Guidance for organisations

Access to information held in complaint files

Information Commissioner's Office

- The General Data Protection Regulation (GDPR) came into effect on 25 May 2018. The Data Protection Act 1998 will be replaced in the UK with the Data Protection Act 2018.
- Our approach to considering the disclosure of personal data under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) remains largely the same and our existing guidance is still of use. We will amend it in due course. However, there are a few key points to consider.
- The definition of personal data and sensitive personal data have changed, as have the data protection principles and the rights of subject access. Please see our Guide to the General Data Protection Regulation for more detailed information.
- If the information constitutes the personal data of third parties, public authorities should consider whether disclosure would breach the data protection principles. (In the case of special category or criminal offence data, public authorities must also satisfy one of the conditions listed in Article 9 of the GDPR). Principle (a) under Article 5 is the most applicable.
- When considering whether disclosure of information is a breach of principle (a), a public authority should first consider whether disclosure is lawful and then whether it is fair. The lawful basis that is most likely to be relevant is legitimate interests under Article 6.1(f).
- The Data Protection Act 2018 amends FOIA and the EIR so that the legitimate interests lawful basis is applicable to public authorities when they are considering disclosure.
- Competent authorities for the purposes of the law enforcement provisions (law enforcement bodies) should consider the application of principle (a) of the GDPR for disclosures under FOIA and the EIR.

What is this guidance for?

It is to help all organisations that hold complaint files to deal with requests for access to personal information held in them. This guidance deals with the issues that arise when an individual makes a subject access requests under the Data Protection Act (DPA) for access to their own personal data. It also deals with the issues that arise when a third party makes a Freedom of Information Act (FOIA)[1] request to a public authority for access to personal data about somebody else held in a complaint file.

This guidance will help your organisation:

- to decide whether information in a complaint file is personal data, and if so whose personal data it is,
- to work out who gets access to which data if one of the parties whose personal data is contained in a complaint file makes a subject access request, and
- to decide how personal data held in a complaint file should be dealt with if a freedom of information request is made to a public authority.

The guidance focuses on whether information is personal data, and if so, whether its disclosure to a third party would be reasonable in all the circumstances (DPA s.7(4)) or would breach the data protection principles (FOIA s.40). It does not address all the other exemptions that might be relevant when someone makes a request for access to the information contained in a complaint file.

This guidance consists of an analysis of the content of a set of typical complaint files. It is based on the sort of organisations may have to deal with in reality. It avoids detailed legal exposition but should help its readers to understand the law and to deal properly with access requests. This guidance gives practical illustration to the ICO's 'Determining what is personal data' Technical Guidance note.

[1] The Freedom of Information (Scotland) Act 2002 applies to public authorities in Scotland.

Some basics

Under the DPA, individuals have a right of subject access to information about themselves. It does not give a right of access to information about anyone else – unless it is a parent acting on behalf of a child, for example. The DPA applies to all organisations that process personal data – public or private sector.

Under FOIA, any individual can make a request for access to any information held by a public authority. However, an individual's own personal data is exempt from FOIA's access right – that has to be dealt with according to the DPA's subject access rules. Potentially, FOIA does give one individual a right of access to information about another. However, if providing the third party information would breach the data protection principles, then it is exempt from disclosure.

Because FOIA only applies to public authorities, individuals will normally have no right of access to third party personal data held by private sector organisations.

How to approach a complaint file

Complaint files can be complex, often consisting of a mixture of information that is the complainant's personal data, is third party personal data and that isn't personal data at all. This means that sometimes you will need to consider each document within a complaint file separately, and even the content of particular documents, to assess the status of the information they contain.

However, a more high-level approach might be possible, using a file's index and by using your experience to make an informed decision as to the sort of information a file, section of a file or document or is likely to contain. In some cases this could make it possible to make an informed decision about disclosure without looking at every line of every document. See Annex 1 below.

If organisations have good information management procedures in place, this will make it easier for them to deal with either DPA or FOIA access requests. For example, reliable indexes, contents pages, descriptions of documents and metadata can make it easier for those dealing with requests to locate personal data, decide whose personal data it is and to make a decision about its disclosure. It may be possible to establish a routine where the same sorts of requests are made to the same sorts of file.

