

28 August 2023

IC-248456-K5K5

Request

You asked us:

I would like to request correspondence between the Information Commissioner's Office and the Home Office on the subject of the facial recognition company Facewatch in March 2023.

I would also like to request any internal correspondence within the ICO about the decision to close the Facewatch investigation, including any information that shows why the Commissioner decided to close the investigation, and the name of the most senior person involved in the decision if it was not John Edwards himself.

We received your request on 30 July.

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. Copies of the information that we hold within the scope of the first and second parts of your request are attached in separate bundles.

Some information has been withheld, and some information has been redacted in the bundle of correspondence covering the first part of your request, this information is exempt pursuant to s.44 FOIA as we are legally prohibited from disclosing it under s.132 DPA 2018. The withheld information is notes taken by the ICO from meetings between the Home Office and the ICO in which Facewatch was raised, amongst other matters.

Additionally, some information has been redacted in the bundle covering the second part of your request for the same reason set out above, under s.44 FOIA and s.132 DPA, and some information has been redacted because it is subject to legal professional privilege and is exempt pursuant to s.42 FOIA. Some redactions have also been made to information which would be likely to prejudice our law enforcement functions, pursuant to s.31 FOIA.

Some redactions have been made to both bundles to information which is the personal data of third parties, pursuant to s.40(2) FOIA.

Some further information has been redacted from both bundles because it is out of scope of your request, i.e. it is about other investigations or other matters between the ICO and the Home Office and not related to Facewatch. All redactions have been labelled to show which exemption applies, redactions which have not been labelled relate to information which is out of scope.

Additionally, we can advise that the decision to close the investigation was made by John Edwards.

Section 44 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 information withheld relates to identifiable businesses (i.e. Facewatch and the Home Office) and we do not have lawful authority to disclose this information to you. 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.

Section 42 FOIA

Some information in the bundle for the second part of your request 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 some of the information in scope of the second part 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 our investigations.

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.

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

Section 40(2) FOIA

You will see that some of the third party personal data has been redacted in our response.

Section 40(2) of the FOIA exempts information if it is personal data belonging to an individual other than the requester and it satisfies one of the conditions listed in the legislation.

We find that the condition at section 40(3A)(a) applies in this instance: that disclosure would breach one of the data protection principles. The principles are outlined in the General Data Protection Regulation (GDPR) with the relevant principle on this occasion being the first principle as provided by Article 5(1): that personal data shall be processed lawfully, fairly and in a transparent manner.

We do not consider that disclosing this information into the public domain is necessary or justified. There is no strong legitimate interest that would override the prejudice to the rights and freedoms of the relevant data subjects. We have therefore taken the decision that disclosing this information would be unlawful, triggering the exemption at section 40(2) of the FOIA.

Section 31 FOIA

We have redacted some information in the bundle for the second part of your request 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 ..."

Section 31 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure.

The Facewatch investigation, while closed, considered matters which are relevant to areas of ongoing ICO regulatory work and we consider that disclosure at this stage would be likely to prejudice that work. This would occur by discouraging organisations from freely and voluntarily providing information in response to the ICO's enquiries and revealing planned lines of enquiry and priorities which could either assist those wishing to evade regulatory action, or cause undue concern where it is not warranted.

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 Facewatch 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 organisations' trust and confidence that their replies to the ICO's enquiries will be afforded an appropriate level of confidentiality;
- the public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public prematurely or, as appropriate, at all;
- the public interest in maintaining the ICO's ability to conduct its investigations as it thinks fit, without unnecessary interference caused by disclosure of information while matters are still live.

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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