal data can and should be disclosed (unless some other exemption or exception applies).

The three parts are:

- whether there is a legitimate interest;
- whether this disclosure is 'necessary' to meet it; and
- whether the disclosure would cause unwarranted harm to the interests of the individual.

The first part of the test raises the awkward issue of whose 'legitimate interest' is in issue (on which see below).

Meaning of 'necessity'

So what does it mean for the processing to be 'necessary'?

Originally it was thought to mean there was no alternative. This later gave way to whether there was a 'pressing social need' and if so, whether the legitimate aims could be achieved by means that resulted in less of an interference with privacy. If not, you would consider whether the interference was both proportionate as to means, and fairly balanced as to ends.

This formulation is now well-established, though a 'pressing social need' appears to restate 'legitimate interest' (i.e. the first element of the test), and proportionate interference overlaps with unwarranted harm (third element) so that the meaning of 'necessary' is weakened as a separate element.

In *South Lanarkshire Council v Scottish ICO* [2013] UKSC 55, the

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Supreme Court confirmed that 'at least in the context of justification rather than derogation, 'necessary' means 'reasonably' rather than absolutely or strictly necessary'.

Handling the three-part test

The test for handling the three-part test was set out in eight 'propositions' endorsed by the Upper Tribunal in *Goldsmith IBS v ICO* (GIA/1643/2014).

The first is that public authorities need to answer the three questions above for the legitimate interests condition to be met.

Second, the test of necessity should be met before the balancing test is applied.

Third, 'necessity' has its ordinary English meaning of more than desirable, but less than indispensable or absolute necessity.

Fourth, the test is thus of 'reasonable necessity', reflecting the European concept of proportionality (though the Tribunal accepted that this may not add much).

Fifth, since the test of 'necessity' involves considering alternatives, a measure would not be necessary if the legitimate aim could be achieved with less. In other words, the measure must be the least restrictive means of achieving the legitimate aim.

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Sixth, where no privacy rights under Article 8 of the European Convention on Human Rights are at issue, the three part test in preposition one could be resolved at the necessity stage (second element).

Seventh, where privacy rights are in issue, the three-part test in proposition 1 can only be resolved after considering whether the interference was excessive (element iii of the test).

Finally, the Supreme Court in South Lanarkshire had not purported to suggest a test that was any different to that adopted in *Corporate Officer of the House of Commons v The Information Commissioner & Ors* [2008] EWHC 1084 (Admin) (16th May 2008).

Potential impact of the new Data Protection Regulation

From 2018, the position regarding applying the personal data exemptions under FOIA and the EIRs is likely to change.

The new General Data Protection Regulation has been agreed by the EU and will have direct effect from May 2018, replacing the DPA.

This in turn will require some changes to be made to section 40 FOIA and a revision to Regulation 13 EIRs to take account of the language and meaning of the new Article 7 (f), which would replace the sixth condition and the existing Article 6(1)(f) in the Directive.

Although the Article is not radically different from the present one, or from the sixth condition, it would appear to include some important changes in the context of how section 40 FOIA and Regulation 13 have been enacted or interpreted.

The first is that the 'legitimate interests' condition is expressed in terms of the interest of the data controller (i.e. the public authority, in the context of FOIA/EIRs) or of 'a' third party (as opposed to 'the' third party in the Directive). The Regulation omits the wording of the Directive, which referred as well to the interests of 'parties to whom the data are disclosed'.

The new formulation appears to include the interests of the requester but probably not the interests of the public as a whole as it has come to be interpreted in the context of FOIA, since disclosure is 'to the world'. This change or wording may require a reinterpretation of the approach that has been taken in FOIA/EIRs cases, that the legitimate interests should be those of the public.

The Upper Tribunal has interestingly recently taken a similar approach, holding that the relevant interest is that of the requester not the public in a FOIA context *(Haslam v ICO* [2016] UKUT 0139 (AAC) and *IC v CF and Nursing and Midwifery Council* [2015] UKUT 449 (AAC).

Under the new Regulation, the interests of the requester have to be 'overridden' by the interests or 'fundamental rights and freedoms' of the individual before a disclosure is prevented. Though not currently in the DPA, this is the same language used in the existing Directive, so it will remain to be seen whether it leads to changes in interpretation in the UK.

In a new development, special emphasis is placed in the Regulation on protection of the personal data of children, which is not mentioned in the existing Article, so that the balance would appear to need to be applied differently as between adults and minors.

Basis of future FOIA/EIRs disclosures?

Finally, and most importantly but also puzzlingly, the new Article 6(1)(f) is stated not to apply to 'processing carried out by public authorities in the performance of their tasks'. On the face of it, this would prevent public authorities from relying on the new Article in a range of circumstances where they use the sixth condition at present.

This would raise a number of practical issues in the data protection field, but it poses in particular the question whether this exclusion would have to be treated as preventing reliance on the new Article for disclosures of personal data under the FOIA/the EIRs.

Without an equivalent of the legitimate interests condition, it would be difficult to see on what basis most of the present disclosures of personal data in response to FOI/EIR requests would be made. This may be an important issue to watch for if there is UK legislation to amend FOIA and revise the EIRs in the light of the Regulation.

Politicians' names

One further recent case may have wider significance, albeit in similar circumstances.

In *Haslam v ICO*, referred to above, the request from a journalist was for the names of elected members of Bolton Council that had received reminders since 2011 for non-payment of council tax.

The Commissioner and First-Tier Tribunal upheld the Council's refusal under section 40, but the Upper Tribunal reversed the decision, and ordered disclosure of the name of a councillor that remained undisclosed. The case was decided on the legitimate interest versus privacy aspect of the 'fairness' test outlined above.

The key issues relevant to fairness were:

- the reasonable expectations of the (previously two) councillors affected;
- the consequences for them of disclosure; and
- the balance of those expectations or consequences against the interests in disclosure.

The Upper Tribunal Judge held that the FTT's decision was fundamentally flawed. The FTT had given no indication that it had considered the relevant factors, and had failed adequately to explain its reasons. The UT agreed that the non-payment of council tax by a councillor had a private element, but said that it also had a public dimension. This was because councillors are barred by statute from voting on the authority's budget if they are more than two months in arrears with their council tax payments and also have to declare the matter and not vote, if they are present at a meeting at which relevant matters are discussed.

As a result, such a default 'strikes at the heart' of the performance of a councillor's functions.

This in turn was critically relevant to his or her reasonable expectations, which should be of a higher level of scrutiny than that applying to private individuals.

The legitimate interest in knowing the name of a councillor who had failed to pay their council tax was 'compelling' — at least where they remained in default for over two months. The legitimate interest outweighed the privacy interests of the councillor involved, since it was 'central to the proper functioning and transparency of the democratic process'. There might be exceptional cases in which the personal circumstances of the councillor were so compelling that disclosure should not be ordered, but they did not apply in this case.

It remains to be seen whether this case will have wider implications for the disclosure of politicians' names in relation to other matters where they may be in default in some way that is seen to affect their core functions, or whether it is confined to the precise circumstances of more serious arrears of council tax owed by councillors. As also noted above, the Judge took the view that the 'legitimate interest' involved should be that of the requester, rather than of the public; and thus the overall effect of the judgment is to narrow, rather than to generalise, the interest.

On the particular facts, the distinction was considered not important because the questioner was a journalist, leaving the outcome had the requester had been a member of the public unclear.

These issues are likely to recur in future cases. As so often, the personal data exemption/exception continues to be a fertile source of change and debate.

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