

18 April 2024

**Case Reference IC-295602-M3D3**

**Request**

*Please provide me with all information held relating to the Information Commissioner's Decision Notice dated 23 November 2021, Reference: IC-86178-D7Q3. This Decision Notice can be found online at the following link: <https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fico.org.uk%2Fmedia%2Faction-weve-taken%2Fdecisionnotices%2F2021%2F4019139%2Fic-86178-d7q3.pdf&data=05%7C02%7Cicoaccessinformation%40ico.org.uk%7C9d6a9efe06904adddd1008dc49221383%7C501293238fab4000adc1c4cfefba21e6%7C0%7C0%7C638465658619776739%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ij1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=xTLysXsR%2BcXtThA5rWJahonZraSMmZCm6o9hLYFPyJ4%3D&reserved=0>*

*This will include, but not be limited to, the items outlined below:*

- *Copy of the original Freedom of Information (FOI) request*
- *Copy of the internal review request*
- *Any other correspondence sent to the the MoJ by the complainant*
- *The MoJ's response to the FOI request*
- *The MoJ's response to the request for internal review*
- *Any other correspondence sent to the complainant by the MoJ*
- *All correspondence sent by the MoJ to the Information Commissioner's Office*
- *Email Freedom of Information r...*
- *All correspondence received by the MoJ from the Information Commissioner's Office*

We received your request on 20 March 2024.

Your request has been handled under the Freedom of Information Act 2000 (the FOIA).

## **Our response**

We do hold information within the scope of your request.

We hold the original FOIA request, the internal review request, along with correspondence exchanged between the Ministry of Justice (MoJ) and the complainant in relation to those requests. However, we are unable to provide copies of these as this information is exempt from disclosure under Section 40(2) of FOIA. Further details about this are provided below.

We also hold correspondence exchanged between the ICO and the MoJ in relation to the complaint. However, the information that the MoJ shared with the ICO is exempt by virtue of section 44 of the FOIA and information sent by us to the MoJ is exempt by virtue of section 31 of the FOIA. Further details about this are provided below.

## **Information withheld**

### **Section 40(2) 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.

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 in relation to the data subject.

When the circumstances of a complaint indicate that a breach of the legislation we oversee may have occurred, we take the view that complainants do not usually expect their letters or complaint forms to be made public. We take the view that any disclosure of the original letter, e-mail, or form of complaint in circumstances such as this would be unfair and would therefore be in contravention of the first data protection principle.

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 subject. We have therefore taken the decision that disclosing this information would be unlawful, triggering the exemption at section 40(2) of the FOIA by virtue of section 40(3A)(a).

## **Section 44 FOIA**

Copies of information sent from the MoJ to the ICO have 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.

This exemption is an absolute exemption, which does not require a consideration of the public interest test.

## **Section 31(g) FOIA**

Information sent by the ICO to the MoJ has been withheld by virtue of section 31(1)(g) of the 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)."*

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" and,*

*"(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise..."*

These purposes apply when the Information Commissioner is considering whether or not a public authority has met its obligations in respect of the FOIA. We consider that disclosure is likely to prejudice the exercise of the ICO's regulatory functions.

This exemption is not absolute, and we must consider the prejudice or harm which may be caused by disclosure. We must also carry out a public interest test to weigh up the factors in favour of disclosure and those against.

In this case the public interest factors in favour of disclosing the information are as follows-

- Increased transparency in the way in which we carry out our investigations.

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

- We consider that disclosure of this information would be likely to compromise our ability to conduct future investigations and therefore affect the discharge of our regulatory function in vital areas, including our ability to influence the behaviour of public authorities and to take formal action.
- There is public interest in us being able to maintain effective and productive relationships with the parties we communicate with based on the confidential sharing of relevant information to help facilitate compliance with the legislation we regulate. It is essential that organisations continue to engage with us in a constructive and collaborative way without fear that the information exchanged between us will be made public if it is inappropriate to do so.

Having considered the arguments both for and against disclosure we do not find that there is sufficient weight in the arguments that favour disclosure.

Disclosure of the requested information would be likely to be prejudicial to our regulatory function as it would impact upon our ability to effectively carry out investigations of this nature both now and in the future.

This concludes our response to your information 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 [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 set out your rights. Our retention schedule can be found [here](#).

Yours sincerely