

13 June 2023

IC-232726-Y5N5

Request

You asked us:

"I am requesting some information about the ICO's enforcement action against TikTok.

I understand that the ICO initially intended to sanction TikTok for a violation of Art. 9 GDPR, but this was "deprioritised" and does not appear in the monetary penalty notice.

Please provide all information in scope of the FOIA that relates to the ICO's decision not to pursue TikTok for its alleged/suspected violation of Art. 9 GDPR.

For example, representations received regarding TikTok's processing of special category data, records of the decision-making process, or generally any documents or emails regarding the ICO's decision to drop this line of investigation.

Essentially, I would like to see any documents held by the ICO that would help explain why the ICO decided not to proceed with this part of its investigation."

We received your request on 15 May.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

Our response

We do hold information within the scope of your request, however this information is withheld because it is exempt under the FOIA.

The information that we hold within the scope of this request is comprised of representations that we received from TikTok, which are exempt pursuant to s.44 FOIA, correspondence between the ICO and its internal legal advisors, which attracts legal professional privilege and is exempt pursuant to S.42 FOIA, and some correspondence sent by the ICO to TikTok, which is exempt pursuant to S.31 FOIA. Further explanation is provided below.

Section 44 of the FOIA –

Section 44 is an absolute exemption which does not require consideration of the public interest test of the type required by a qualified exemption.

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'

In this case, the Data Protection Act 2018, Part 5, section 132 prohibits the disclosure of confidential information that -

- 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.

The representations received from TikTok about the potential Article 9 breach relate to an identifiable business, were obtained in the course of our regulatory function, and we do not have lawful authority to disclose this information to you.

Section 132(2) of the DPA provides conditions in which disclosure could be made with lawful authority, however we find that none of these conditions apply in these circumstances.

Section 132(3) imposes a criminal liability on the Commissioner and his staff not to disclose information relating to an identifiable individual or business for the purposes of carrying out our regulatory functions, unless we have the lawful authority to do so, or it has been made public from another source.

S.42 of the FOIA

Some of the information that you have requested is subject to legal professional privilege and is withheld from our response in accordance with section 42 of the FOIA.

Section 42(1) of the FOIA states:

"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."

There are two types of privilege covered by the exemption at section 42. These are:

- Litigation privilege; and
- Advice privilege.

We find that the information in scope of your request is subject to advice privilege. This covers confidential communications between the client and lawyer, made for the purpose of seeking or giving legal advice.

Section 42 is not an absolute exemption, so we must consider whether the public interest favours withholding or disclosing the information.

The factors in favour of lifting the exemption include:

- The public interest in the ICO being open and transparent;
- The public interest in transparency about the TikTok investigation.

With the public interest factors in favour of maintaining the exemption including:

- The disclosure of legally privileged information threatens the important principle of legal professional privilege;

- Maintaining openness in communications between client and lawyer to ensure full and frank legal advice;
- This matter is still 'live' in the sense that the period in which TikTok have a right of appeal has not yet expired, there is therefore a real risk of prejudice to any future appeal or connected matters.

Taking into account the above factors we conclude that the public interest lies in maintaining the exemption.

S.31 of the FOIA

We have withheld some information because it is exempt from disclosure under section 31(1)(g) of the FOIA.

We can rely on Section 31(1)(g) of the FOIA where disclosure:

"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 ..."

In order to apply the exemption at Section 31, we must consider the prejudice or harm which may be caused by disclosure.

We find that disclosure of this information would be likely to prejudice the ICO's law enforcement functions. The information withheld under s.31 amounts to sections of correspondence sent from the ICO to Tik Tok about the ICO's reasons for not pursuing the potential Article 9 breach. If made public, this information could be used by parties undertaking unlawful practices to attempt to evade regulatory action by the ICO.

We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

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

- Increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are –

- There is an inherent strong public interest in the ICO being best equipped to prevent the most harmful practices and to take action when they are used;
- The public interest in the ICO being able to prioritise its enforcement action in the most effective way, without information being made public which could undermine its strategies;
- The ICO has published lots of information about the TikTok case, including the Penalty Notice, and this goes some way to satisfying the public interest into its decisions in the case, without prejudicing its future regulatory work.

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 concludes our response.

Next steps

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

Your information

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely



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