

14 March 2024

IC-288905-Y4B3

## Request

On 16 February 2024, you asked us, aside from the guidance we publish on our website, *"what research or policy the ICO has towards assessing when a Subject Access Request is excessive, unfounded, excessive, disproportionate or vexatious?"* and *"will the ICO take into account the EU doctrine of proportionality, the ECHR or some other underlying principle of UK law when measuring a Controller's refusal of an Article 15 request, and in what form will that consideration take?"*.

We have handled the first part of your request under the Freedom of Information Act 2000 (the FOIA). The second part is not a request for recorded information so we have dealt with this separately as a query below.

## Response

We have conducted reasonable searches for policy and research information that relates to our current position and guidance on the terms outlined in the first part of your request, and has not already been published on our website.

A copy of the information is attached. Bundle 1 consists of the relevant sections of draft guidance and information related to this. Bundle 2 consists of internal guidance, requests for advice, in relation to the topics outlined in your request, and corresponding responses from our policy teams.

Please note that some of this information refers to the 1998 Data Protection Act and historic provisions which may no longer be applicable.

Some information is not included due to being out of scope, for example, information relating to other sections of our guidance that does not relate to the terms referenced in your request. Where this falls within individual documents or

correspondence items the relevant sections have been marked in white with the phrase 'Information not in scope'.

Some information has been withheld, and where this falls within the bundles, it is marked in black, with red text indicating the exemption that applies in each case. This includes:

- Information relating to law enforcement - withheld in accordance with Section 31 (this includes some internal email addresses and some information about our regulatory work);
- Third party personal data – withheld in accordance with Section 40(2)
- Information relating to our regulatory work with identifiable third parties – withheld in accordance with Section 44 (DPA s.132); and
- Legal advice – withheld in accordance with Section 42

### **Information withheld – FOIA Section 31**

We have withheld some internal email addresses and some information about our regulatory work with individuals and organisations under section 31(1)(g) of the FOIA. We can do this when 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):

“ *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.*”

Misuse of internal email addresses that exist to support ICO staff and information relating to specific complaint cases would likely prejudice our ability to perform our regulatory functions.

Disclosure of internal email addresses would leave us vulnerable to phishing or other cyber-attacks, spam, or an increased volume of irrelevant correspondence which it would take us time to process. There are other channels that the public can use to contact us, and they are publicly available via [our website](#).

Disclosure of information relating to specific complaint cases and engagement we have conducted in a regulatory capacity could compromise the ICO's ability to

conduct investigations into data protection concerns and reach decisions as it sees fit.

The exemption at section 31(1)(g) is not absolute. When considering whether to apply it in response to a request for information, there is a 'public interest test'. We have to consider whether the public interest favours withholding or disclosing the information.

In this case the public interest factor in favour of disclosing the information is:

- Increased transparency in the way in which the ICO conducts its operations, including regulatory work such as dealing with complaints

The public interest factors in maintaining the exemption are as follows:

- There is a public interest regarding internal email addresses being used appropriately. If these are used inappropriately this will reduce the effectiveness and efficiency of our regulatory functions. For example, if these are disclosed to the wider world these addresses are likely to receive increased amounts of correspondence which would be more productively managed via our public facing contact points;
- The information of primary relevance to your request is not affected by the redaction of our internal email addresses;
- The public interest in transparency is met by the public provision of other more appropriate means of contacting us;
- There is a public interest in the ICO providing a cost effective and efficient regulatory function. This relies on the cooperation of third parties we engage with, such as data controllers, and we feel this is best achieved by an informal, open, voluntary and uninhibited exchange of information with these third parties. We feel that this cooperation may be adversely affected if all details about our engagement with third parties were routinely made public. This would be likely to make said parties more cautious about providing information to us which would in turn prejudice the ICO's ability to deliver the levels of service required of it;
- There is a public interest in maintaining the ICO's ability to conduct investigations into data protection concerns as it thinks fit;
- There is a public interest in the ICO being an effective and efficient regulator. It is essential to the efficacy of the ICO as a regulator that we are able to express our views and opinions in confidence where we need to. We need a safe space to formulate our conclusions and in which to communicate with those we regulate, and this includes being able to seek

- advice on specific cases and legislative matters internally, which may involve sharing details of specific cases, for example; and
- We already publish anonymised examples in [our guidance](#), to support our position in relation to the legislation, as well as publishing information about [data protection complaint cases](#) we deal with. We have also provided redacted examples in the attached disclosure, and we do not consider that providing the case reference for these examples would add anything to the policy and research discussions disclosed.

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.

### **Information withheld - FOIA Section 40(2)**

Some third party personal data has been withheld in accordance with section 40(2) of the FOIA.

Disclosure of this data would break the first principle of data protection - that personal data is processed lawfully, fairly and in a transparent manner.

There is no strong legitimate interest that would override the prejudice that disclosure would cause to the rights and freedoms of the individuals concerned. So we are withholding the information under section 40(2) of the FOIA.

### **Information withheld – FOIA Section 42**

Some of the information you have requested is subject to legal professional privilege and is exempt from disclosure under section 42 of the FOIA. Section 42(1) of the FOIA states:

*"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*

There are two types of privilege covered by the exemption at section 42. These are:

- Litigation privilege; and
- Advice privilege.

Litigation privilege covers confidential communications between the client and lawyer made for the purpose of preparing for existing or anticipated legislation.

Advice privilege covers such communications when they're made for the purpose of seeking or giving legal advice. We find that the information in scope of your request is subject to advice privilege.

Section 42 is not an absolute exemption, so we must consider whether the public interest favours withholding or disclosing the information.

In this case the public interest factors in disclosing the information are:

The factors in favour of lifting the exemption include:

- The public interest in the ICO being open and transparent; and
- The public interest in transparency about development of policy and guidance in this area

With the public interest factors in favour of maintaining the exemption including:

- The disclosure of legally privileged information threatens the important principle of legal professional privilege;
- Maintaining openness in communications between client and lawyer to ensure full and frank legal advice;
- The disclosure of legal advice could have a chilling effect on both policy officers and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public; and
- We already publish completed guidance on our website, which is informed by the relevant points made within any legal advice received.

Taking into account the above factors we conclude that the public interest lies in maintaining the exemption.

### **Information withheld - FOIA Section 44 and DPA section 132**

Some information about third parties and their engagement with the ICO has been withheld under section 44 of the FOIA. Section 44(1)(a) 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. Section 132(1) of part 5 of that Act states that:

*"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—*

*(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."*

Section 132(2) lists circumstances in which a disclosure can be made with lawful authority, however none of them apply here. As a result, the information is exempt from disclosure.

## **Query**

Details about our current position on refusal are detailed in [our guidance](#), and any updates will be published here in due course. Where these relate to refusing a request (e.g. as manifestly unfounded or excessive) the relevant sections can be located using the links below:

[When can we refuse to comply with a request?](#)

[Manifestly unfounded and excessive requests](#) (Law enforcement processing)

We have also provided some information about the ECHR, proportionality and how these inform our current position within the attached disclosure. When assessing refusals our data protection complaints team use the guidance on our website, the internal guidance (see disclosure bundle 2) and may seek additional advice from the relevant policy team (again, see disclosure bundle 2 for examples).

## **Advice and assistance**

In case you are not already aware, relevant external consultations on the draft detailed right of access guidance can be found here:

[ICO's consultation on the draft detailed right of access guidance Summary of responses and ICO comments](#)

[Responses to the consultation on the draft right of access detailed guidance](#)

You can also search [our disclosure log](#) for responses we've published on related topics.

This concludes our response to your request.

### **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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