Being helpful to the public versus legal requirement

It is good practice for data controllers and public authorities to be as helpful as possible to individuals who make access requests.

In addition to being helpful, it can often be easier to give an applicant a mixture of all the personal data and ordinary information relevant to his request, rather than to look at every document in a file to decide whether or not it is his personal data. This is a feasible way to progress a case where none of the information is particularly sensitive or contentious. For example, a file relating to a customer's complaint about a routine consumer protection issue might fall into this category.

However, organisations should be clear about the approach they are taking to dealing with access requests. In particular, they should be clear that they are recommending that the information be provided to the applicant on a discretionary basis and that their organisation is under no legal obligation to provide it. Of course individuals have no right of appeal to the ICO or Information Tribunal in respect of information that they have no legal right of access to. Providing the information on a discretionary basis does not mean that it becomes the applicant's personal data.

The limits of personal data within a complaint file

Typically, a complaint file will start off at the more 'personal' end of the spectrum – an exchange of personal views about an issue or something that has happened. As an investigation progresses, more general information may be included in the file, for example, an organisation's policies and procedures or geographical information about the place where an accident took place. The latter information may not be personal data, even though it is contained in a complainant's file and may be relevant to the complaint. It is important to be able to detect any 'cut-off' points, at which information within a complaint file ceases to be personal data and becomes ordinary, non-personal information. See document 1 below - the first three bullet points are about a particular individual's behaviour. However, the fourth point - though a related one - is about the relationship between one organisation and another and is not 'personal' at all.

Document 1 – extract from minutes of internal meeting:

Weekly case review meeting

Attendees: Joey Jacobs (JJ), George Lemon (GL), Sabina Patel (SP), Karen Stone (KS)

Relevant extract:

Agenda item 7 – Long Lane complaint

1. GL confirmed that two visits had now been made to Long Lane following a complaint about Peter Abalone by a neighbour and initial investigation indicating a significant problem.

2. JJ summarised original complaint and said what he saw when he visited Long Lane. Explained that in his view there had been no real improvement in the situation despite warnings and would not be. KS confirmed no previous complaints relating to the property and suggested it was worth making further attempts at resolution, especially considering Mr Abalone's possible health issues.

3. SP raised concern about level of risk from amount of glass in the street. GL confirmed arrangements had been made to remove. First stage formal warning will be issued and then situation to be monitored. Will be reviewed at next meeting.

4. GL explained that the Long Lane case highlights the need to chase-up the application for a regional 'clean-up' grant that SP had submitted to the Regional Rejuvenation Agency in October last year. SP provided an update and explained that due to a cut in the RRA's own funding, it was unlikely any clear-up grant would be forthcoming.

Is everything in a complaint file the complainant's personal data?

The short answer is 'no'. For information to be personal data it must *relate to* an individual and allow an individual to be *identified* from it – not all the information in a file will do this. However, the context in which information is held, and the way it is used, can have a bearing on whether it *relates* to an individual and therefore on whether it can be the individual's personal data. Even if information is used to inform a decision about someone, this does not necessarily mean that the information is personal data. For example, a company's corporate policy might be used to inform a decision about whether to continue an individual's employment, but this does not mean the policy is, or becomes, the employee's personal data.

Document 2 below is about legal advice written by a company lawyer. Originally the advice related to the various issues the lawyer had given advice about. At that stage it did not relate to the lawyer himself, and he was certainly not the *subject* of it. Later on, the lawyer's boss collated all the advice the lawyer had given in a file about him, because he was concerned about the standard of the advice being given. At this point, the focus of the information changed from the issues the lawyer has dealt with to the lawyer himself – the collection of information started to *relate* to him. In addition, the lawyer is *identified* as the author of the advice, it records his personal opinions and therefore it has become his personal data.

