

Supplement to *Third party consultations* guideline

Incidental references to public sector employees in the context of the *Information Act*

The term “interference with privacy” (and variants) is used in a number of provisions of the *Information Act*, relating both to the FOI and Privacy Protection schemes, eg, s.30, s.56, s.104.

An interference or potential interference with privacy can give rise to an exemption from disclosure and a requirement for consultation under the FOI provisions, and a right to complain under the Privacy Protection provisions. However, a disclosure required under the FOI provisions is a disclosure required or authorised by law, and so not an interference with privacy under Information Privacy Principle 2.1.

Section 30 consultation requirement

Under s.30, an organisation considering disclosure of certain information under the FOI provisions is required to consult third parties. For present purposes, a person will only be a “third party” under s.30 if disclosure of the information in question might “be an interference with a person’s privacy”, the third party being “the person whose privacy would be interfered with” – section 30(1) and (2).

Further, the only provision that allows a person to make a complaint to the Information Commissioner about an initial decision to grant access to information is s.30(6). A person can only take advantage of s.30(6) if they are a “third party” whose views must be sought under s.30. If they are not a “third party”, they have no right to make a complaint to the Commissioner about an initial decision, even if they have been consulted as part of the decision-making process.

Not every disclosure of a reference to a person has the potential to be an interference with privacy. If the Parliament had intended that there be consultation on every occasion on which a reference is made to an identifiable person, it could simply have used the term “personal information” in s.30. However, it used the distinct term, “interference with ... privacy”, requiring a different test.

The term “personal information” is broadly defined to encompass any identifying information. However, while “privacy” is defined as “privacy with respect to personal information”, this should not be taken as an indication that the concept of “privacy” is merely co-extensive with the concept of “personal information”. The definition limits the particular dimension of privacy governed by the *Information Act* to privacy of personal information. This dimension may be compared to other dimensions such as “privacy of the person”, “privacy of personal behaviour” and “privacy of personal communications”¹.

The term “interference with a person’s privacy” in s.30 bears significance beyond a simple requirement that the information be “personal information”. Section 30 applies to a more limited, although still extensive, category of information.

Privacy exemption

Section 56 of the Act sets out an exemption for information if its disclosure would “be an unreasonable interference with a person’s privacy”. Section 56(2) states that “Disclosure of information may be an unreasonable interference with a person’s privacy even though the information arises from or out of the performance of a public duty.”

¹ See, for example, Roger Clarke, *Introduction to Dataveillance and Information Privacy* (1997). These dimensions are discrete but may overlap.

Section 56(2) gives a clear indication that disclosure of information about public sector employees can give rise to an interference with that person's privacy. There are a number of types of information held by public sector organisations in relation to public officials that will clearly be regarded as relating to the private or personal aspects of their lives. Government will hold personal financial details relating to salary, superannuation and banking. It will often hold sensitive information about health such as sick leave certificates and reasons for absences.

In addition, it will hold reports or comments that assess or reflect on the performance or other attributes of the individual. This will include both formal performance assessments and reports or comments about the employee created in the course of the day to day functions of the organisation or in the course of handling some inquiry or complaint. To the extent that they relate to the private or personal aspects of an employee's life, they may well impinge on the privacy of the employee.

However, s.56(2) does not state that every reference to a public sector employee must be regarded as an interference with that person's privacy. Neither s.56(2) nor anything else in the *Information Act*, requires or suggests that the mere appearance of the name of, or a reference to, a person in the course of performing their normal duties as a public sector employee should be regarded as an interference with their privacy.

Cases from other jurisdictions

There are a number of decisions in relation to provisions in other jurisdictions aimed at protecting privacy (although those provisions are worded differently). For example, in *Commissioner of Police v District Court of New South Wales and Perrin* (1993) 31 NSWLR 606, the Full Bench of the New South Wales Court of Appeal held that:

... It cannot properly be said that the disclosure of the names of police officers and employees involved in the preparation of reports within the New South Wales Police can be classified as disclosing information concerning their personal affairs. The preparation of the reports apparently occurred in the course of the performance of their police duties. What would then be disclosed is no more than the identity of officers and employees of an agency performing such duties. As such, there would appear to be nothing personal to the officers concerned. Nor should there be. It is quite different if personnel records, private relationships, health reports, or (perhaps) private addresses would be disclosed. Such information would attract the exemption. But the name of an officer or employee doing no more than the apparent duties of that person could not properly be classified as information concerning the personal affairs of that person. The affairs disclosed are not that person's affairs, but the affairs of the agency.

And De Jersey J of the Queensland Supreme Court stated in *State of Qld v Albietz, Information Commissioner & Anor* [1995] QSC 254:

The Commissioner found that the names of the departmental officers were not pieces of information concerning their "personal affairs". He therefore did not have to consider whether disclosure would be, in any event, "in the public interest".

The words should be taken to carry their ordinary meaning. In Perrin, Kirby P said (p.625) that was "the composite collection of activities personal to the individual concerned", with which I am prepared to agree. I do not think that the name by which a person is known ordinarily forms part of that person's 'personal affairs'.

Similarly, in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414, the Commonwealth Administrative Appeals Tribunal stated:

In my view, the fact that a document may refer to a person by name does not necessarily mean that the document relates to that person's 'personal affairs'.

Incidental references to employees and interference with privacy

It is the Information Commissioner's present view that neither the name of a public sector employee, nor the mention of a public sector employee in the context of their normal duties will, by itself, give rise to "interference with a person's privacy" that would establish a right to complain under s.30, a basis for exemption under s.56(1)(a), or a ground for a privacy complaint in the context of a disclosure under the FOI provisions of the Act.

For disclosure to amount to an "interference with the person's privacy", the nature of the information must be such that there is some personal or private element that takes it beyond routine references in the course of normal duties.

As indicated above, there will be cases where the nature of information about a public official is such that its disclosure can be said to stray into the realm of "interference with the person's privacy". In such cases, the person will have a right to be consulted, and the organisation will need to make a decision on access, taking into account the views of the third party, and no doubt considering the application of the s.56 exemption. However, even in such cases, it will be necessary to consider whether there is an "unreasonable" interference with privacy, and to balance public interest factors for and against disclosure.

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