

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2019

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

Decision (including any steps ordered)

1. In this case the Information Commissioner is both the public authority which is the subject of the complaint and the regulator of the FOIA responsible for investigating the complaint. The notice will use the term Information Commissioner's Officer (ICO) when referring to the Information Commissioner as the public authority subject to the complaint and the term Commissioner will be used to refer to her as the regulator.
2. The complainant has requested from the ICO information about the scope of the exemption for processing data for personal and household activities contained in article 2(2)(c) and Recital 18 of the EU General Data Protection Regulation (GDPR). The ICO refused to disclose the information citing sections 22 (information intended for future publication) and 42 (legal professional privilege) of the FOIA.
3. The Commissioner's decision is that the ICO has correctly applied sections 22 and 42 of the FOIA in this case and that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

5. On 8 August 2018, the complainant wrote to the ICO and requested information of the following description:

"Please can you provide an electronic copy of any policy, guidance, lines-to-take or other material you hold on the scope of the exemption contained in GDPR art 2(2)(c) and/ or recital 18."

6. On 6 September 2018 the ICO responded. It applied section 22 of the FOIA to withhold information within scope of the request contained in draft GDPR guidance and section 42 of the FOIA to withhold legal advice provided in respect of article 2(2)(c) of the GDPR.
7. On 18 September 2018 the ICO conducted a review of its handling of the request and wrote to the complainant maintaining its original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the ICO has correctly applied sections 22 and 42 of the FOIA to withhold the requested information.

Reasons for decision

Section 22 of the FOIA – information intended for future publication

10. Section 22 of the FOIA states that information is exempt from disclosure if the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not) and in all the circumstances it is reasonable to withhold the information until its planned publication.
11. This exemption is also subject to the public interest test. So, in addition to demonstrating that section 22 of the FOIA is engaged, the public authority must consider the public interest arguments for and against disclosure and demonstrate in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

12. The Commissioner is satisfied that the requested information was held at the time of the request by the ICO with a settled expectation that it will be published at a future date. The ICO explained that at the time of the request, there was a settled intention to publish the sections of the guidance containing information within the scope of the request (as they appeared at the time) in accordance with its commitment to publishing guidance for GDPR, that is, to publish guidance as soon as it has been agreed and is feasibly possible. The ICO provided the Commissioner with a copy of the draft guidance – version 0.4 and the final published version. She notes that the draft contains a publication schedule (although it had not been finalised at the time of the request), that the schedule in the final version shows it was approved on 20 September 2018 and published on 21 September 2018 (43 days after the request was received and 15 days after a response was provided) and evidence under the 'What's new?' section of the ICO website confirming this. The ICO says it therefore had a settled intention (at the time of the request) to publish the information within scope of the request contained in the draft at a future date.
13. The Commissioner notes that the complainant does not agree this exemption can apply because he says there was no settled intention to publish the draft guidance and it was not published. He believes the published information was in fact the final version which is not the same as the requested information. He also said that the ICO failed to provide him with a timescale for intended publication of the information as is stated good practice in the Commissioner's 'Information intended for future publication and research information (Sections 22 and 22A)' guidance.
14. The Commissioner has considered a number of previous cases concerning the application of section 22 of the FOIA to draft information. It has been the Commissioner's established viewpoint that documents can go through many drafts before they are finalised. However, if the intention or expectation in producing anyone of the drafts is to publish the information in it, the exemption can be considered. Therefore, if there is a settled intention at the time of the request to publish information within scope of the request contained within a draft, the exemption can apply. It is the Commissioner's view that in this case the ICO has demonstrated that at the time of the request there was a settled intention to publish information relating to processing for personal and household activities (within scope of the request) contained in the draft guidance at a future date.
15. The Commissioner notes that there is no requirement in the exemption in section 22 of the FOIA to have a determined publication date. The

public authority only has to demonstrate that there was a settled intention to publish the requested information at the time of the request at "some future date". For the reasons given above, the Commissioner is satisfied that the ICO has sufficiently demonstrated that this was indeed the case. The Commissioner notes that at paragraph 67 in the section 22 guidance, it says that it is good practice to provide the requester with an anticipated date of publication¹. She however notes that in this case, the publication schedule contained in the draft guidance had not been finalised and therefore it was not possible for the ICO to provide an anticipated publication date at the time of responding to the request.

16. Turning now to whether it is reasonable to withhold the information until the date of publication. The ICO said that it has a history of publishing and updating its guidance on a regular basis and that at the time of the request it had committed to publishing information about processing data for personal and household activities and the GDPR (in the guidance) as soon as agreed and feasibly possible and therefore it was sensible and reasonable to control the release of information in accordance with this commitment.
17. The Commissioner is of the view that it was reasonable to withhold the information until its intended publication. She has viewed the withheld information and notes that it forms part of the GDPR guidance that relates to the processing of information in the course of personal and household activity, which, relates to every member of the public. It is therefore sensible and fair to all, to control and manage the release of this information by way of an established publication process in line with the ICO's accepted guidance publishing practice. This, ensures that the requestor receives the information at the same time as the public and not prior to general publication. Under point 26 of the section 22 guidance it states that the closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place. In this case, although the publication schedule in the draft was yet to be finalised, the Commissioner notes that the ICO's commitment to publish GDPR guidance (as soon as agreed and feasibly possible), she also notes that the request was made on 8 August 2018 and responded to on 6 September, the information was then published on 21 September 2018 (43 days after the request was received and 15 days after a response was provided), she is therefore satisfied that at the time of the request

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf> v

the ICO was close to publishing the information and it was reasonable to withhold the information until its planned publication.

