

15 August 2023

IC-245405-S5Z7

Request

You asked us:

"I write further to recent reporting about the ICO's investigation into Facewatch Limited ("Facewatch"): <https://ico.org.uk/about-the-ico/media-centre/blog-balancing-people-s-privacy-rights-with-the-need-to-prevent-crime/>

From the ICO's findings and IC-230118-D2G8, I assume Facewatch relies on Article 9(2)(g) UK GDPR (substantial public interest) and Part 10 of Schedule 2 to the Data Protection Act 2018 for processing special category data. If this is not the case, please specify which Article 9(2) exemption the ICO considers Facewatch relies on, in addition to any further conditions in the Data Protection Act 2018.

Please could you provide me with the following information in respect of the ICO's investigation into Facewatch.

- 1. Please provide the ICO's assessment of whether Facewatch's processing of special category data is 'necessary' for the purposes of the prevention or detection of an unlawful act (particularly in the context that alternative measures such as ordinary CCTV or security guards are also readily available).*
- 2. Please provide the ICO's assessment of whether Facewatch's processing of special category data is necessary for reasons of 'substantial public interest'.*
- 3. Please confirm whether the ICO considers retailers using Facewatch's products to be a (joint) controller in respect of Facewatch's processing, and why.*

4. Please disclose any correspondence regarding Facewatch that the ICO has received from or sent to other data protection supervisory authorities, a Member of Parliament, or a Government Department.

5. Please provide any further assessment, guidance or policies that the ICO has regarding what generally constitutes a 'substantial' public interest in the context of Article 9(2)(g) (as opposed to the ordinary public interest, or something not in the public interest)."

We received your request on 17 July.

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

Our response

Regarding the first part of your request, we confirm that the ICO understands that Facewatch relies on Article 9(2)(g) UK GDPR (substantial public interest) and Part 10 of Schedule 2 to the Data Protection Act 2018 for processing special category data.

We do hold information within the scope of parts 1-3 of your request. This information is withheld pursuant to s.42 FOIA (legal professional privilege) and s.31 FOIA (prejudicial to law enforcement functions). We have provided further information about this below.

We do hold information within the scope of part 4 of your request. This is withheld, pursuant to s.44 FOIA (prohibitions on disclosure) and s.31 FOIA (prejudicial to law enforcement functions). We have provided further information about this below.

We hold no information within the scope of Part 5 of your request.

Section 42 FOIA

Some of the information that we hold within the scope of parts 1 to 3 of your request is legal advice given to our investigations team by our external counsel which 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 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;
- This advice relates to recently concluded matters and the issues raised may be relevant to other live ongoing or future matters and potentially prejudicial;
- 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 44 FOIA

Some of the information that we hold within the scope of part 4 of your request is exempt pursuant to s.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 an identifiable business/ identifiable businesses 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 31 FOIA

The remainder of the information that we hold within the scope of parts 1-4 of your request is withheld 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 investigation into Facewatch was only recently closed and disclosure of the information that you have requested is likely to prejudice the ICO's functions in investigating breaches of the laws that we regulate and taking enforcement action in a number of ways.

Firstly, it is likely to reveal details about the ICO's investigatory strategy and processes which are relevant to and likely to prejudice other ongoing investigations.

Further, it is likely to discourage free and frank disclosure of information to the ICO by Data Controllers which are subject to our investigations. We are aware from experience that there is a reticence among private sector organisations to disclose commercially sensitive information to the regulator for fear of disclosure into the public domain through FOI.

We have seen the effects of this in a number of high -profile matters, where where parties have expressed reluctance to disclose sensitive information to the ICO, stating concerns that the ICO may disclose that information in response to FOIA requests, and this has generated more work for the ICO in working through these concerns.

If parties are concerned that we will disclose information of this nature, they are much less likely to engage with us or disclose materials on a voluntary basis and are much more likely to attempt to withhold information in response to formal requests. This will prejudice our ability to carry out our functions as it will result in many more time-consuming interactions and potential litigation with parties to our investigations. It will also prejudice our ability to gather the relevant evidence to establish the truth.

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 investigatory process already provides for transparency as a result of public law obligations which oblige disclosure of appropriate information at key stages of the process, further disclosure beyond these obligations is not always necessary in order to satisfy the public interest;
- 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 investigations as it thinks fit without prejudice caused by disclosing details of its processes into the public domain.

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.

By way of advice and assistance, the ICO had disclosed some of its correspondence with Facewatch about the investigation and this correspondence is available on our disclosure log [here](#).

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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