

From: icocasework@ico.org.uk  
To: AccessICOinformation@ico.org.uk;  
CC:  
Subject: ICO Case Reference: IC-272439-J4B6  
Direction: Outgoing  
Date Sent: 01/12/2023 15:03

1 December 2023

Case Reference: IC-272439-J4B6

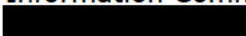
Dear Sir/Madam,

Please see attached letter regarding a complaint we have received.

Yours sincerely,

  
Information Commissioner's Office

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF

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Information Commissioner's Office  
By email to: [accessICOinformation@ico.org.uk](mailto:accessICOinformation@ico.org.uk)

**1 December 2023**

Dear Sir/Madam,

**Freedom of Information Act 2000 (FOIA)**

**Complaint from:** [REDACTED]

**Your reference: IC-260900-T4T0**

**Our reference: IC-272439-J4B6**

This complaint has been accepted as eligible for formal consideration. Investigation of this complaint will, in all likelihood, look at your application of **section 36 to withhold information**.

Once the complaint has been allocated to a case officer, they will proceed to a decision notice or contact you directly if they require further information.

Please be aware that whilst submitted emails are monitored, any detailed enquiries relating to the case will not be addressed until it has been allocated to a case officer for investigation. For more general enquiries, please call our helpline on **0303 123 1113**.

Sent on behalf of

[REDACTED]  
[REDACTED]

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**and vexatious requests. There are also other tools to help with improving your timeliness, the details you need to join our feedback group, and more. They're on this section of our website: [Resources, toolkits and training | ICO](#)**

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From: accessicoinformation@ico.org.uk  
To: [REDACTED]@ico.org.uk;  
CC: icocasework@ico.org.uk;  
Subject: FW: ICO Case Reference: IC-272439-J4B6  
Direction: Incoming  
Date Received: 05/12/2023 09:46

Good morning [REDACTED]

I just wanted to follow up on the attached case acceptance letter, which advises that "investigation of this complaint will, in all likelihood, look at your application of section 36 to withhold information". However, this case didn't involve the application of s.36, the only exemption applied was s.21 as the majority of the information the requester asked for was already on our website. So I just wanted to check the reference numbers so we're looking at the correct case.

Kind Regards

[REDACTED]

Logo

[REDACTED]

### Risk and Governance Department

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow,  
Cheshire SK9 5AF

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[REDACTED]

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Information Commissioner's Office  
By email to: [accessICOinformation@ico.org.uk](mailto:accessICOinformation@ico.org.uk)

**1 December 2023**

Dear Sir/Madam,

**Freedom of Information Act 2000 (FOIA)**

**Complaint from:** [REDACTED]

**Your reference: IC-260900-T4T0**

**Our reference: IC-272439-J4B6**

This complaint has been accepted as eligible for formal consideration. Investigation of this complaint will, in all likelihood, look at your application of **section 36 to withhold information**.

Once the complaint has been allocated to a case officer, they will proceed to a decision notice or contact you directly if they require further information.

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Sent on behalf of

[REDACTED]  
[REDACTED]

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**and vexatious requests. There are also other tools to help with improving your timeliness, the details you need to join our feedback group, and more. They're on this section of our website: [Resources, toolkits and training | ICO](#)**

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From: icocamework@ico.org.uk  
To: accessicoinformation@ico.org.uk;  
CC:  
Subject: Your email to the ICO - Case Reference IC-272439-J4B6  
Direction: Outgoing  
Date Sent: 05/12/2023 11:38

5 December 2023

Case Reference: IC-272439-J4B6

Dear [REDACTED]

Thank you for your email of 5 December 2023.

Apologies it was a error on my part, it should be section 21.

If you require anything else please do not hesitate to contact me.

Yours sincerely,

[REDACTED]

Information Commissioner's Office

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF

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From: [REDACTED]@ico.org.uk  
To: AccessICOinformation@ico.org.uk;  
CC: icocasework@ico.org.uk;  
Subject: RE: ICO Case Reference: IC-272439-J4B6  
Direction: Incoming  
Date Received: 06/12/2023 12:16

Hi [REDACTED]

Ah I see now - I will copy this email exchange to casework so it goes onto the case and the investigating case officer is aware when they pick the case up. We'll amend the exemption applied on ICE as well.

