

6 February 2024

Case Reference IC-280344-G9N4

Thank you for contacting the Information Commissioner's Office (ICO). Your information request was received on 9 January.

Your request

You asked us for the following:

"I refer to the attached list showing a search result from the BAILII database of GRC reported decisions. The search term was "closed witness statement".

The six cases numbered 3, 4, 6, 7, 9 and 10 on the list are all GRC decisions from 2022 and later, where the applicant (for information) challenged the IC's Decision Notice. Each case involved 'closed material' (beyond the withheld information), such as (parts of) witness statements and other documentation.

Regarding each of these six cases, please provide any recorded information:

- 1) indicating that the Information Commissioner made any submissions to the First Tier Tribunal concerning the content of any closed materials (excluding the withheld information); additionally*
- 2) relating to any evaluation by the IC as to whether or not it would be appropriate for the IC to make submissions concerning the content of such closed materials.*

If there is no such recorded information for a particular case, please say so.

To be clear, I do not ask to see any such submissions. I only want to know, concerning the individual cases, if there is any recorded information indicating that the IC made submissions concerning the content of the closed (parts of) witness statements and other closed materials (excluding the withheld information). And/or indicating that the IC evaluated the appropriateness of making such submissions."

Where your questions satisfy the criteria of a valid information request, we have considered your request under the Freedom of Information Act 2000 (FOIA).

Our response

- 1) We are neither confirming nor denying that we hold emails between the ICO and the Tribunal for the purposes of these appeals as they are subject to the exemption at 32(1)(a) of the FOIA.

Section 32(1) of the FOIA states in full:

32(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in –

any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter, any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or any document created by –

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

Section 32 is a 'class' based exemption and is 'absolute', which means that if the nature, or class, of the information held falls within the scope of the exemption it need not be provided in response to a request under the FOIA.

Any emails between the ICO and the Tribunal fall within the scope of section 32(1)(a) above, and as such are exempt from disclosure under the terms of the FOIA.

The rationale for this exemption being absolute is that courts and tribunals regulate access to information generated in the course of proceedings, and the exemption is intended to protect court documents.

Moreover, section 32(3) of the Act states that:

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

As such, we reiterate that we are neither confirming nor denying whether we hold such information.

- 2) We can confirm that we do hold information which could be considered to fall within scope of this part of your request.

However, this information is exempt as it constitutes privileged information as defined by section 42 of the FOIA. We note that you are only interested in a confirmation/denial of whether we hold information in relation to each case. However, the exemption at s32 is relevant to our consideration of the provision of this response.

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.

Litigation privilege covers confidential communications between the client and lawyer made for the purpose of preparing for existing or anticipated litigation. Advice privilege covers such communications when they're made for the purpose of seeking or giving legal advice. We find that the information in scope of your request is subject to advice privilege.

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

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

- The general public interest in transparency concerning the ICO's regulatory activity

The factors in withholding the information are:

- legal professional privilege is fundamental principle of the legal system
- There is also public interest in maintaining the ability for legal advisors and clients to be able to have full and frank discussions without the fear that such information will be potentially made public
- The need to maintain LPP in relation to these particular cases is strengthened by the fact that these cases are very recent

and that therefore the issues involved are subject to ongoing and heightened sensitivity

Having considered these factors, we are satisfied that it is appropriate to withhold the information.

Moreover, section 32(2) states:

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

We find that conforming which cases we did or did not hold information in relation to would indicate the nature of the information held, or the type of advice given/not given by legal representatives, by virtue of the accessible details of each case.

We are, therefore, refusing to confirm or deny in relation to which cases information in scope is held.

This concludes our response.

We hope you find this information helpful.