

27 October 2023

**Case reference IC-259418-M3J5**

I write further to your correspondence dated 21 October 2023 in which you confirmed that you would like us to conduct an internal review of our response to your information request, handled by the Information Access team under the above case reference number.

The purpose of an internal review is to look again at your request, at our response, and to check that any exemptions applied were appropriate.

My name is Ian Goddard and I am an Information Access Group Manager. I can confirm that I have had no prior involvement in the handling of this request.

You have challenged our decision to withhold information under the exemption at section 44 of the FOIA on two grounds. Firstly, you dispute that PONI is 'an identified or identifiable individual or business' and therefore section 132 of the DPA18 cannot apply. Secondly, even if section 132 is germane to this case, that the gateway at section 132(2)(f) allows for lawful disclosure of the information you have requested.

**Section 44 FOIA by virtue of section 132 of the DPA18**

Section 44, which is an absolute exemption, allows a public authority to withhold information when disclosure is prohibited by or under any enactment. We explained that section 132(1) of the Data Protection Act 2018 (DPA), which governs confidentiality of information provided to the Information Commissioner, applied in this instance.

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'*

The enactment in question is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act.

We confirmed that in respect of the conditions at s132(1):

- The information was provided to the Commissioner in order to carry out his role as regulator of the Information Acts.
- The information relates to an identifiable business, specifically PONI.
- The information is not, and was not previously, publicly available from other sources.

As a result we cannot disclose the information unless we can do so with lawful authority.

Your first challenge to our response is you dispute that PONI can be considered an identifiable individual or business. As a result, it is your view that the statutory bar at section 132 is not engaged and the exemption at section 44 cannot apply.

I am afraid I must disagree with your interpretation of the law in this regard. It may help to explain that case law has established that a public authority can be considered a 'business' for the purpose of data protection legislation.

In the matter of *Lampert v Information Commissioner*, Upper Tribunal Judge Andrew Lloyd-Davies commented regarding the contention that 'business' was a description reserved for entities of a commercial nature:

*"If the word "business" in section 59 (1) of DPA 1998 were to be given [this] limited interpretation... it would mean that a very considerable number of the public authorities covered by schedule 1 of FOIA, namely, those which are governmental or not for profit organisations would not be caught by section 59(1)... Such a result gives rise to a nonsense and cannot be what Parliament intended. Furthermore... if this was the true construction of section 59, this would mean that public authorities would become reluctant to reveal to the Commissioner information, which could subsequently become disclosed by what I have described as "the back door". I am satisfied for the above reasons that the word "business" in section 59 cannot be limited to bodies which are engaged in commercial activity but encompasses anybody engaged in regular professional activities, including all those bodies listed or included in schedule 1 to FOIA which are not-for-profit organisations."*

While the comments refer to section 59 of the Data Protection Act 1998, that section is substantially similar to section 132 of the DPA 2018, DPA 1998's successor legislation. Section 132 of the DPA 18 has an identical purpose to that of section 59 of the DPA 98; specifically that of ensuring that information provided to the Information Commissioner for the discharge of its duties is afforded the appropriate level of confidentiality.

A copy of the decision can be found on the gov.uk website at:  
[www.gov.uk/administrative-appeals-tribunal-decisions/lampert-v-information-commissioner-2019-ukut-60-aac](http://www.gov.uk/administrative-appeals-tribunal-decisions/lampert-v-information-commissioner-2019-ukut-60-aac).

The FTT decision that gave rise to the Upper Tribunal decision above can be found here:

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1880/Lampert,%20Jeffrey%20EA-2016-0111%20\(21-9-16\).PDF](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1880/Lampert,%20Jeffrey%20EA-2016-0111%20(21-9-16).PDF)

For this reason, I can only conclude that PONI must be considered a 'business' in this instance, and I cannot uphold your first challenge to our response.

I have therefore gone on to consider the grounds at Section 132(2) of the DPA18 which provide conditions in which disclosure could be made with lawful authority and in particular, section 132(2)(f) which forms the second part of your grounds for review.

I have considered each condition in turn:

*"(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,"*

We do not have consent to disclose this information.

*"(b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),"*

The information was not obtained by or provided to the Commissioner as part of his regulatory role in order to make it available to the public and for this reason we are treating it as confidential.

*"(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions,"*

We find that disclosure is not necessary in order to fulfil any of his functions.

*"(d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation,"*

This gateway was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union and is not available to us.

*"(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising,"*

Disclosure would not be for the purposes of criminal or civil proceedings.

*"(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."*

We do not consider it necessary or justifiable to disclose this information as there is no compelling public interest to do so. The Commissioner and his staff risk criminal liability if they disclose information without lawful authority. The right of access under the FOIA is not sufficient to override these important factors and the information is therefore withheld.

It is worth noting that, as explained in the First-tier Tribunal ruling in *Lamb vs Information Commissioner*, EA/2010/0018 (in which the Tribunal was asked to consider the ICO's reliance on the equivalent gateway in the Data Protection Act 1998 (under section 59) as preventing disclosure), there is an assumption of non-disclosure and that a high threshold must be met before any disclosure can be made under this gateway:

*"Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in*

*maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."*

We do not consider that threshold is met here. It is important to understand that in order to fulfil our regulatory function, the ICO relies on the co-operation of organisations responding to our enquiries. If we were to release information which we receive from organisations relating to these issues (and without consent) this would be likely to deter them from providing information to us in future and would therefore undermine our regulatory function. We would stress that disclosing confidential information, which we have received for the sole purpose of fulfilling our regulatory function, would have a substantial and detrimental impact on our ability to operate as an effective regulator. There is a clear and significant public interest in not undermining the operation of the ICO as regulator of the data protection legislation. In our view any legitimate interest in disclosure is very heavily outweighed by the public interest in protecting the ability of the ICO to receive information in confidence from public authorities and controllers.

As a result, I do not consider that we have a lawful authority to disclose this information to you. We do not have consent to disclose this information and do not have another legal gateway to make this information available to you.

Therefore, I find that the exemption at section 44 has been correctly applied and I uphold the decision to withhold the requested information. I realise that this response may be disappointing to you, but I hope our reasoning is clear.

### **Complaint procedure**

If you are dissatisfied with the outcome of this review you can make a formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000.

To make such an application, please write to our Customer Contact Team at the address below, or visit the 'Make a complaint' section of our website: <https://ico.org.uk/make-a-complaint/>

Please ensure you attach any documents requested to progress your complaint when submitting your complaint.

### **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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