[REDACTED]

[REDACTED]

Freedom of Information Casework

[REDACTED]

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From: Information Access Inbox <AccessICOinformation@ico.org.uk>  
Sent: Wednesday, December 6, 2023 11:12 AM  
To: [REDACTED]@ico.org.uk; Information Access Inbox <AccessICOinformation@ico.org.uk>  
Subject: RE: ICO Case Reference: IC-272439-J4B6

Hi [REDACTED]

We did not apply s36 in our response. As [REDACTED] has explained, the only exemption we used was s21.

The request was about our approach to complaints involving the application of s36. Where s36 is mentioned this is only in the context of the request itself, which is possibly where the confusion lies.

Thanks

[REDACTED]

Logo



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---

**From:** [REDACTED] [@ico.org.uk](mailto:[REDACTED]@ico.org.uk)>  
**Sent:** Wednesday, December 6, 2023 10:52 AM  
**To:** Information Access Inbox <[AccessICOinformation@ico.org.uk](mailto:AccessICOinformation@ico.org.uk)>  
**Subject:** RE: ICO Case Reference: IC-272439-J4B6

Hi [REDACTED]

I've just looked at this case – your ref IC-260900-T4T0 and it does appear to involve s.36. Could you check again your end as your reference seems to correctly relate to 272439.

[REDACTED]

[REDACTED] Freedom of Information Casework

[REDACTED]

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF  
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Please consider the environment before printing this email

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---

**From:** Information Access Inbox <[AccessICOinformation@ico.org.uk](mailto:AccessICOinformation@ico.org.uk)>  
**Sent:** Tuesday, December 5, 2023 9:46 AM  
**To:** [REDACTED] [@ico.org.uk](mailto:[REDACTED]@ico.org.uk)>  
**Cc:** icocasework <[icocasework@ico.org.uk](mailto:icocasework@ico.org.uk)>  
**Subject:** FW: ICO Case Reference: IC-272439-J4B6

Good morning [REDACTED]

I just wanted to follow up on the attached case acceptance letter, which advises that "investigation of this complaint will, in all likelihood, look at your application of section 36 to withhold information". However, this case didn't involve the application of s.36, the only exemption applied was s.21 as the majority of the information the requester asked for was already on our website. So I just wanted to check the reference numbers so we're looking at the correct case.

Kind Regards

[REDACTED]

Logo

[REDACTED]

Risk and Governance Department

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow,  
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[REDACTED]

---

From: icocamework@ico.org.uk  
To: AccessICOinformation@ico.org.uk;  
CC:  
Subject: ICO Case Reference: IC-272439-J4B6  
Direction: Outgoing  
Date Sent: 18/03/2024 11:07

18 March 2024

Case Reference: IC-272439-J4B6

Dear Sir/Madam

I am writing to confirm that [REDACTED] complaint has recently been allocated to me for consideration. I have attached a copy of your refusal notice and internal review response for ease of reference.

I have already written to [REDACTED] to explain the limitations of FOIA and how many aspects of his internal review fall outside the scope of the legislation and the ICO's obligations. The purpose of this email is to establish what recorded information is held, if any, and whether appropriate and adequate searches for that information were undertaken. With that in mind, please may I ask the ICO to go through the information request again and explain in detail for each question what recorded information is held, if any, and what searches have been carried out to establish that position (where searched, which departments, staff, records etc). If any recorded information is held or additional information identified, please outline the ICO's position on that.

With regards to question 3, [REDACTED] has said:

"This question has not been answered properly. My question was whether any decision notices were issued by the ICO where the section 36 was engaged before the authorisation obtained by the JAC was put in place on 10 October 2022. If the only decisions are those indicated in the review response, then that should be specifically stated."

In relation to this aspect of the request, please can the ICO consider whether on reflection further recorded information is indeed held. If it is, can this be disclosed? If not why not? If no recorded information is held/no further recorded information is held, please explain why.

I would be grateful if you would provide this information as soon as possible and in any event no later than 3 April 2024.

Thank you for your assistance in this matter. If you have any questions or wish to discuss this matter, please do not hesitate to contact me.

Yours faithfully,

[REDACTED]  
Information Commissioner's Office

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF  
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16 November 2023

**Ref: IC-260900-T4T0**

I write in response to your email of 20 October 2023 in which you request a review of our response to your request for information.