Document 2 - extract from legal advice by the company's solicitor:

The behaviour of our delivery man, Mr Stevens, could certainly leave the company open to legal action should Mr O'Dwyer decide to pursue the matter through the courts. Although Mr Stevens' actions may not amount to an actual assault, the courts could still award Mr O'Dwyer considerable compensation for the anxiety and distress that seems to have been caused, and for his inconvenience in that we failed to install the washing machine when we were contracted to do so.
I note that Mr Stevens has a bit of a 'history' since he joined us. My advice would be to offer to settle out of court and to sort out his washing machine ASAP. We can discuss the numbers once we have contacted Mr O'Dwyer again to assess his intentions. I'll defer to HR on the Stevens situation.

Maurice Carpentier, Company Solicitor.

Some information in a complaint file will never be personal data, regardless of the context it is held in and the way it is used – even if it is used in a way that affects an individual. For example, the company's disciplinary policy contains general corporate rules and procedures. It does not *identify* the lawyer (or anyone else). However, it cannot *relate* to the lawyer either, in the way that his legal advice does. Therefore the disciplinary procedure is not the lawyer's personal data even if it is held in a disciplinary file about him and is used to inform decisions that affect him.

Remember that section 8(2) of the DPA says that where information provided under subject access is expressed in terms which are not intelligible without explanation, the copy of the information must be accompanied by an explanation of those terms. If, for example, a document in the company's disciplinary file says that action is being taken against Mr. Carpentier under section 4-1-3 of its code of corporate conduct, this provision of the DPA would require the company to explain what section 4-1-3 of its code says. As a matter of good practice, it might decide to provide a copy of that part of its code, or even the whole code. However the DPA would not require the company to do this.

Are somebody's opinions their personal data?

Complaint files will often contain information recording an individual's opinion of something or another - for example a probation officer's opinion of whether a client is likely to re-offend or a housing department executive's opinion of a new government

proposal to offer increased funding for the demolition of 'slum' housing.

It can be difficult to determine whether an opinion:

- relates to the person who holds it,
- relates to the person or issue the opinion is of, or
- both.

However, for an opinion to be personal data is must both *identify* an individual and *relate* to him or her.

It is usually easy to determine whether the person that holds the opinion is identified or not. For example, a probation officer's report will usually be signed and the minutes of a Housing Committee meeting will record that the housing department executive who gave her opinion of the government's proposal was Irina Morrissey.

It can be more difficult to determine whether an opinion *relates* to the person holding it. This can call for careful judgement based on the nature of the information, the context in which it is held and the purpose for which it is used.

Case officers can ask the following questions to help them work out whether information recording a person's opinion is the personal data of the person holding the opinion:

- does the opinion tell you anything significant about the person holding the opinion – for example biographical details, characteristics or their personal beliefs?
- just how 'personal' is the opinion? Is it a subjective, personal view rather than a professional, objective appraisal of a person or issue?
- is the opinion being used, or could it be used, to find out something about the person holding the opinion, to treat him or her in a certain way or to inform a decision in respect of him or her?

If the answer to any of these questions is 'yes' then the opinion is likely to be the personal data of the person holding it.

If the answer is 'no', then the opinion is unlikely to be the personal data of the person holding it – of course it could be the personal data of the person the opinion is about.

We recognise that making this decision can call for the exercise

of careful judgement in the circumstances of a particular case. However, the considerations set out above will help you to come to the right decision.

In the case of the probation officer's report below, the first paragraph of the report will only be personal data of his client; it identifies her and the information recounts her previous behaviour and her current status. Although the opinion expressed is clearly that of her probation officer, the information does not reveal anything substantive about the probation officer's own characteristics or behaviour. The client is the subject of the information, not the probation officer. It is possible to infer information about the probation officer from his opinion – for example that he is a probation officer and works with that particular client. However, this does not mean that this part of the probation officer's opinion is his personal data.

"Gail Wallis has been in contact with our agency since her release from HMWP Livenham on 21 October 2009. She is currently subject to a Good Behaviour Contract agreement that is due to expire in October 2013. She has a case-worker at her local Substance Dependency Support Unit and is required under her Contract to attend the Unit weekly."

However, the probation officer's report goes on to say the following:

" Given my 15 years' experience of dealing with clients like this, including my management of those on drug rehabilitation programmes, I am happy to conclude that my client no longer poses a threat to herself or to those around her and is unlikely to reoffend - provided access to the necessary support services is in place. My own approach is always to give clients the benefit of the doubt in cases like this, and usually this has worked out to the client's and the department's satisfaction.

