

Access to third party personal information — data protection and FOI compared

Annette Hogan, Consultant at McCann FitzGerald, examines the extent to which third party personal information may be released under data protection and FOI law, drawing some interesting contrasts between the different access regimes

Individuals are more conscious than ever of their rights to access and amend personal information relating to themselves under data protection law and other access regimes. This is highlighted by the Data Protection Commissioner's Annual Report for 2013 which notes that in the previous five years, complaints relating to subject access requests have more than doubled.

The UK Information Commissioner's Annual Report for 2013 also shows that, consistent with previous years, the vast majority of FOI requests received by public bodies involve requests for personal information (e.g. just under 80% in 2013). While this suggests that individuals have an increased awareness of their rights, it may also indicate a high level of public distrust in relation to public bodies and private entities such as banks and insurance companies. This is perhaps no surprise given the turbulence which the global and local economy has experienced in recent years.

Dealing with access requests is a time consuming and resource intensive exercise, and any trawl for personal information relating to a requester inevitably pulls up information on third parties. This article examines the extent to which third party personal information may be released under data protection and freedom of information law and notes some interesting contrasts between the different access regimes.

Irish data protection law

Section 4(4) of the Irish Data Protection Acts 1988 and 2003 ('the DPAs') provide that a data controller is not obliged to disclose to a data subject personal data relating to another individual unless that other individual has consented to the disclosure. However, where the circumstances are such that it would be reasonable for the data controller to conclude that if third party personal data were omitted, and the data could be disclosed to the data subject without the third party being identified, the data con-

troller is obliged to disclose the data to the data subject with the third party data omitted. Given the impracticalities of obtaining third party consent, particularly where a number of third parties are referred to in the material, the practice in Ireland has been to redact third party personal information before responding to the requester.

As there is a clear basis for such an approach in section 4(4) of the DPAs, this is for the most part uncontroversial. However, in certain cases, the boundaries between personal data relating to the requester and personal data relating to a third party are more blurred and may be susceptible to challenge. For example, banks, telcos and utility service providers often receive requests from a joint account holder for personal data relating to the account. In such circumstances, unless the consent of the other account holder has been obtained (which is often problematic in the context of matrimonial disputes, suspected infidelity, etc.), the requester should only be provided with personal data relating to himself and information relating to the other account holder should be redacted.

In another example, during the economic downturn in Ireland, financial institutions received a large volume of subject access requests from individuals and investors in businesses experiencing financial difficulties. Dealing with such requests typically involved a complicated and time consuming process of separating personal data relating to the requester (e.g. personal guarantees, etc.) from personal data relating to business colleagues and making appropriate redactions.

UK data protection law

Access to third party personal information is treated slightly differently under the UK Data Protection Act 1998 ('UK DPA'). The UK DPA states that a data controller does not have to comply with a subject access request to the extent that it would mean disclosing information about another individual who can be identified from the infor-

mation unless: (i) the other individual has consented to the disclosure; or (ii) it is reasonable in all the circumstances to comply with the request without the individual's consent. It is noteworthy that this appears to provide data controllers with an obligation to release third party information which is not available under the Irish DPAs.

In its Subject Access Code of Practice, the UK Information Commissioner's Office ('ICO') makes it clear that data controllers should make decisions about releasing third party personal information on a case-by-case basis, and should not apply a blanket policy of withholding such information. The ICO further recommends following a three step approach to dealing with requests for third party personal data:

Step 1: Does the request require the disclosure of information which would identify a third party?

Step 2: Has the third party consented to disclosure?

Step 3: Would it be reasonable in all the circumstances to disclose without consent?

In determining whether it would be reasonable to disclose the information without consent, the UK DPA sets out a non-exhaustive list of factors to be taken into account, including any duty of confidentiality owed to the third party individual, any steps that have been taken to obtain the consent of the third party, whether the third party is capable of giving consent and any stated refusal of consent by the third party.

The ICO recommends considering whether the third party information would already be generally known

by the requester (e.g. the information is publicly available or has already been made available to the requester). The ICO also suggests that the importance of the information to the requester should be taken into account, though obviously this needs to be weighed against the rights of the third party to confidentiality. As such, when considering whether or not third party personal data may be disclosed, it appears that data controllers in the UK must carry out a more detailed analysis of the matter than is required under Irish law.

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Draft EU Data Protection Regulation

The issue of access to third party personal data is not dealt with specifically in the draft EU Data Protection Regulation ('draft Regulation'). The general right of access for the data subject is dealt with in Article 15. Separately, Article 21.1 of the draft Regulation provides that Member States may adopt legislative measures which restrict the rights of individuals under the draft Regulation, including the right of access to personal data.

Any such restriction must constitute a reasonable and proportionate measure in a democratic society to safeguard certain specified matters including the protection of the data subject or the rights and freedoms of others.

The explanatory memorandum to the draft Regulation further indicates that those restrictions should be in compliance with the requirements set out by the Charter of Fundamental Rights of the European Union and by the European Convention for the protection of human rights.

On this basis, it seems likely that Member States will implement provisions (similar to existing laws) which are designed to protect the privacy of third party individuals in the context of data subject access requests. However, as the draft Regulation is not prescriptive as to how that might be achieved, it is conceivable that the difference in approach in Ireland and the UK on this issue will be maintained once the draft Regulation is finalised and enters into force.

