

19 October 2023

IC-260900-T4T0

Request

1. I refer to the case of Abbas Mithani v Information and Judicial Appointments Commission EA/2022/0299 – EA/2022/0300 and EA/2022/0310 which has been heard by the first tier tribunal. Judgment in that case was reserved. In that case, it transpired that there had been no person authorised to issue qualified-person opinions in the history of that organisation until 10 October 2022. It was also ascertained that, despite this, there were several cases in which the exemption in s. 36 of the FOIA was relied on by the JAC.

Please provide the following information:

- a) Has the information commissioner [IC] been informed of this by the JAC?*
- b) If he were informed, please state how.*
- c) If the IC were informed in writing, please let me have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you sent your response to this request, including any advice or guidance given to the JAC by the IC to remedy these situations.*
- d) If the answer to (c), above, were Yes, please let me know whether the advice or guidance provided to the JAC has been complied with and provide all communication passing between you and the JAC confirming this.*
- e) If the IC were informed orally, please state when and what he was told and any communication (whether oral or in writing) passing by or between the JAC and the IC.*
- f) If any of the answers to (a) to (e) above were Yes, please let me know what action the IC proposes to take against the JAC.*

- g) If the IC were not informed, please state what action the IC proposes to take for this very serious breach of the FOIA.*
- 2. In respect of the cases referred to in question (1), above, please state what remedial action (if any) the IC proposes to take in the matter, such as notifying the requesters that the JAC misled the ICO and is now entitled to the information sought.*
- 3. In respect of the cases where QPs were issued without authorisation, please state, whether there was a complaint made to the IC by the requester, providing full details of the requester (other than their personal data) and the decision notice issued by the IC.*
- 4. Regarding Question (3), above, will the IC be rescinding the decision notice he issued and substituting for that notice a fresh decision notice?*
- 5. If so, when does he propose doing this?*
- 6. The IC's guidance on section 36 expressly states that public bodies must identify the QPs in their organisations. It appears that caseworkers at the ICO simply assume that the authorisation is in force. This has happened in other cases, e.g., Salmon v IC and King's College [2008] EA 2007/1035, specifically referred to in the IC's guidance. It is understood that this is because of resource issues at the ICO. Please provide:*
- a) any internal written guidance issued by the IC to caseworkers about what they should look for when dealing with section 36 exemption.*
- b) Whether or not there is any such written guidance, please let me know whether there is any policy or guidance (official or unofficial) that in section 36 cases, the caseworker need not ask for copies of the authorisation. Please provide full details of this.*
- c) Has or does the IC intend to inform the requesters directly of this fact? If so, please let me know whether the requesters have been informed of this and, if so, how.*

d) Does the IC consider that it is required to inform any other body about the breaches referred to above? If it is, please provide evidence that it has.

7. If the IC obtained legal advice in relation to the above, please provide full details of that advice.

Your request, received on 28 September 2023, has been handled under the Freedom of Information Act 2000 (the FOIA).

Response

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

For context, the relevant appeal is EA/2022/0310. During proceedings JAC stated that they were unable to locate a copy of the ministerial authorisation on file in relation to the Qualified Person (QP). A new authorisation was then sought and granted.

Even if no authorisation was in place at the time, JAC could rely on section 36 at a later point. We accept the JAC's late reliance on section 36.

I will address each of your points in turn.

a) Has the information commissioner [IC] been informed of this by the JAC?

No, we were not informed directly but were made aware during proceedings.

b) If he were informed, please state how.

As above.

c) If the IC were informed in writing, please let me have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you sent your response to this request, including any advice or guidance given to the JAC by the IC to remedy these situations.

We do not hold any advice or guidance given to the JAC.

- d) If the answer to (c), above, were Yes, please let me know whether the advice or guidance provided to the JAC has been complied with and provide all communication passing between you and the JAC confirming this.*
- e) If the IC were informed orally, please state when and what he was told and any communication (whether oral or in writing) passing by or between the JAC and the IC.*
- f) If any of the answers to (a) to (e) above were Yes, please let me know what action the IC proposes to take against the JAC.*
- g) If the IC were not informed, please state what action the IC proposes to take for this very serious breach of the FOIA.*

No information is held.

- 2. In respect of the cases referred to in question (1), above, please state what remedial action (if any) the IC proposes to take in the matter, such as notifying the requesters that the JAC misled the ICO and is now entitled to the information sought.*

There is no information held in respect of this element of your request.

- 3. In respect of the cases where QPs were issued without authorisation, please state, whether there was a complaint made to the IC by the requester, providing full details of the requester (other than their personal data) and the decision notice issued by the IC.*
- 4. Regarding Question (3), above, will the IC be rescinding the decision notice he issued and substituting for that notice a fresh decision notice?*

As the Decision Notice was appealed, it would be for the Tribunal to substitute if necessary.

- 5. If so, when does he propose doing this?*

6. *The IC's guidance on section 36 expressly states that public bodies must identify the QPs in their organisations. It appears that caseworkers at the ICO simply assume that the authorisation is in force. This has happened in other cases, e.g., Salmon v IC and King's College [2008] EA 2007/1035, specifically referred to in the IC's guidance. It is understood that this is because of resource issues at the ICO. Please provide:*

a) any internal written guidance issued by the IC to caseworkers about what they should look for when dealing with section 36 exemption.

b) Whether or not there is any such written guidance, please let me know whether there is any policy or guidance (official or unofficial) that in section 36 cases, the caseworker need not ask for copies of the authorisation. Please provide full details of this.

c) Has or does the IC intend to inform the requesters directly of this fact? If so, please let me know whether the requesters have been informed of this and, if so, how.

d) Does the IC consider that it is required to inform any other body about the breaches referred to above? If it is, please provide evidence that it has.

In relation to this element of your request, we have only considered guidance directly relating to authorisation of the qualified person to be in scope.

Our [section 36 guidance](#) can be found on our website. We also have a [form for recording the qualified person's opinion](#). This information is withheld under section 21 of the FOIA because it is reasonably accessible to you.

In general terms, we assume that a qualified person is authorised unless they are in a junior position, have a job title not expected of a qualified person, or a name we do not recognise.

We have carried out reasonable searches for any internal information held about the authorised qualified person. Please find attached the internal guidance and policy advice we have located.

7. If the IC obtained legal advice in relation to the above, please provide full details of that advice.

We do not hold information in scope of this element of 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



Information Commissioner's Office



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

ico.org.uk twitter.com/iconews

Please consider the environment before printing this email

For information about what we do with personal data see our [privacy notice](#)