Idries Thesiger – Issues Resolution Officer."

This part of the report does tell us something about the probation officer himself – his professional approach and work-history. This part of the report is, therefore, the probation officer's own personal data.

Similar considerations apply in the case of the housing department executive. The minutes of the meeting may merely record the following:

> "Ms Morrissey reported that 85% of the housing stock in the Seedham Road estate in Stevenham was built before 1895. 47% of the properties the LA has surveyed lack basic amenities and are in severe disrepair. Ms Morrissey expressed her opinion that we should take advantage of the government's new funding offer and demolish the estate ASAP."

Although this information reveals Irina Morrissey's professional opinion of the housing issue, it reveals nothing of Ms Morrissey's own characteristics, behaviour or personal beliefs. Her opinion relates to the Seedham Road estate, not to her.

The situation would be different if the minutes of the meeting did record information that relates to Ms Morrissey's personal beliefs, for example. The minutes might record the following:

> "Ms Morrissey then expressed her opinion that given the sort of people who live in the estate, and their record of criminality and anti-social behaviour, it would be better off if we bull-dozed the place and didn't bother re-housing its occupants."

This opinion clearly reveals something about Ms Morrissey herself – it relates to her attitudes, state of mind and possibly her political beliefs. It is therefore Ms Morrissey's personal data. (The situation would be even clearer if Ms Morrissey's employer were to collate records of her outbursts from the minutes of the various meetings she has spoken at with a view to taking action against her under its Equality and Diversity policy.)

We recognise that this is a difficult area and calls for careful judgement – there is not always an obvious answer. One factor that might favour the disclosure of recorded opinions to the person who held the opinion is that the person will already know the content of the information because he or she gave the opinion in the first place. However, this does not mean that the opinion is necessarily his or her personal data, or that the opinion can necessarily be withheld on 'personal data' grounds if there is an FoI request for access to it.

Can more than one person be the subject of personal data?

Yes – information can have more than one person as its subject. An obvious example is a witness statement. It will say who the witness is, record his or her whereabouts and will typically detail what the witness saw another person do or say. Normally, both the witness and the other person will be identified in the statement. Although a witness statement is primarily about the witness (where he was, what he saw etc.), it also identifies and relates to the other person because it says what the witness saw him do, heard him say etc. Therefore information like this can be personal data about two (or more) people. See document 3 below.

Document 3 – witness statement:

Note of preliminary conversation between Mrs Wainwright, Staff/Pupil Liaison Officer, and David Tang, Year 10 pupil.

I spoke to David Tang about his experiences at hockey practice sessions. In particular I explored his recollection of last Thursday's hockey practice. David said that Mr Boon was 'getting stroppy' with the team as they have not been very successful in recent weeks. He said that Mr Boon had 'gone off the deep end' with James Monk last week.

David said that he was aware that James Monk's parents have complained about Mr Boon. David gave me an account of the incident in question. I asked David if anyone else witnessed this incident but he said that he didn't think so. I discussed the school's procedures for investigating complaints with David, and tried to impress upon him the importance of telling the truth and sticking to the facts of the matter as he recalls them. I asked David if he would be willing to write down his version of last Thursday's events:

2. David Tang's written account of incident between Mr Boon and James Monk:

Mr Boon was on everybody's case at last week's hockey practice. He was shouting at everyone all the time. He was especially picking on me and James Monk.

We were having a game at the end of practice and Mr Boon kept picking on me and James. James missed a shot at goal towards the end of the game. When we were walking off the field Mr Boon told him that he was a horrible little loser and that he didn't deserve to attend this school. I remembered the words clearly because he'd said the same thing to me at last week's practice. I think he's a horrid bully.

Third party personal data

Both the DPA and FOIA have mechanisms for dealing with situations where one individual makes a request but the personal data of another individual falls within its scope.

In FOIA, the test for third party disclosure of personal data is whether this *would breach the data protection principles*. However, the DPA itself works slightly differently. Whether a data controller can disclose personal data held on a file to a third party depends on whether it would be *reasonable in all the circumstances to do so*.