Freedom of Information Act 2014

The Irish Freedom of Information Act 2014 ('FOI Act') entered into force in October 2014 and replaced the Freedom of Information Acts 1997 and 2003 in their entirety. Unlike freedom of information laws in other jurisdictions, which state that if a request for personal information is received under FOI it is automatically dealt with under data protection law, Ireland has a separate regime governing access to personal information under the FOI Act.

Section 37(1) of the FOI Act provides that the head of the FOI body shall refuse to grant a request if it would involve the disclosure of personal information. The restriction does not apply, however, where the personal information relates to the requester or where the person to whom it relates has consented to its disclosure. Section 37(7) further provides that the head of the FOI body shall refuse to disclose personal information to the requester if it would involve the disclosure of personal information relating to a third party.

Notwithstanding these provisions, the FOI body has a discretion to release third party personal information where it believes the public interest in disclosure outweighs the privacy rights of the individual or where it would benefit the individual. Where it is proposing to do so, the FOI body is obliged to consult the relevant third party before any information is released. The third party may appeal the matter to the Office of the Information Commission-

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er ('OIC') if, following such consultations, the FOI body intends to release the information against the third party's wishes. As such, a more nuanced approach applies under the FOI Act than would be the case under the DPAs.

Also worth noting in this context are the Freedom of Information Act 1997 (Section 28(6)) Regulations 2009 (the 'Regulations') which have been carried over by the FOI Act. These Regulations provide for the release of personal information to parents and guardians in respect of minors and persons suffering from a disability, where it would be in their best interests to do so. Guidelines issued in conjunction with the Regulations emphasise that FOI decision makers should have due regard to the best interests of the person to whom the records relate and should put themselves in the shoes of that person so as to be better able to assess the impact of releasing the information on that person.

The application of this provision has often proven contentious. In *N McK and Information Commissioner* (copy available at www.pdp.ie/docs/10072), the requester had applied to a hospital for access to medical records relating to his daughter (a minor). The hospital refused access on the basis that the records were subject to the personal information exemption. The OIC took the view that release of the information under the Regulations should only be directed where there is tangible evidence that it would serve the best interests of the child (which had not been provided in this case).

The Supreme Court ruled that the OIC had erred in law by requiring such evidence. This was on the basis that a parent has rights and duties in relation to a child and it should be presumed, unless the contrary is demonstrated, that the parent's actions are in the best interests of the child.

The Regulations also specify the classes of person who are entitled to access personal information relating to deceased persons. These are: (i) personal representatives of the deceased; (ii) persons appointed by the

courts or statute (e.g. where a person's affairs are taken over by a court or State agency); and (iii) spouses/former spouses, partners/former partners and next of kin of the deceased.

The guidelines specify a number of factors which should be taken into account in determining if the release is appropriate to persons in category (iii), including the confidentiality of the information, whether the deceased would have consented to release, whether release would damage the good name and character of the deceased, the nature of the records and the nature and circumstances of the relationship of the requester to the deceased prior to death.

FOI and the DPAs compared

On initial viewing, the provisions of the FOI Act and Regulations governing access to third party personal information might be perceived to conflict with the more restrictive access regime under the DPAs. However, when their practical effect is considered, both regimes would appear to be broadly consistent.

In the first instance, if the person to whom the information relates consents, the information may be disclosed. Where consent is not sought or provided, third party personal information may not be disclosed and will usually be redacted. Information relating to deceased persons falls outside the scope of the DPAs so there is no conflict with the FOI guidelines in this regard.

Also, whilst the DPAs are not prescriptive as to the circumstances in which parents or guardians may access personal data relating to their children, the DPAs do recognise that certain individuals, by reason of age or mental incapacity, may be incapable of giving consent for data protection purposes. In such circumstances, parents or guardians may consent, and presumably exercise subject access rights, on their behalf. The only real difference is that a FOI decision maker has a discretion to release personal information in the public interest which would not be the case under the DPAs. In practice, however, the discretion to

release is rarely invoked and if it is, it is usually the subject of an appeal to the OIC with a view to preventing release.

Both pieces of legislation and their related guidance support this view. For example, the DPAs provide that a right conferred under the Acts shall not prejudice the exercise of a right under the FOI Act and the DPC and OIC are obliged to co-operate with one another in the performance of their functions. Public bodies are also required to assist people who make requests other than under the FOI Act (e.g. under the DPAs).

However, the Code of Practice for Freedom of Information for Public Bodies issued in December 2014 acknowledges that the relationship between data protection and FOI can be difficult to navigate. It also suggests that clarity is needed about how to treat collateral information about third parties, provided by third parties and joint personal information.

The Code acknowledges that the FOI Central Policy Unit is responsible for ensuring guidance is up-to-date on these issues which may suggest that the existing CPU circular (Notice number 23) on the relationship between data protection and FOI is due to be refreshed.

In the meantime, Data Protection and FOI Officers should take comfort from the fact that the two regimes, at least insofar as the treatment of third party personal information is concerned, are not as diametrically opposed as it might first appear.

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