

20 November 2023

IC-269572-P6Q3

Request

We received your request on 10 November. You asked for the following information:

All information held about a complaint made to the ICO under the Freedom of Information Act against the Department of Health and Social Care (DHSC) by campaign group Factor 8, which resulted in the ICO ordering the DHSC to release previously withheld information, and the subsequent appeal against this decision brought by the DHSC.

Your request has been handled under the Freedom of Information Act 2000 (the FOIA). As you are probably aware, this legislation provides public access to recorded information held by a public authority unless an appropriate exemption applies.

Our response

We do hold information within the scope of your request. You can find a copy of the relevant Decision Notice on our website [here](#).

The information that we hold about the complaint and the appeal is otherwise withheld pursuant to s.32 FOIA and s.31 FOIA. Explanation of the application of the exemptions can be found below.

s.32 FOIA

We are withholding the correspondence between the ICO and the Tribunal for the purposes of the appeal and the appeal documents and as they are subject to the exemption at 32(1)(a) of the FOIA.

Section 32(1) of the FOIA states in full:

32(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in –

- a. any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,*
- b. any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*
- c. any document created by –*

(i) a court, or

*(ii) a member of the administrative staff of a court,
for the purposes of proceedings in a particular cause or matter.*

Section 32 is a 'class' based exemption and is 'absolute', which means that if the nature, or class, of the information held falls within the scope of the exemption it need not be provided in response to a request under the FOIA.

The information specified falls within the scope of section 32(1)(a) above, and as such are exempt from disclosure under the terms of the FOIA.

Our pleadings and investigation documents form part of the hearing bundle which is disclosed to the tribunal and parties only a couple of weeks before the hearing. There is an express acknowledgment on the front of the hearing bundle that the contents of the bundle are for the tribunal and parties' eyes only and not to be disseminated further. It also acknowledges that the bundle is not disclosure under FOIA and if any party wants to disseminate the bundle further they need to request express permission from the Tribunal, which is very rarely given.

The rationale for this exemption being absolute is that courts and tribunals regulate access to information generated in the course of proceedings, and the exemption is intended to protect court documents.

s.31 FOIA

The remainder of the information that we hold relating to the complaint and appeal is exempt pursuant to s.31 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 ...”

The exemption at section 31 is not absolute, and we must therefore consider the prejudice or harm which may be caused by disclosure of the information you have sought, as well as applying a public interest test by weighing up the factors in favour of disclosure against those in favour of maintaining the exemption.

As you are aware, this matter is currently subject to live litigation, therefore release of information to the world at large at this stage would be likely to prejudice not only our ability to be a party to the Tribunal proceedings, but also prejudice the Tribunal’s ability to make a reasoned fair decision. This is a high-profile case, on an emotive issue which has already garnered press interest, and therefore putting our current ‘position’ into the public domain would be likely to cause significant disruption to the appeal process.

We are currently at the very early stages of this process and our position in the appeal is always subject to potential change up to the day of the hearing, so early disclosure of information could also potentially prejudice our ability to change our position further down the line, where it would be best practice to do so.

Additionally, putting documents relating to our investigation of the complaint into the public domain while the matter is still live may deter requestors and public authorities from assisting us in our investigations and providing full and frank disclosure of information in future.

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 the DHSC 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 the ICO being able to put forward the best possible response to an appeal without having its ability to do so prejudiced by premature disclosure of information into the public domain;
- the public interest in maintaining the integrity of the appeals process.

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.

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



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