

Our Ref: DAS/IB/AJR

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18 October 2011

Dear Maurice,

Thank you for your letter of 6 October 2011 about the guidance we have just released on accessing information held in complaint files.

Before I address your specific points, I should explain what we hoped to achieve by publishing this guidance. We are aware – not least from our own experience of dealing with requests for access to our own complaint files – that it can be difficult to decide which information in a file is personal data, who it relates to and whether it should be released to one party or another. We are confident that this guidance will help organisations to make this decision in a way that makes sense in practice and is consistent with the law.

Our objective in producing this guidance was to strike the right balance between pragmatism, legal precision and the need to uphold the rights of individuals. We want to make compliance as easy as possible for organisations, and we want organisations to do all they can to be helpful to individuals who make DP or FoI access requests. However, we are aware that taking on overly broad brush approach to the concept of 'personal data' can be inconsistent with the law and can have undesirable outcomes in both DP and FoI contexts. Therefore in this guidance we placed due emphasis on the

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DPA's definition of personal data, as expanded on in our separate guidance on the subject, particularly the concepts of identification and 'relates to'.

Perhaps the easiest way to approach access to information in complaint files - and the approach that many individuals expect - is to consider everything in an individual's complaint file to be his or her personal data. This is also the approach that some organisations take - wrongly in our opinion. This can lead to information that is not 'personal' in any real sense - for example an Ordnance Survey map or a company's corporate plan - being considered to be an individual's personal data simply because it is held in a file about his or her complaint. (Although I accept that information is only held in the file because it is relevant to the complaint.) When an FoI request is made, this could lead to non-personal information being withheld wrongly on s.40 grounds. It could also lead to organisations being required to provide subject access applicants with information that is not their personal data - and to process this information in compliance with the data protection principles.

As the guidance explains, a typical complaint file can contain personal data about one person or another, personal data about a number of people and information that is not personal data at all. We are confident that our guidance will help organisation to work out the status of the information they hold in their complaint files and to deal with access requests properly. However, we acknowledge that this is a difficult area and recognise that not everyone will agree with our interpretation. There are many grey areas here and, as the guidance says, in many cases there will be no alternative to the exercise of sensible judgement based on the circumstances of the case. It is worth noting that other feedback we have received about the guidance has been positive.

### **Whose personal data is it?**

The example you cite is meant to be read in the context of the explanatory material relating to the status of opinions. Of course it

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was not our intention to suggest that the part of the passage that you underline is not also the personal data of the client; we took it 'as read' that readers would understand this. This part of the guidance was meant to illustrate the more difficult issue of whether an opinion is necessarily the personal data of the person expressing it. However, we will bear your comment in mind and will clarify this in any future iteration of the guidance.

### **Third party personal data.**

We can see your point about the desirability of providing a 'negative' witness statement – "I didn't see anything" – to a person accused of something or another. This may be a helpful approach that corresponds with the principles of natural justice. However, we have to base our approach primarily on what the DPA says. Therefore we do not accept that Mrs Oddman saying "I didn't see anything" can be the personal data of Mr Stevens. This information does not, in our view, 'relate to' Mr Stevens, only to Mrs Oddman. However, we recognise that this is a difficult area and that other interpretations may be possible. Of course, Mr Stevens may well be able to gain access to Mrs Oddman's statement by means of the legal process of discovery should his case come before an Employment Tribunal, for example.

### **The section 7(4) balancing test.**

Again, this is a difficult area. However, we stand by our view that where an individual has been threatened by someone, and then makes a complaint about this, he or she should normally be able to do so on a confidential basis. This is clearly the case where there is a risk that if the subject of a complaint finds out who has complained about him, he would be likely to engage in further threatening behaviour, or worse, against the complainant. This is a principle that most individuals and organisations would accept.

As you point out, the test in section 7(4) of the DPA is whether it would be reasonable in all the circumstances to disclose the information to a third party. Section 7(6) then goes on list several

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factors – such as whether there is a duty of confidentiality – that shall be taken into account in determining reasonableness. However, this certainly does not mean that only information that is subject to a duty of confidence can be withheld on the grounds that it would not be reasonable to disclose it. There are all sorts of non-confidential information that, in the circumstances, it would be not be reasonable to disclose to a third party.

In our example, we were not trying to suggest that only the interests of the one party – in this case the complainant - should be taken into account. This is made clear throughout the explanatory material in the guidance. We were merely illustrating the way the law works by focussing on a particular case. We fully accept that in other circumstances information about a complainant could be provided to the person being complained about, whether the complainant consents to this or not.

I thank you for bringing these matters to our attention. We will take your comments into account should we revise the guidance.

Yours sincerely

David Smith  
Deputy Commissioner and Director of Data Protection



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