

14 July 2023

IC-238847-J0M9

## Request

In relation to the ICO's investigation into the seizure of mobile phones from migrants by the Home Office you requested the following:

*"we ask that you provide information of your investigation over the past two years and any preliminary findings and recommendations or advice to date, in particular in relation to the points raised above."*

We received your request on 15 June 2023.

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

## Our response

I can confirm that we hold information which falls within the 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 the Home Office 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'

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.

Section 132(3) imposes a criminal liability on the Commissioner and his staff not to disclose information except where certain circumstances apply. 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.

### **Section 31 – Law enforcement**

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

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 obtained or created information during an investigation into whether or not a data controller has met its obligations under data protection legislation.

The exemption at Section 31 is not absolute, and we need to consider the public interest test by weighing up the factors for and against disclosure of the information we hold, as well as any prejudice or harm which may be caused by disclosure.

Disclosure of the information you have requested at this point could prejudice any future discussions between the ICO and the Home Office on this matter should the need arise.

Disclosure could also jeopardise the ICO's ability to obtain information from the Home Office 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 disclosed to us being made public.

Disclosure of the information you have requested could also prejudice our ability to conduct investigations in an efficient way in the future; if data controllers are made aware of the way ICO investigators consider the evidence provided to them it would allow those who choose to do so to manipulate their responses in a way which may prejudice our ability to carry out our regulatory duties.

With this in mind, we have 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 the ICO conducts its investigations;
- increased transparency in the way in which the Home Office has responded to the ICO's enquiries;
- there is a wider public interest in transparency about how the ICO protects the rights of vulnerable individuals.

The factors in withholding the information are –

- the public interest in maintaining the ICO's ability to conduct investigations as it thinks fit;
- there is a public interest in maintaining our ability to conduct investigations in line with established processes and procedures without the risk of prejudicing these, or any future, investigations by disclosing specific methods or decision making processes;

- there is a public interest in the ICO being an effective and efficient regulator. It is essential to the efficacy of the ICO as a regulator that we are able to express our views and opinions in confidence where we need to. We need a safe space to formulate our conclusions and in which to communicate with those we regulate.
- 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. This applies both to the Home Office, and our future engagement with them, and other organisations who may see our treatment of the Home Office as an indicator of how we may treat them;
- the public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public.

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.

### **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



Information Access Team  
Strategic Planning and Transformation  
Information Commissioner's Office, Wycliffe House, Water  
Lane, Wilmslow, Cheshire SK9 5AF  
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