

24 April 2023

IC-225351-L9Q3

Request

We received your email on 24 March 2023. You asked a series of questions, two of which were requests for information we hold. These were:

- 1. ICO outlined its "initial view" on the issue of US cloud providers in the DESC in correspondence with the SPA – has ICO sought legal advice on the issue? If so, what did this advice conclude, and does the ICO now have a formal position on the matter?*
- 2. Multiple policing bodies have claimed to have gotten regulatory sign off from ICO on their use of Microsoft – can the ICO confirm if it has ever given formal regulatory approval for the use of these systems in a law enforcement (I.e. part three) context?*

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 some information in scope of your request.

In relation to your first question, we have obtained legal advice about this issue. However, the matter is still ongoing and we have not yet come to a formal position. The advice itself is subject to legal professional privilege and is withheld under section 42 of the FOIA. More information about this can be found below.

In relation to your second question, we have never given formal regulatory approval for the use of these systems in a law enforcement context.

Information withheld – section 42

I can confirm that we hold legal advice on the matter. This 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 the legal advice obtained in relation to this matter in particular, which involves the processing of sensitive personal data involving a large number of data subjects.

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;
- The disclosure of legal advice could have a chilling effect on both policy officers and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public;
- The matter is currently live and no formal position has yet been reached.

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

This concludes our response to your 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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