Public interest

18. In terms of the public interest, the ICO recognised the public interest in openness, transparency and accountability. It also acknowledged that the information would provide guidance to the public and enable greater understanding, specifically, the ICO's position in respect of the GDPR and processing information for personal and household activities. However, in this case the ICO felt it was in the public interest to maintain the exemption. It said that it is in the public interest to publish the information in accordance with its commitment to GDPR, that is, to publish as soon as the guidance has been agreed and is feasibly possible in order to prevent misleading or incorrect information in other sections of the guidance (that were being reviewed during the drafting process at the time) entering the public domain. This would ensure that the general public receives the correct information at the same time. The ICO also said that at the time of the request, its policy department was reviewing the draft guidance, which, was placed on hold whilst staff were re-assigned to provide organisational training. Therefore, responding to the request and providing information that was already in the process of being published, would have required liaison with colleagues in the policy department and impacted on the ICO's already stretched resources.
19. The Commissioner acknowledges the public interest in transparency and accountability and in members of the public having access to information that would enable them to understand the ICO's position on the GDPR and processing data in the course of personal and household activities. However, in this case the Commissioner is satisfied that there are stronger public interest arguments in favour of maintaining the exemption. The Commissioner notes that the information now published does not in fact change the position of processing information for personal or household activities (or domestic purposes) under the previous Data Protection Act 1998. She considers it in the public interest that information (guidance) intended to be used by the general public is correct (should not cause confusion) and is accessible fairly to the general public. She also accepts that there is a legitimate public interest in ensuring that public authorities (funded by the public purse) allocate their resources appropriately and proportionately and notes in this case that there was work in progress to publish the requested information within the guidance. The Commissioner is therefore satisfied that disclosure of the requested information does not outweigh the public interest arguments in favour of maintaining the exemption.

Section 42 of the FOIA – legal professional privilege

20. Section 42(1) of the FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

21. This exemption is subject to the public interest test.

22. The purpose of Legal Professional Privilege (LPP) is to protect an individual's ability to speak free and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that their position can be properly assessed. LPP has therefore evolved to make sure communications between a lawyer and his or her client remain confidential.

23. There are two types of LPP; advice privilege and litigation privilege.

24. The ICO said that LPP covers confidential communications between lawyers and their clients for the purpose of seeking and/or providing legal advice. It said that the withheld information in this case consists of legal advice provided by both its internal legal advisers and external counsel regarding its interpretation of article 2(2)(c) of the GDPR and has therefore applied section 42 of the FOIA to withhold this information in respect of advice privilege.

25. The ICO provided the Commissioner with copies of the withheld information. The Commissioner reviewed the information in its entirety. She notes that it comprised of advice sought by the ICO's policy department (the client) between June and July 2018. Part of the information is external legal advice from a barrister in relation to the ICO's interpretation of article 2(2)(c) and part of the information is legal advice provided by the ICO's internal legal department based upon the external advice received and presenting options as a way forward on article 2(2)(c). It is therefore her view that the dominant purpose of the communications is for internal and external legal advisers to provide the ICO with legal advice sought in respect of its interpretation of the GDPR.

26. The Commissioner is therefore satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. She will now consider the public interest test.

Public interest

27. In terms of the public interest, the ICO recognised the general public interest in it being open and transparent. It also acknowledges that disclosure would enable public understanding of the ICO's interpretation of article 2(2)(c) and how any issues with its interpretation are being considered.
28. However, in this case the ICO felt that there was a strong inherent public interest in favour of maintaining the exemption due to disclosure of any legally privileged information threatening the principle (legal privilege) the exemption is designed to protect. It said that the advice that had been sought and obtained was part of live ongoing policy considerations at the time of the request, that there is a public interest in safeguarding openness in communications between the ICO (client) and its internal/external legal advisers in order to ensure access to full and frank legal advice and that it was important to maintain confidentiality as disclosure would lead to reticence in the ICO seeking advice and the provision of that advice. It said that this could impact the effectiveness of the advice process and potentially undermine its ability to make fully informed legal decisions in the future.
29. The Commissioner acknowledges the public interest in transparency and accountability and in members of the public having access to information that could better help them understand the formulation of the ICO's interpretation of article 2(2)(c) of the GDPR. However, in this case the Commissioner is satisfied that there are stronger public interest arguments in favour of maintaining the exemption. She accepts that because the advice was obtained as part of ongoing policy considerations about article 2(2)(c), disclosure of the information would be likely to prevent legal advisers providing free, frank and candid advice in the future, impacting the quality of advice received and potentially affect decisions made about the legislation the ICO regulates and guidance it issues in the future. Because of the long standing principle of LPP and the clear need for all (not just public authorities) to have access to full and frank legal advice only in very exceptional cases can this be overridden when considering where the public interest lies.
30. The Commissioner also notes (from considering the application of section 22 of the FOIA in this case) that at the time of the request the ICO had not published any information about its position on article 2(2)(c) of the GDPR, and is cautious that if the information (advice) was released at the time of the request, inferences about what the Commissioner's position could be may have lead to confusion by the general public. For the above reasons, the Commissioner is satisfied that disclosure of the requested information does not outweigh the public interest arguments in favour of maintaining the exemption.

Right of appeal

31. 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

32. 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.
33. 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

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