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Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF
T. 0303 123 1113
ico.org.uk

16 May 2024

ICO Case Reference IC-303477-S2N6

Request for information

Request received 30 April 2024:

"I am writing this email to ask you for a copy of the preliminary assessment of the Information Commissioner's Office (ICO) on the privacy and data protection impacts of the Privacy Sandbox, as mentioned by CMA (Pagine 2, Working paper (publishing.service.gov.uk)) and your X account."

Your request has been handled under the Freedom of Information Act 2000 (the FOIA). This legislation provides public access to recorded information held by a public authority unless an appropriate exemption applies.

Our response

We do hold information in scope of this request. However, we are withholding the requested information.

The ICO has been conducting tri-lateral engagement with the Competition and Markets Authority (CMA) and Google, providing specialist input as privacy regulator, throughout the development of Google's Privacy Sandbox (GPS) proposals and its agreed Commitments to the CMA. The requested information is the preliminary assessment of the ICO on the proposals for Google's Privacy Sandbox; an assessment based on information provided by both the CMA and Google during this process.

To the extent that the requested information is that which has been provided to the ICO, this information is withheld pursuant to section 44 of the FOIA. There are legal prohibitions on disclosure of this information under section 241(2) of the Enterprise Act 2002, and section 132 of the Data Protection Act 2018 (the DPA). Other information is withheld pursuant to section 31(1)(g) of

the FOIA, because disclosure would be likely to prejudice our law enforcement functions. Further explanation of these exemptions is provided below.

Section 44 FOIA – Prohibitions on disclosure

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, some of the information shared with ICO by the CMA about Google has been shared under section 241(1) of the Enterprise Act 2002, which includes a prohibition on further disclosure. Some other information has been shared with the ICO by Google. The enactment prohibiting disclosure of this information is section 132 of the Data Protection Act 2018 (DPA 2018). Further information about these enactments is provided below.

Section 241 Enterprise Act 2002 – Statutory functions

Section 241 of the Enterprise Act 2002 states that:

"(1) A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment.
(2) If information is disclosed under subsection (1) so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that subsection."

Some of the requested information has been shared with the ICO by the CMA under subsection one above, and so under subsection two the ICO is prohibited from further sharing this information without consent from the CMA. We do not have this consent.

Section 132 DPA 2018 – Confidentiality of information

Section 132(1) of part 5 of the DPA 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) of the DPA provides conditions in which disclosure could be made with lawful authority. We have considered each condition in turn:

> *"(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 this 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 their regulatory role in order to make it available to the public. 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,"*

We find that disclosure is not necessary in order to fulfil any of their functions.

> *"(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."*

We do not consider it necessary or justifiable to disclose this information as there is no compelling public interest to do so. The Commissioner and his staff risk criminal liability if they disclose information without lawful authority. The right of access under the FOIA is not sufficient to override these important factors and the information is therefore withheld.

Section 31 FOIA 2000 – Law enforcement

The rest of the information you have requested is exempt from disclosure under section 31(1)(g) of the FOIA. We can rely on this exemption where disclosure of requested 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) which state:

> *"(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 …"*

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.

Prejudice test

The CMA is relying on their formal investigative powers to assess the GPS, and Google have made legally binding Commitments to the CMA. ICO is not party to these commitments but is relying on its tasks and functions as a regulator to engage with both the CMA and Google in assessing the GPS. This is to ascertain if information processing under the GPS complies with UK law, and if regulatory action is required. These tasks and functions can be found in the UK GDPR Article 57(1)(a) to 57(1)(d), and the DPA 2018 section 115(3)(a).

Engagement between ICO, CMA and Google is ongoing. As the process is very much live it continues to rely on all parties having the confidence to engage in the uninhibited sharing of information to ensure effective regulatory oversight. Disclosure of any information before the process has concluded could jeopardise free and frank communication between the parties. Revealing information about regulatory activity while that activity is underway, and prior to any outcome being determined, would damage trust in the ICO.