In reality, the effect of applying either the DPA or FOIA disclosure tests to third party personal data is likely to be the same. It is best to make sure, though, that the correct statutory language is cited when dealing with a case.

Third party personal data cannot be disclosed if it would be unfair to do so. Fairness in the DPA is particularly about fairness to any person the personal data were obtained from (DPA Sch.1, Pt 2, 1 (1) – i.e. it is primarily about fairness to the data subject. However, other factors, such as a person's seniority, role and the legitimate interests of the public in the disclosure of the personal data must also be taken into account when assessing fairness. *In general*, it is more likely to be fair to disclose information about an employee acting in a professional capacity than about a private citizen.

Case study 1

A complaint file held by a supermarket about the behaviour of a delivery man

Extract from the complainant's letter about the delivery man's behaviour:

Mr B O'Dwyer
47 Catkin Street
Livenham
LV6 7H8

Dear sir,

I was having a washing machine delivered last Monday (6th January) but one of the delivery men – his colleague informed me that he's called Noel Stevens - started to go crazy because I wanted him to bring the machine through the garden and through my back door, rather than through the house. When I told him I wasn't prepared to move the furniture in my hall, he literally started to jump and down, swearing and threatening to hit me. He told me what I could do with my washing machine and left it in the middle of the road. I have been suffering from severe stress following an accident 2 years ago and this has made it worse. I want to know what you intend to do about this.

Note added by supermarket: *sure we had similar complaint from same guy few years ago about a cooker – can Complaints Dept. check files pls*?

Is it personal data?

- We can assume that this letter is kept in a complaint file listed under Mr O'Dwyer's name and that all the information in the file is relevant to his complaint. This does not mean though that the entire content of the file is necessarily Mr O'Dwyer's personal data.
- All of the information in the letter *relates* to Mr O'Dwyer, because it describes the incident he was involved in and his feelings about it. Mr O'Dwyer is clearly *identified* in relation to the information. The information in this letter is therefore Mr O'Dwyer's personal data.
- Mr O'Dwyer is the *subject* of the personal data in the letter. This means that he is its data subject and will have a right of subject access to that information, unless an exemption

applies. Note that Mr O'Dwyer may not be the only subject of the personal data.

- Some of the letter – highlighted in red - identifies Mr Stevens and relates to his behaviour. This is therefore personal data about Mr Stevens and he therefore may have a right of subject access to this part of Mr O'Dwyer's letter.
- Note: information will not necessarily be the personal data of just one person. In cases like this, where one person is complaining about another, the information will usually be personal data that relates to both the complainant and the person being complained about, and both will have subject access rights. The DPA 7(4) test of reasonableness must be used to decide whether the personal data can be released.

If Mr O'Dwyer makes a subject access request:

- He should be provided with a copy of the whole letter, even though it contains some information that is also personal data about Mr Stevens. As Mr O'Dwyer wrote the letter and already knows what it says about Mr Stevens, it would be reasonable in the circumstances to provide Mr O'Dwyer with the whole letter. Note: the fact that some information may be personal data about both people does not mean that it becomes third party personal data in respect of Mr O'Dwyer – it remains his first party personal data.
- Mr O'Dwyer should also get the comments that the supermarket's investigator wrote on the letter because they relate to him and state the supermarket's intentions in respect of him – i.e. to check whether he has made any similar complaints in the past.

If Mr Stevens makes a subject access request:

- The letter contains some information that relates to, and identifies, Mr Stevens. This means that he is the subject of the personal data in this part of the letter, and it should be provided to him. In practice, this means the supermarket should provide a redacted version of the letter, or an extract from it. The section of the letter highighted should be provided - unless an exemption applies.

If a third party makes a freedom of information request:

The supermarket is not a public authority so FOIA rights do not apply.

