

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2018

Public Authority: The Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

NB: This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant made a Freedom of Information request to the ICO for correspondence with the Home Office regarding its handling of FOI requests. The ICO disclosed some of the requested information but also withheld some information under the exemptions in section 44 (prohibitions on disclosure), section 31 (law enforcement) and section 40 (personal information).
2. The Commissioner's decision is that the section 44 exemption applies to all of the withheld information and the ICO dealt with the request in accordance with FOIA. The Commissioner requires no steps to be taken.

Request and response

3. On 8 November 2017 the complainant submitted a freedom of information request to the ICO which read as follows:

"All correspondence between the ICO and the Home Office in the last two years relating to the Home Office not responding to freedom of information requests a) in a timely manner and b) not replying at all (other than correspondence which relates only to a specific request)."
4. The ICO responded to the request on 7 December 2017 when it disclosed some of the requested information but also withheld some information under the exemptions in section 44 (prohibitions on disclosure), section 31 (law enforcement) and section 40 (personal information).
5. The complainant subsequently asked the ICO to carry out an internal review of its application of the section 31 exemption only and in doing so argued that the public interest in disclosure outweighed the public interest in maintaining the exemption.
6. The ICO presented the findings of the internal review on 15 January 2017. The review upheld the earlier decision to withhold some of the requested information under the section 31 exemption.

Scope of the case

7. On 15 January 2018 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. In requesting an internal review the complainant said that he was only challenging the ICO's application of the section 31 exemption and did not contest any redactions made under section 40(2) and section 44. In light of this, the Commissioner has not considered the ICO's application of section 40(2). However, during the course of the Commissioner's investigation the ICO confirmed that section 31 and section 44 had been applied to the same information, which the complainant did not appear to appreciate when making his request for an internal review. Given that the complainant has made it clear that he wants to complain about the decision to withhold the information to which section 31 has been applied the Commissioner considers it appropriate to go on to consider whether either section 31 or section 44 applies to this information.

9. The Commissioner has first considered the application of section 44 (prohibitions on disclosure).

Reasons for decision

Section 44 – Prohibitions on disclosure

10. Section 44 provides that information is exempt if its disclosure is prohibited under any other law or enactment. It is an absolute exemption and so there is no public interest test to apply. In this case the ICO has said that section 44 applies by virtue of the statutory prohibition in section 59 of the Data Protection Act 1998 which was in force at the time the complainant made his request.
11. The withheld information in this case includes detailed information about how the Home Office is handling specific, and in some cases ongoing, FOI requests. It includes information regarding the wider context of the Home Office's operations and how this was relevant regarding its approach to FOIA and its section 10 compliance. The ICO said that this was information which it was provided with as the regulator of FOIA and in response to its enquiries, exclusively for the purposes of its regulatory function.
12. Section 59 DPA 98 states that neither the Commissioner nor her staff shall disclose:

"any information which:

a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts.

b) relates to an identified or identifiable individual or business, and

c) is not at the time of disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority."
13. The Commissioner has reviewed the withheld information and has found that it is all information which has been obtained by the ICO for the purposes of the Freedom of Information Act. That is to say, the ICO would not have obtained the information from the Home Office were it not the regulator of the FOIA. Therefore this part of the test is satisfied. The information also relates to the Home Office which is an identifiable

business (this includes public authorities) and so section 59(1)(b) is also satisfied.

14. As regards section 59(1)(c) the ICO confirmed that the withheld information had not been disclosed to the public and therefore this does not provide a route to disclosure either.
15. However, section 59(1) also makes clear that information can be disclosed where disclosure is made with lawful authority. This is defined in section 59(2) which provides that:

"...a disclosure of information is made with lawful authority only if, and to the extent that—

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of—

- (i) any functions under the information Acts, or*
- (ii) any EU obligation,*

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest."

16. In responding to the request the ICO considered these 'gateways to disclosure' and found that none applied. For section 59(1)(a) it confirmed that it did not have consent from the Home Office to disclose this information. For section 59(1)(b) it explained that the information was not provided to the ICO for the purpose of being made public.
17. As regards section 59(1)(c) the Commissioner must consider whether this applies in any way without reference to the ICO having received an information request because section 4(1) FOIA sets out that 'Information is exempt information if its disclosure (*otherwise than under this Act*)'. The Commissioner is satisfied that the ICO was not required to disclose this information in order to discharge a function

under the information Acts or a Community obligation. Further, in relation to section 59(1)(d) a disclosure would not be for the purposes of proceedings.

18. Section 59(1)(e) provides a gateway to disclosure where this is necessary in the public interest. However, it is important to note that this is a different test from the one normally applied under FOIA when considering whether the public interest in maintaining a qualified exemption outweighs the public interest in disclosure. For section 59(2)(e) the presumption is that the information should be withheld. This approach follows the findings of the Tribunal in *Lamb v Information Commissioner EA/2009/0108*:

"Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."

19. This has also been endorsed by the Tribunal in a different case, *Cialfi v Information Commissioner & Cabinet Office – EA/2014/0167* where it reached the same conclusion that there is a high threshold for disclosure. Having taken these decisions into account the Commissioner is satisfied that in this particular case disclosure cannot be said to be 'necessary in the public interest'.
20. The ICO has explained that in order to fulfil its regulatory function, it relies on the co-operation of public authorities responding to its enquiries. It said that if it were to release all the information which it receives from public authorities relating to these issues (and without consent) this would be likely to deter them from providing information to the ICO in future and would therefore undermine its regulatory function.
21. The ICO went on to say that in its view it satisfied the public interest by publishing a list of monitored authorities, its casework datasets, and enforcement actions it takes against those authorities which fail to comply with the legislation it enforces.

22. The Commissioner accepts that there is a public interest in disclosure insofar as this would promote transparency which in turn promotes public awareness and understanding of the ICO's regulatory functions. Disclosure would also help the public to understand how the Home Office is complying with its responsibilities under FOIA. However, the Commissioner also takes the view that the public interest has largely been met by the information the ICO routinely makes available and the information the ICO has already disclosed in response to the complainant's request. Any remaining public interest in disclosure is not sufficiently compelling to override the public interest in protecting the confidentiality of information passed to the ICO, given the importance of this for the effectiveness of the ICO's regulatory functions.
23. For these reasons the Commissioner has decided that section 44(1)(a) is engaged by virtue of section 59 of the DPA 1998. Since the Commissioner has decided that all of the withheld information is exempt under section 44 it is not necessary to go on to consider whether section 31 might also apply.

Right of appeal

24. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

**Paul Warbrick
Senior Case Officer
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Wilmslow
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SK9 5AF**