Information shared with the ICO remains particularly sensitive as Google works to refine its proposals and continue product testing. We are of the view that both the CMA and Google would be deterred from working with us in this manner and from sharing further information with us if they lacked confidence that their correspondence and shared information would not be disclosed in response to FOI requests. Such damage to the ICO's working relationships with Google and/or the CMA would likely hinder the progress of any future investigations that the ICO may need to undertake in consideration of regulatory action involving either organisation.

We have also considered the mosaic effect of this request, potential future requests, and information already in the public domain. Disclosure of the requested information could make it more difficult to withhold information in relation to the same topic in the event of future FOI requests. Also, there is already information in the public domain that the parties have agreed to release. Public scrutiny and comparison of pro-actively released information, alongside scrutiny and comparison of information released piecemeal following FOI requests, could lead to premature and inaccurate conclusions being drawn

about the process. This could rupture the safe space needed for the CMA and ICO to complete their work effectively.

Beyond this specific arrangement, disclosure of the requested information could harm our ability to engage in future with data controllers, including other big technology companies, and other regulatory bodies. If other regulators, and organisations being regulated, perceive that information obtained or created in the course of its regulatory functions may be disclosed under the FOIA, there is a real possibility this will inhibit exchanges with the ICO. Any blocks to the flow of information to the ICO would be likely to undermine our investigative and regulatory functions.

This would damage our ability to collaborate with and to support other agencies on work that will ultimately protect the public and organisations. Where it is seen that information meant for one regulator for the purposes of their investigation is released to the public during that investigation, it is highly likely to have a negative impact on future working relationships between regulatory authorities. It could have a detrimental impact on the outcome of these far-reaching and significant investigations as it would lead to a more closed way of working.

It would also be likely to deter other organisations from sharing information with us about new initiatives and products, hindering the ICO's ability to act as a proactive regulator in ensuring compliance with data protection law is built into products and services. Such a hinderance would instead increase our workload in investigating potential breaches of the law after the fact. Such an increase in the need for this type of work would impede the ICO's efficiency as a regulator, ultimately prejudicing our ability to conduct each investigation as effectively as possible.

With this in mind, we have then considered the public interest test for and against disclosure.

Public interest test

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

- increased transparency in the way in which the ICO conducts its tasks and functions, especially in relation to data protection concerns around new technology products.
- increased transparency in the way in which Google has responded to the ICO's enquiries and the CMA's investigation.
- the understandable public interest in the development of Google's Privacy Sandbox, and related privacy concerns.

The public interest factors in withholding the information are:

- in maintaining the trust of organisations that their candid interactions with regulators will be afforded an appropriate level of confidentiality, ultimately ensuring their future compliance with the law.
- in organisations being open and honest in their communications with the ICO when regulatory action is under consideration.
- in organisations being confident that information will not be made public until all processes have been completed, the facts fully established, and conclusions have been reached.
- in the ICO maintaining good working relationships with the technology industry, and the other bodies that regulate it, so that advice can be provided to prevent the need for regulatory action, or so that investigations can take place efficiently if regulatory action is required.
- in the ICO and the CMA avoiding the disruption to their work that likely queries and follow-up requests would generate following such a disclosure, drawing attention and resources away from the core work of these organisations, impeding enquiries and investigations.

In addition, the public interest in the process is already met to an extent by the information that the CMA has proactively released throughout the process. For example, the ICO's preliminary assessment of the GPS is summarised in the tables within the CMA working paper referenced in the request, and the CMA has published regular updates into its Investigation into Google's 'Privacy Sandbox' browser changes on the .gov.uk website. This balances the public interest in transparency with due legal process.

Having considered these factors, we are satisfied that it is appropriate to withhold the information.

This concludes our response to your request.

Next steps

You can ask us to review our response. Please let us know in writing within 40 working days if you want us to carry out a review.

You can read a copy of our full review procedure on our website.

If we perform a review but you remain dissatisfied, you can raise a complaint to the ICO as regulator of the Freedom of Information Act. This complaint will be handled just like a complaint made to the ICO about any other public authority.

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
Strategic Planning and Transformation
Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
Telephone: 0303 123 1113. Website: ico.org.uk
For information about what we do with personal data, please see our privacy notice