Witness statement from the complainant's neighbour:

Mrs P Oddman
45 Catkin Street
Livenham
LV6 7H8

Dear sir,

My neighbour, Bernard O'Dwyer, has asked me to write to you about what I saw last Monday. I was washing my front windows when I noticed that my neighbour was having a washing machine delivered. I don't know why but one of the delivery men seemed to get very agitated and started behaving really threateningly towards Mr O'Dwyer. I have never seen anything like it. Although Mr O'Dwyer tried to calm him down, in the end the delivery man drove off at high speed, leaving the washing machine and his colleague standing in the street.

Is it personal data?

- The information in the letter is the personal data of Mrs Oddman because it identifies her, relates to her whereabouts and actions and contains her account of the incident.
- The letter also contains the personal data of Mr O'Dwyer because it identifies him and details his behaviour. Although Mrs Oddman's letter does not name the delivery man, the information about him – highlighted in red - would be personal data in the hands of the supermarket because it will hold the other information needed – both in the complaint files and in sources such as delivery schedules – to identify Mr Stevens.
- A witness statement might be less explicit in terms of the identification and observation of another individual. For example, Mrs Oddman's statement might have said that she hadn't seen anyone doing anything. In this case the information in the statement would be Mrs Oddman's personal data but not Mr Stevens' – even though it is held in a file about him.

If Mrs Oddman makes a subject access request:

- Mrs Oddman should be provided with a copy of the whole letter, even though some of it is also personal data about Mr O'Dwyer and Mr Stevens.

If Mr O'Dwyer makes a subject access request:

- Mrs Oddman's letter does contain personal data of which Mr O'Dwyer is the data subject. It would be reasonable for the supermarket to provide Mr O'Dwyer with a copy of the personal data about him contained in Mrs Oddman's letter. Mrs Oddman says that the complainant asked her to write to the supermarket and it is likely that Mr O'Dwyer will be aware of the content of the letter. If in doubt, the supermarket could ask the witness for her consent to provide a copy of her letter to Mr O'Dwyer.

If Mr Stevens makes a subject access request:

- Much of Mrs Oddman's letter constitutes personal data relating to Mr Stevens – where she describes his behaviour (highlighted in red). This means that Mr Stevens does have subject access rights in respect of that part of Mrs Oddman's letter.
- However it would not be reasonable in the circumstances for the supermarket to provide Mr Stevens with a copy of the personal data about him contained in Mrs Oddman's letter. This is because, given the nature of the incident, it is likely that the witness would expect her letter to be held in confidence by the supermarket. It would therefore be unfair to Mrs Oddman to disclose any of her letter to Mr Stevens. The supermarket could seek Mrs Oddman's consent to disclose all, or part, of her letter to Mr Stevens.

Summary of other complaints about the delivery man extracted from his personnel file:

N Stevens – Deliveries Department - Employee no.57689391

Summary of previous complaint activity.

- 16-9-2010: Complaint: dropped chest freezer down cellar steps and threatened householder
- 4-4-2011: Complaint: abusive behaviour whilst delivering toaster
- 6-1-2011: Complaint: abusive and threatening behaviour and failure to install washing machine

Is it personal data?

This is personal data about Mr Stevens because it identifies him and relates to his behaviour.

If Mr Stevens makes a subject access request:

- He should be provided with a copy of this information. The information is exclusively about Mr Stevens. Even if the information is held in a file about Mr O'Dwyer's complaint, it is not Mr O'Dwyer's personal data because it neither identifies nor relates to Mr O'Dwyer. (In reality this information would also be held in Mr Stevens' personnel file.)

If Mr O'Dwyer, Mrs Oddman or any other third party makes a subject access request:

- If Mr O'Dwyer makes a subject access request for access to all the information the supermarket holds about him, he should not be provided with information about other complaints made about Mr Stevens. Even though the information is held in a file about Mr O'Dwyer's complaint, and may be relevant to it, it is personal data about Mr Stevens and not about Mr O'Dwyer.

Extract from legal advice by the company's solicitor:

The behaviour of our delivery man, Mr Stevens, could certainly leave the company open to legal action should Mr O'Dwyer decide to pursue the matter through the courts. Although Mr Stevens' actions may not amount to an actual assault, the courts could still award Mr O'Dwyer considerable compensation for the anxiety and distress that seems to have been caused, and for his inconvenience in that we failed to install the washing machine when we were contracted to do so.

