

22 February 2024

Case reference: IC-284981-R8H5

We are now in a position to respond to your information request of 27 January.

Request

"...this previous disclosure by you... refers to a "remedial arrangement [the "Arrangement"] in place with the City of Edinburgh Council" (and confirms that there is one.

<https://ico.org.uk/about-the-ico/our-information/disclosure-log/ic-275663-p7x2/>

Please could you disclose:

1) what are the issues that the Arrangement seeks to remedy? By which, I mean that the disclosure does not indicate in what way the Council in question is in contravention of the laws the ICO regulates - is the Arrangement in respect of FOI compliance, or data protection compliance, or something else?

2) you have cited section 44 FOIA, by way of section 132 DPA, to refuse disclosure. These only work to prove an exemption of information provided to or obtained by the commissioner. Please disclose information you hold in relation to the Arrangement which was not provided to or obtained by you.

3) please disclose any information (or provide an explanation under your section 16 duty) as to why section 71 DPA is relevant in these circumstances."

We have handled your request for information in questions 1 and 2 under the Freedom of Information Act 2000 (FOIA).

Our response

Please find below information in response to your questions.

1. What are the issues that the Arrangement seeks to remedy? By which, I mean that the disclosure does not indicate in what way the Council in question is in contravention of the laws the ICO regulates - is the Arrangement in respect of FOI compliance, or data protection compliance, or something else?

We are currently monitoring the compliance rates of all local authorities in Scotland, including the City of Edinburgh Council ('Edinburgh Council').

We are aware that some local authorities have poor performance rates in relation to responding to (SAR) subject access requests (data protection compliance). We have asked them to put action plans in place to improve their compliance as well as respond to any cases that are beyond the statutory timeframe. The 'remedial arrangement' that was the subject of the previous information request is the action plan provided to us by Edinburgh Council.

We are due to publish details about this area of work on our website in the next couple of weeks.

2. You have cited section 44 FOIA, by way of section 132 DPA, to refuse disclosure. These only work to prove an exemption of information provided to or obtained by the commissioner. Please disclose information you hold in relation to the Arrangement which was not provided to or obtained by you.

The 'remedial arrangement' (action plan) provided to us by Edinburgh Council in June 2023 was withheld under section 44 of the FOIA.

Please find enclosed the information within scope of your request in question 2 to which you are entitled. We have interpreted this request as being information created by the ICO that relates to this Edinburgh Council action plan.

We have redacted some information pursuant to sections 31(1)(g), 40(2) and 44 of the FOIA, and further details on these exemptions are provided below. Some information has been redacted as it is not in scope of your request. Please note, the first page in the PDF attachment is from 11 July 2023.

3. Please disclose any information (or provide an explanation under your section 16 duty) as to why section 71 DPA is relevant in these circumstances.

By way of advice and assistance, section 71 of the Data Protection Act 2018 (DPA 2018) relates to the tasks of the data protection officer (DPO). This is relevant because the action plan outlines the steps being taken by the DPO on behalf of

the data controller, to improve the organisation's compliance in the areas identified.

Section 31(1)(g) FOIA

Some of the information has been redacted under section 31(1)(g) of the FOIA. This relates to our discussion of the action plan where disclosure would prejudice our functions as regulator on this ongoing work.

This section states:

"Information... is exempt information if its disclosure under this Act would, or would be likely to, prejudice – (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

The purposes referred to in sections 31(2)(a) and (c) are:

- 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

The purposes at section 31(2)(a) and (c) apply when a regulator is determining whether or not there has been a breach of relevant legislation, and whether any further action is appropriate.

The exemption at section 31 is not absolute, and we need to consider the public interest test by weighing up the factors for and against disclosure of the information we hold at this time, as well as any prejudice or harm which may be caused by disclosure.

Our work with Edinburgh Council, and other local authorities, on their SAR compliance is ongoing. To release the information you have requested at the present time could prejudice the ICO's ability to conduct these enquiries fairly and in an appropriate manner.

In considering the prejudice and/or harm that disclosure may cause, we have taken into account the factors that would, in our view, impact on the release of the information at this time.

We have considered the public interest test for and against disclosure. In this instance, the public interest factors in favour of disclosure are:

- Openness and transparency about our work as regulator to improve the data protection compliance of organisations.
- The understandable interest of the public, and data subjects who may have been affected by this poor compliance, in being able to see the details of our work in this area.

The public interest factors in favour of maintaining the exemption are:

- The need for the ICO to continue to encourage Edinburgh Council, and other local authorities, to engage with us on our ongoing regulatory work in this area.
- To allow the ICO to maintain the trust and confidence of data controllers by affording the information provided an appropriate level of confidentiality. Disclosure of information provided in confidence, or considered confidential, would be likely to have a long term detrimental effect on our ability to encourage data controllers to improve their compliance.
- Allowing us a 'safe space' in which to consider the information provided to us, free from external influence whilst our work remains ongoing.
- The ICO has a demonstrable history of sharing information about our regulatory activities when it is appropriate to do so, in line with our 'Communication our regulatory and enforcement activity policy' available [here](#). We are due to publish details of our work with these local authorities to improve SAR compliance in the coming weeks.

Having considered all of these factors we have taken the decision that the public interest in withholding this information outweighs the public interest in disclosing it, and the information is exempt from disclosure under section 31(1)(g) of the FOIA.

Section 40(2) FOIA

We have redacted some names and contact details under section 40(2) by virtue of section 40(3)(a)(i), which is the exemption under FOIA concerning personal information. You can read our policy on the disclosure of employee information on our website [here](#).

Section 44 FOIA

Whilst we appreciate you have asked for information that has been created by the ICO, some of the information contained within this correspondence was provided to us by Edinburgh Council. We have withheld this information under section 44 of the FOIA.

Section 44 is an absolute exemption which means that it can be withheld without further consideration if other legislation prevents its release, if it meets certain conditions, and if none of the circumstances that would give us lawful authority to release it apply.

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'

In this case, the Data Protection Act 2018, Part 5, Section 132 prohibits the disclosure of confidential information that –

- a. has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,
- b. relates to an identified or identifiable individual or business, and
- c. is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources, unless the disclosure is made with lawful authority.

We do not have lawful authority to disclose this information to you as this information was provided to us in confidence.

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 to do so or it has been made public from another source.

This concludes our response to your request. We hope you found this information helpful.

Next steps

You can ask us to review our response to questions 1 and 2. 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 [here](#).

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



Information Access Team
Risk and Governance Department, Corporate Strategy and
Planning Service
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Please consider the environment before printing this email
**For information about what we do with personal data
see our [privacy notice](#)**