

11 January 2024

Internal Review: IC-275663-P7X2

I write further to your emails of 8 January 2024, in which you expressed dissatisfaction with the response to your recent information request, processed under case reference IC-275663-P7X2.

I am a Senior Information Access Officer in the Information Access Team. I can confirm that I have had no prior involvement in the handling of this request. My role is to review the application of the Freedom of Information Act (2000) FOIA in relation to your request.

Section 45 of the Freedom of Information Act 2000 (FOIA) requires the publication of a code of practice, designed to assist public authorities handle requests under the FOIA.

This guide recommends that public authorities put in place an internal review process for FOIA responses, which our guide suggests should be triggered whenever a requester expresses dissatisfaction with the outcome of a request they have made.

Request and response

Your request consisted of the following points:

- 1. Does the Information Commissioner's Office have a remedial arrangement in place with the City of Edinburgh Council?*
- 2. If you do have a remedial arrangement in place with the City of Edinburgh Council then what are the terms and conditions of that arrangement?*
- 3. What legal basis does such an arrangement have? Are there regulations that allow for this and, if so, what are they?*
- 4. Does the ICO have a remedial arrangement in place with any other organisations or authorities?*
- 5. Why have the ICO not published information about all of these arrangements on their website?"*

The request handler confirmed that we hold information within scope of your request, with the exception of point 5, which is not a request for recorded information. The information we hold in relation to point 2 was withheld in accordance with Section 44 of the Freedom of Information Act 2000 (the 'FOIA') and Section 132 of the Data Protection Act 2018. Information relating to point 3 is available online, so Section 21 of the FOIA was applied to this. The request handler provided a link to the information, and to details about our publication scheme and approach in relation to point 5.

Review

The purpose of this review is to look again at your request and the response that was provided to you, to ensure it was correct, that any exemptions applied were appropriate and that any concerns are addressed.

My review will focus on the concerns you have raised in your emails.

- 1. You state that we should have used the Freedom of Information (Scotland) Act 2002 to process your request.*

The ICO is subject to the Freedom of Information Act 2000. Scottish public authorities are subject to the Freedom of Information (Scotland) Act 2002. The ICO is not a Scottish public authority. I have concluded that the request handler processed your request in accordance with the correct legislation, which is the Freedom of Information Act 2000 (the 'FOIA').

- 2. You ask 'Is there legislation that allows the Information Commissioner's Office to make secret arrangements with authorities and other public bodies and is there legislation that allows the Information Commissioner's Office to conceal these arrangements from the public?'*

The request handler has answered your request in accordance with the FOIA. We cannot lawfully disclose information if an exemption applies, and where this is the case (points 2 and 3) the relevant exemptions have been explained to you by the request handler. I am satisfied that these exemptions have been correctly applied and have provided more details about the exemption applied to point 2 below.

- 3. You question the legal basis for withholding the information covered by point 2 and assert that the legislation has not been adequately explained, i.e. that we should have included the wording of Section 132 (2) in the response.*

The full wording for Section 132 is publicly available [here](#). We are not required to reproduce the legislation in entirety within our responses. I have reviewed the application of the exemption in full below, with the inclusion of the relevant legislation wording for reference.

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'

Section 44 is an absolute exemption, and it allows a public authority to withhold information when disclosure is prohibited by or under any enactment. In the response, the request handler 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.

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

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
- The information is not, and was not previously, publicly available from other sources.

The information requested in relation to point 2 meets these criteria, so we cannot disclose the information unless we can do so with lawful authority. I am satisfied that the criteria above are met in this instance.

Section 132(2) of the DPA18 provides conditions in which disclosure could be made with lawful authority. I have considered each in turn, below.

"(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 the requested 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”

Disclosure is not considered necessary in order to fulfil any of the Commissioner’s functions at this time.

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

Disclosure is not considered necessary in order to perform an EU obligation.

“(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.”

While I appreciate that there is a public interest in how the ICO works with organisations to promote compliance, there is also a public interest in the ICO being able to work effectively with such organisations. This requires their cooperation and trust. If we were to routinely consider for disclosure any remedial or other arrangements we have with organisations (without consent) in relation to compliance, this would be outside their reasonable expectations, and may also be detrimental to any ongoing engagement work – not only with that particular organisation, but also with others. This could undermine trust in our processes and regulatory work more broadly.

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. The right of access under the FOIA is not sufficient to override these important factors. 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.

I therefore uphold the request handler's decision to withhold the information.

- 4. In the case of point 3, you consider that the information covered by Section 21 does not sufficiently address your question.*

The request handler has cited the section 'Tasks of data protection officer' 71(1) of the Data Protection Act 2018, and provided a link to the information, which, to re-iterate, can be found [here](#). See in particular parts (c) and (d) which require data controllers to cooperate and consult with the Commissioner, and this may involve remedial measures.

- 5. You ask in your emails if you have right of appeal.*

The request handler provided full details of the next steps in their response covering email on 8 January 2024. You replied on the same day to express your concerns and I replied on 9 January 2024 to confirm that we were treating this as a request for an internal review, as per the next steps outlined in your response letter.

If you are dissatisfied with my review response, you can pursue this further by [making an FOI complaint](#). Next steps are also detailed at the bottom of this letter for your reference.

If you are dissatisfied with how we have dealt with any previous complaint(s) from you, you can follow the next steps provided in your outcome letter(s). Please also [see the relevant guidance on our website](#).

- 6. You state that a named member of staff from the City of Edinburgh Council has already confirmed to you the existence of a remedial plan and that you are concerned about this.*

The fact that the public authority has confirmed the existence of such a plan to you does not contradict our response to your FOI request. The request handler has also confirmed that we hold the information, but that the contents have been withheld in accordance with Section 44 of the FOIA. Confirming that the information exists does not necessarily undermine the application of the exemption, which in this case applies to the information contents (rather than the fact of whether or not it exists).

If you have concerns about a public authority or their staff, then you are welcome to pursue these further [via the relevant complaints process](#).

While I appreciate that you have concerns about the response to your request, and are interested in the withheld information, having reviewed the response I have concluded that this was handled correctly in accordance with the legislation and our request handling procedures. I therefore uphold the original response.

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. Please follow the link below to submit your complaint:

<https://ico.org.uk/make-a-complaint/>

Your rights

Our [privacy notice](#) explains what we do with the personal data you provide to us and what your rights are, with a specific entry, for example, for [an information requester](#). Our retention policy can be found [here](#).

Yours sincerely,



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