

26 January 2024

Reference number: IC-280966-B0Z3

Request

You asked us: *"I refer to case IC-219991-T8C5 where it was ruled that s36 was not engaged given there was no substantive (or any) opinion emitted by the QP [Qualified Person]. I would like to obtain information related to:*

- 1.- Internal discussions or consultations between ICO Staff (Caseworkers, Team Leaders, Senior Management, Legal) about taking this approach (altogether invalid s36 engagement) and ensuring it would stand scrutiny.*
- 2.- External communications between the ICO and the PA where: (i) this problem was flagged to the PA, (ii) any opportunity was given to them to explain themselves, and (iii) any opportunity was given to them to rectify the situation by re-issuing the QP's opinion."*

We received your request on 27 November 2023, however, we feel it important to note that the ICO initially responded to this request on 22 December 2023, under case reference number IC-272562-K1J4. We initially interpreted this as a request for all Section 36 information held, with case IC-219991-T8C5 being used as an example.

You replied on 22 December 2023 and explained that your request was specifically for communications on case IC-219991-T8C5 and requested an internal review. The ICO provided you an internal review of case IC-272562-K1J4, however, because of the misinterpretation we also created a new case. This is so that you are not unfairly penalised by the misinterpretation and can still invoke the rights available to you under the FOIA.

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

Our response

Having searched our records, we can confirm that we hold information in scope of both parts of your request.

In relation to request 1, this information 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..."

(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. We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

As the regulator, our work into the legislations we oversee is continuous and ongoing and involves liaising with multiple organisations at any one time. Disclosure of the requested information could lead to less, or no, engagement from public authorities and data controllers. This would make it much more difficult for us to disseminate and influence good practice in the legislations we oversee. This could potentially lead to a more 'hazardous' data protection landscape.

Disclosure of the requested information could also reveal the methods we use to assess public authorities' compliance with the FOIA. This would negatively impact the ICO's ability to complete any regulatory work, both now and in the future, as public authorities would be aware what information would have a potentially negative impact to them, if supplied to the Commissioner.

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 ICO conducts its regulatory work.
- Increased transparency in the way the ICO corresponds with public authorities.

The factors in withholding the information are:

- The public interest in organisations being open and honest in their correspondence with the ICO.
- The public interest in maintaining the ICO's ability to conduct regulatory work as it thinks fit.
- The public interest in the ICO being able to maintain a communications channel with all organisations. A lack of, or reduced, communications channels would inhibit our work into the legislations we over see which is not in the public interest.

In relation to request 2, we have considered your request as individual points, rather than as conditional points. The wording of your request has meant that we have only been able to consider our outbound correspondence to DCMS. This is because for the ICO to flag the problem, and give them an opportunity to explain or rectify it, the correspondence would have had to have been sent by us.

Please find attached the information in the scope of your request. This has been taken from our correspondence sent to the public authority. Where there are gaps on the correspondence this is where out of scope information has been removed.

Some third party personal data has been redacted in our response. It is exempt under section 40(2) of the FOIA. Section 40(2) of the FOIA exempts information if it is personal data belonging to an individual other than the requester and it satisfies one of the conditions listed in the legislation.

We find that the condition at section 40(3A)(a) applies in this instance: that disclosure would breach one of the data protection principles. The principles are outlined in the General Data Protection Regulation (GDPR) with the relevant principle on this occasion being the first principle as provided by Article 5(1): that personal data shall be processed lawfully, fairly and in a transparent manner.

We do not consider that disclosing this information into the public domain is necessary or justified. There is no strong legitimate interest that would override the prejudice to the rights and freedoms of the relevant data subjects. We have therefore taken the decision that disclosing this information would be unlawful, triggering the exemption at section 40(2) of the FOIA.

In the interests of transparency, we can advise that that we do not hold information in the scope of your request if it is read conditionally. This is because the ICO did not explicitly flag the problem to them. As such, we did not explicitly give them any opportunity to explain themselves nor did we explicitly give them any opportunity to rectify the situation by re-issuing the QP's opinion.

This concludes our response.

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](#) on our website.

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 sets out [your rights](#). Our [Retention and Disposal Policy](#) details how long we keep information.

Yours sincerely



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