The purpose of an internal review is to look again at your request, at our response, and to check that any exemptions applied were appropriate. I am a Group Manager in the Information Access Team. I have had no prior involvement in the handling of your request.

### **Review response**

It is important to clarify with you from the outset that my review will only be looking at whether the response to your information request was compliant with the FOIA. Your request for review seems primarily concerned with challenging the position taken by the ICO in relation to EA/2022/0310 (Abbas Mithani v Information Commissioner) and asking us to express opinions, clarify our position, or otherwise provided a commentary that is outside the scope of the FOIA and which I will not be addressing in this review.

To the extent that your request for review is challenging the information disclosed in response to your request, I have specifically considered the following points you have raised:

1. That there is likely to be additional information held by the ICO relevant to your request, which should have been disclosed as part of our response; and
2. We have not provided you with an appropriate level of advice and assistance, in breach of section 16 of the FOIA.

In relation to questions 1 (a-g) and 2 from your request, I have looked again at the information provided and I am satisfied that it is accurate and that we hold no further recorded information that would address these points.

In relation to questions 3-5, you appear to have clarified in your request for review that these questions relate to whether we hold information about cases

which are similar in circumstance to *Abbas Mithani v Information Commissioner*. I do not think this was clear in your original request; however, I can address this with you now by confirming that we do not hold information regarding further cases of relevance to your request.

You are able to review all [decision notices](#) issued by the ICO on our website, searchable in a variety of ways, including by public authority and exemption type used. The ICO has issued seven decision notices in total to the Judicial Appointments Commission, two of which considered the application of s.36. One was *Abbas Mithani v Information Commissioner*, and the other, [FS50797020](#), dates from February 2019 and the complaint regarding the application of section 36 was upheld.

In relation to question 6 I have reviewed the information provided to you and the consultations my colleague undertook in identifying information in scope of your request and I am satisfied that we have identified and disclosed everything we hold. I am also satisfied that we do not hold information in scope of question 7.

Finally, I note your challenge that we did not provide you with an appropriate level of advice and assistance to enable you "to understand the information or documentation provided". It is important to clarify that this is not an expectation of [section 16](#), which is primarily focused on ensuring that public authorities take the necessary action to ensure a request is valid, assist a requester in refining an unclear request or a request which exceeds the appropriate limit (section 12). These circumstances are not relevant to your request. Furthermore, I consider that you have been provided with a clear response, using your own numbering system for clarity, and the information disclosed is not technical or otherwise specialised in nature, so requires no further explanation or interpretation.

This concludes my review.

### **Complaint procedure**

If you're not satisfied with the outcome of this review, you can make a formal complaint to the ICO as regulator of the FOIA. This complaint will be handled by a separate, independent team of ICO staff, just like a complaint made to the ICO about any other public authority.

You can raise that type of complaint through our [website](#).

## Your information

Our [Privacy notice](#) explains what we do with the personal data you provide to us and what your rights are. Our retention schedule can be found [here](#).

Yours sincerely



Shannon Keith  
Information Access Group Manager  
Risk and Governance Department

Information Commissioner's Office, Wycliffe House, Water Lane,  
Wilmslow, Cheshire SK9 5AF

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19 October 2023

IC-260900-T4T0

## **Request**

1. *I refer to the case of Abbas Mithani v Information and Judicial Appointments Commission EA/2022/0299 – EA/2022/0300 and EA/2022/0310 which has been heard by the first tier tribunal. Judgment in that case was reserved. In that case, it transpired that there had been no person authorised to issue qualified-person opinions in the history of that organisation until 10 October 2022. It was also ascertained that, despite this, there were several cases in which the exemption in s. 36 of the FOIA was relied on by the JAC.*

*Please provide the following information:*

- a) *Has the information commissioner [IC] been informed of this by the JAC?*
- b) *If he were informed, please state how.*
- c) *If the IC were informed in writing, please let me have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you sent your response to this request, including any advice or guidance given to the JAC by the IC to remedy these situations.*
- d) *If the answer to (c), above, were Yes, please let me know whether the advice or guidance provided to the JAC has been complied with and provide all communication passing between you and the JAC confirming this.*
- e) *If the IC were informed orally, please state when and what he was told and any communication (whether oral or in writing) passing by or between the JAC and the IC.*
- f) *If any of the answers to (a) to (e) above were Yes, please let me know what action the IC proposes to take against the JAC.*

