

9 June 2023

IC-228367-G3D4

Dear **s40(2)**

Further to our email of 19 May 2023, we are now in a position to provide our final response to your request.

Your request has been handled under the Freedom of Information Act 2000 (the FOIA).

Request

You asked for the following information about our investigation into Facewatch:

- *Copies of any guidance given to Facewatch LTD by the ICO in relation to their activities since 1/1/2016.*
- *Copies of any assessment, inspection, report examining, evaluation or similar of Facewatch's watchlists and/or facial recognition tools dated since 1/1/2016.*
- *Any correspondence sent by the ICO to Facewatch LTD, or its staff, containing information, guidance, advice or similar about the company's application of data protection rules.*

We contacted you on 19 May and explained that the information was exempt in accordance with section 31 of the FOIA and we required more time for consideration of the public interest factors.

On 31 May we provided you with a copy of our final outcome letter to Facewatch.

Response

I can confirm that we hold information in scope of your request.

The information is withheld in accordance with sections 31 and 44 of the FOIA.

FOIA section 44 (& DPA section 132)

Information provided to us by Facewatch has been withheld under the provisions of section 44 of the FOIA which places prohibitions on disclosure. This exemption is an absolute exemption, which does not require a consideration of the public interest test of the type required by the qualified exemptions.

Section 44(1)(a) of the FOIA states;

'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment'

The enactment in question is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act. This states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

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

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

unless the disclosure is made with lawful authority."

Section 132(2) lists the circumstances in which a disclosure can be made with lawful authority, however we find that none of them apply here. As a result the information is exempt under the FOIA and withheld from our response.

FOIA section 31

The information we hold about our investigation into Facewatch is also exempt pursuant to section 31 of the FOIA.

The exemption at section 31(1)(g) refers to circumstances where the disclosure of information:

"would, or would be likely to, prejudice – ... the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

In this case the relevant purposes contained in subsection 31(2) are 31(2)(a) and 31(2)(c) which state:

"(a) the purpose of ascertaining whether any person has failed to comply with the law" and

"(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise ..."

These purposes apply when the Information Commissioner has considered whether or not a data controller has met its obligations under data protection legislation.

The exemption at section 31 is not absolute and we must therefore consider the prejudice or harm that may be caused by disclosure, as well as performing a public interest test by weighing up the factors in favour of disclosure against those in favour of maintaining the exemption.

Although we have closed our investigation into Facewatch, our decision to do so represented our views at that point in time. Disclosure of the information you have requested at this point could prejudice any future discussions between the ICO and Facewatch.

Disclosure could also jeopardise the ICO's ability to obtain information from Facewatch or other data controllers in relation to future investigations. In our view harm could be caused if data controllers were reluctant to engage with the ICO due to concern about information being disclosed to us being made public.

With this in mind, we have then considered the public interest test for and against disclosure.

In this case the public interest factors in disclosing the information are –

- increased transparency in the way in which Facewatch has responded to the ICO's enquiries;
- increased transparency in the way in which the ICO conducts its investigations;
- there is increased public interest in transparency about our reasoning for

- closing the case with an outcome of 'no further action';
- there is a wider public interest in transparency about privacy concerns regarding the use of live facial recognition;
- at the time the request was made there was an increased public interest in transparency in this case given Facewatch's claims about the conclusion we had reached.

The factors in withholding the information are –

- the public interest in maintaining organisations' trust and confidence that their replies to the ICO's enquiries will be afforded an appropriate level of confidentiality during the course of an investigation;
- the public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public;
- the public interest in meeting Facewatch's expectation of non-disclosure having ascertained their views on this individual request;
- we have now amended our [blog](#) to stress that we have not given blanket approval to Facewatch, and Facewatch has amended the wording on their website.

Having considered all of these factors we have taken the decision that the public interest in withholding the information outweighs the public interest in disclosing it.

This therefore concludes our response to your information request.

FOI review procedure

If you are dissatisfied and wish to request a review of our decision or make a complaint about how your request has been handled you should write to the Information Access Team at the address below or e-mail icoaccessinformation@ico.org.uk.

Your request for internal review should be submitted to us within 40 working days of receipt by you of this response. Any such request received after this time will only be considered at the discretion of the Commissioner.

If having exhausted the review process you are not content that your request or review has been dealt with correctly, you have a further right of appeal to this office in our capacity as the statutory complaint handler under the legislation.

To make such an application, please write to our Customer Contact Team at the address given or visit our website if you wish to make a complaint under the FOIA.

Your information

Please note that our [Privacy notice](#) explains what we do with the personal data you provide to us and what your rights are. This includes entries regarding the specific purpose and legal basis for the ICO processing information that people that have provided us with, such as an [information requester](#).

The length of time we keep information is laid out in our retention schedule, which can be found [here](#).

Yours sincerely



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Risk and Governance Department, Corporate Strategy and
Planning Service
Information Commissioner's Office, Wycliffe House, Water
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