I note that Mr Stevens has a bit of a 'history' since he joined us. My advice would be to offer to settle out of court and to sort out his washing machine ASAP. We can discuss the numbers once we have contacted Mr O'Dwyer again to assess his intentions. I'll defer to HR on the Stevens situation.

Maurice Carpentier, Company Solicitor.

Is it personal data?

- This information identifies three people, but this does not necessarily mean that the legal advice is the personal data of all, or any, of the individuals named. To establish whether the information is personal data, and if so whose, we must consider which individual, or individuals, the information *relates to.*

If Mr Carpentier makes a subject access request:

- Mr Carpentier has no right of subject access to the legal advice because even though he is identified as its author, the legal advice relates to Mr O'Dwyer and his complaint – nothing in the legal advice relates to Mr Carpentier and he certainly is not the subject of it.
- Mr Carpentier's legal advice does contain his name and job title. This is his personal data and should be provided to him. However we would not expect the supermarket to provide '*Maurice Carpentier, Company Solicitor'* more than once, even if it appears on various documents he has authored.
- Note: Later on the supermarket may decide to collate a file of the poor legal advice Mr Carpentier has been giving, with a view to taking disciplinary action against him. If this happens the legal advice itself would become Mr Carpentier's personal data because the focus of the information would become Mr Carpentier's own professional competence, rather than the various topics and people his legal advice is about.

If Mr O'Dwyer makes a subject access request:

- The information relates to Mr O'Dwyer and his complaint. In particular it sets out the company's intentions in respect of Mr O'Dwyer, should he make a claim against it. This means that the information is Mr O'Dwyer's personal data – although the information may be exempt from subject access on the grounds of legal professional privilege.
- Leaving aside legal professional privilege, it would not be reasonable in the circumstances to disclose personal data about Mr Stevens contained in the legal advice to Mr O'Dwyer – particularly that he has a 'history' with the company and that HR may act against him. It would be reasonable to provide Mr Stevens' personal data to Mr O'Dwyer in so far as it consists of information that Mr O'Dwyer is already aware of. However, the legal advice consists of the supermarket's internal considerations and calculations and some of it is not personal data.

If Mr Stevens makes a subject access request:

- The legal advice identifies Mr Stevens and much of it relates to him. This is Mr Stevens' personal data. He would be entitled to this under subject access unless an exemption, for example legal professional privilege, applies.

Supermarket policies and procedures

- Complaints procedure
- Staff conduct policy
- 'Our customer care charter'

Is it personal data?

- These documents contain the supermarket's general policies and procedures. They are relevant to the incident in question because the supermarket will use them to decide whether to take any action against Mr Stevens, and perhaps to assess whether to offer Mr O'Dwyer's compensation. However, even though these documents are held in Mr O'Dwyer's complaint file they do not *identify* any individual or *relate* to any individual. Therefore they cannot constitute personal data and no one has a right of subject access to them. However, it might be reasonable for the supermarket to provide copies of these documents to Mr O'Dwyer or the other individuals involved in this matter, because they contain relevant background information. However, the supermarket is under no legal obligation to do so.

Case study 2

A local authority's file concerning their investigation of Mrs Belshaw's complaint about the state of her neighbour's property.

1. Livenham County Council site visit report

Report prepared by: Joey Jacobs
Address/ location visited: 2 Long Street, Livenham
Reason for visit: Report by neighbour at no.4, Mrs Belshaw, of persistent mess in drive and into road from cans and bottles.
Date and time of visit: 15 January 14:00

Report: When I arrived at the premises a large quantity of cans and beer bottles were covering most of the drive of 2 Long Street. There was no recycling box visible and the black bin was already overflowing with rubbish bags. Approximately 20 cans had spilt onto the pavement and there were a large number of broken bottles on the pavement and in the gutter.

The occupant, Mr Abalone, was at home and explained that he had never been given a recycling box by the Council. He said he had been having a clear out and was planning to take the rubbish to the tip himself but his car was in the garage, which was inaccessible because of the rubbish. He also explained that he is being treated for depression and is in no position at the moment to clear the mess up. He did seem a bit under the weather.

