

16 September 2022

IC-188114-V8L7

Request

We are now in a position to respond to your information request of 19 August 2022.

You said: *"I'd like to request any reports or findings made by the ICO following its investigation into employee monitoring by Barclays in 2020."*

Your request has been handled under the Freedom of Information Act 2000 (the FOIA). As you are probably aware, this legislation provides public access to recorded information held by a public authority unless an appropriate exemption applies.

Response

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

Our investigation into Barclays' use of employee monitoring software was concluded on 31 March 2022 with an outcome of 'no further action'.

In our outcome letter we made the following recommendations to Barclays:

- 1. If you do intend to use an employee [Information redacted] monitoring system that processes personal data, such as Sapience in Open Mode, ensure that you complete a DPIA with particular attention to demonstrating how such processing is fair, lawful and proportionate and be clear of your lawful basis for processing such data.
The DPIA should:
 - Identify and assess any risks arising to individuals' data protection rights and should identify any additional measures and/or steps required to mitigate these risks.
 - Contain an assessment of necessity and proportionality. This should consider other alternative approaches which may not be so intrusive and evidence to show why this method is required.
 - An assessment of risks to the rights and freedoms of individuals and measures envisaged to address or mitigate those risks.*

- Details of security within the systems involved such as how the details are stored, how long it is retained for, who has access to the data etc.

2. Please be aware that the ICO is hoping to publish some updated guidance about employee monitoring but this is unlikely to be published in the short term but it is advised that you make yourself aware of the contents when it becomes available (likely to be in 2023).

The remaining information we hold, together with the redacted information from the recommendation above, has been withheld from disclosure for the reasons set out below.

FOIA section 44 (& DPA section 132)

The majority of the information we hold in scope of your request was provided to us in confidence by Barclays solely for the purpose of assisting us with our investigation. We have therefore withheld this information 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

Some information has also been withheld under section 31(1)(g) of the FOIA.

This is an exemption relating to information which, if disclosed, would or would be likely to cause prejudice to our ability to regulate the laws we oversee.

Specifically, the exemption at section 31(1)(g) of the FOIA 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 ..."

Clearly, these purposes apply when the Information Commissioner has carried out an investigation into whether or not Barclays has complied with data protection legislation.

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

We take the view that to release the information you have asked for could prejudice the ICO's ability to conduct future investigations with Barclays and other data controllers in an appropriate manner. Disclosure could jeopardise the ICO's ability to obtain information either relating to this case or others in the future.

In our view harm could be caused if either party of an investigation is reluctant to enter into any further discussions if information provided to us confidence is disclosed in response to information requests or even general enquiries. This is likely to result in other parties being reluctant to engage with the ICO in the future.

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 Barclays has responded to the ICO's enquiries;
- increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are –

- the public interest in maintaining data controllers' trust and confidence that their replies to the ICO's enquiries will be afforded an appropriate level of confidentiality;
- the public interest in data controllers being open and honest in their correspondence with the ICO about an investigation, without fear that their comments will be made public;
- the public interest in meeting Barclays' expectation of non-disclosure of information clearly marked as confidential and commercially sensitive;
- the public interest in disclosure is already met to a certain extent by disclosure of the recommendations made to Barclays.

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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