I confirmed that the Council had received a complaint about the mess and explained consequences of not taking action to clear it up. Told Mr Abalone because of the scale of the problem we would visit again in a week and expected it to be cleared. I would order a new box for him. I left my business card with him so he can contact me.

Follow up action:

- Replacement recycling box to be ordered – confirmed 17/01
- Follow up site visit TBC – [file note – In area 23/01 visit arranged PM]

2. Internal email between Council staff

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From: Joey.Jacobs@livenhamcouncil.gov.uk
To: Mihaila.Stari@livehnamcouncil.gov.uk

Subject: Site visit to Long Street - litter problem

Mihaila,

As discussed on the phone I went to Long Street last week
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and I have spoken to Mr Abalone at number 2. The outside of the property is a mess and there is a lot of glass on the street. I've given Mr Abalone a week to clear it up but I don't think it's likely he'll do it. I am in the area again on the 23rd so I'll have another look but will let you know if I need you to make other arrangements to get it cleared up or there is any further action we need to take.

Thanks

Joey

Is it personal data?

- Both these documents contain Mr Abalone's personal data because much of their content identifies him and relates to him, detailing his behaviour, describing his reaction to the accusation against him and setting out the authority's intentions in respect of him.

- The first of these documents contains some personal data about Mrs Belshaw – she is named in the document and it tells us that she has made a complaint (highlighted in green) – this part of the document identifies her and relates to her.

- Information contained in these documents that identifies the authority's two officials and details their activities, whereabouts, intentions and thoughts is personal data about them. However, not all of the information in the documents is personal data about the officials. For example, the paragraph highlighted in red in the first document relates exclusively to Mr Abalone and is his personal data, it does not relate to the council officials and is not therefore their personal data.

If Mr Abalone makes a subject access request:

- We have established that most of the information in the documents is personal data about Mr Abalone, and he has a right of subject access to it – unless an exemption applies.

- Where the local authority owes a duty of confidentiality to an individual care should be taken to ensure that any disclosure of information provided by that individual would not breach the duty of confidentiality. That said, a public authority should not agree to hold information in confidence where it is not appropriate to do so.

- Personal data about the authority's officials should be disclosed to Mr Abalone unless a specific risk has been identified. Mr Jones has already identified himself to Mr Abalone, and the personal data about the two officials only details their professional, public activities; there is nothing particularly private about it. This means that disclosing personal data relating to the two officials to Mr Abalone would not breach the data protection principles. In particular, the disclosure would be fair because both officials are in a public-facing role and are normally expected to identify themselves to members of the public.

If Mrs Belshaw makes a subject access request:

- Even though the two documents are held in a file listed under Mrs Belshaw's name, this does not mean that all of the information they contain is Mrs Belshaw's personal data.

- Only the information in the first document (highlighted in green) that identifies Mrs Belshaw as the complainant is her personal data and should be provided to her.

- As matters progress, the focus of the local authority's investigation becomes Mr Abalone and his property. This means that even though the file is listed under Mrs Belshaw, most of its content will be personal data about Mr Abalone. This is reflected in the two documents above, which only contain one brief, incidental reference to Mrs Belshaw.

If the local authority receives a request for any information it holds about littering in the Long Street area:

- The Local Authority will have to decide whether releasing the personal data in these documents would breach the data protection principles – in particular whether disclosure would be unfair to any data subject. Most of the information is personal data about Mr Abalone, some of it sensitive, and it would be unfair to release most of this information to the general public. It would also be unfair to release information identifying Mrs Belshaw as the complainant.

- However, it would be fair to release personal data detailing the activities of the council officials and information describing the mess at Mr Abalone's property; anyone walking down Long Street would be aware of this anyway.

- The FOIA / EIR 'personal data' exemption is an absolute one, and does not involve a public interest test. However, the legitimate interest of the public in the information being

disclosed must be taken into account, as well as the interests of the data subject in deciding fairness. In this case the legitimate desire of other residents to know what the council is doing about Mr Abalone's mess might lead the authority to release certain de-personalised information about the issue.

- Consideration should be given as to whether certain information can be redacted so that an individual is no longer identifiable. This will not be possible in all cases.