- g) If the IC were not informed, please state what action the IC proposes to take for this very serious breach of the FOIA.*
- 2. In respect of the cases referred to in question (1), above, please state what remedial action (if any) the IC proposes to take in the matter, such as notifying the requesters that the JAC misled the ICO and is now entitled to the information sought.*
- 3. In respect of the cases where QPs were issued without authorisation, please state, whether there was a complaint made to the IC by the requester, providing full details of the requester (other than their personal data) and the decision notice issued by the IC.*
- 4. Regarding Question (3), above, will the IC be rescinding the decision notice he issued and substituting for that notice a fresh decision notice?*
- 5. If so, when does he propose doing this?*
- 6. The IC's guidance on section 36 expressly states that public bodies must identify the QPs in their organisations. It appears that caseworkers at the ICO simply assume that the authorisation is in force. This has happened in other cases, e.g., Salmon v IC and King's College [2008] EA 2007/1035, specifically referred to in the IC's guidance. It is understood that this is because of resource issues at the ICO. Please provide:*
- a) any internal written guidance issued by the IC to caseworkers about what they should look for when dealing with section 36 exemption.*
- b) Whether or not there is any such written guidance, please let me know whether there is any policy or guidance (official or unofficial) that in section 36 cases, the caseworker need not ask for copies of the authorisation. Please provide full details of this.*
- c) Has or does the IC intend to inform the requesters directly of this fact? If so, please let me know whether the requesters have been informed of this and, if so, how.*



*d) Does the IC consider that it is required to inform any other body about the breaches referred to above? If it is, please provide evidence that it has.*

*7. If the IC obtained legal advice in relation to the above, please provide full details of that advice.*

Your request, received on 28 September 2023, has been handled under the Freedom of Information Act 2000 (the FOIA).

## **Response**

I can confirm that we hold some information in scope of your request.

For context, the relevant appeal is EA/2022/0310. During proceedings JAC stated that they were unable to locate a copy of the ministerial authorisation on file in relation to the Qualified Person (QP). A new authorisation was then sought and granted.

Even if no authorisation was in place at the time, JAC could rely on section 36 at a later point. We accept the JAC's late reliance on section 36.

I will address each of your points in turn.

*a) Has the information commissioner [IC] been informed of this by the JAC?*

No, we were not informed directly but were made aware during proceedings.

*b) If he were informed, please state how.*

As above.

*c) If the IC were informed in writing, please let me have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you sent your response to this request, including any advice or guidance given to the JAC by the IC to remedy these situations.*

We do not hold any advice or guidance given to the JAC.

- d) If the answer to (c), above, were Yes, please let me know whether the advice or guidance provided to the JAC has been complied with and provide all communication passing between you and the JAC confirming this.*
- e) If the IC were informed orally, please state when and what he was told and any communication (whether oral or in writing) passing by or between the JAC and the IC.*
- f) If any of the answers to (a) to (e) above were Yes, please let me know what action the IC proposes to take against the JAC.*
- g) If the IC were not informed, please state what action the IC proposes to take for this very serious breach of the FOIA.*

No information is held.

- 2. In respect of the cases referred to in question (1), above, please state what remedial action (if any) the IC proposes to take in the matter, such as notifying the requesters that the JAC misled the ICO and is now entitled to the information sought.*

There is no information held in respect of this element of your request.

- 3. In respect of the cases where QPs were issued without authorisation, please state, whether there was a complaint made to the IC by the requester, providing full details of the requester (other than their personal data) and the decision notice issued by the IC.*
- 4. Regarding Question (3), above, will the IC be rescinding the decision notice he issued and substituting for that notice a fresh decision notice?*

As the Decision Notice was appealed, it would be for the Tribunal to substitute if necessary.

- 5. If so, when does he propose doing this?*

6. *The IC's guidance on section 36 expressly states that public bodies must identify the QPs in their organisations. It appears that caseworkers at the ICO simply assume that the authorisation is in force. This has happened in other cases, e.g., Salmon v IC and King's College [2008] EA 2007/1035, specifically referred to in the IC's guidance. It is understood that this is because of resource issues at the ICO. Please provide:*

*a) any internal written guidance issued by the IC to caseworkers about what they should look for when dealing with section 36 exemption.*

*b) Whether or not there is any such written guidance, please let me know whether there is any policy or guidance (official or unofficial) that in section 36 cases, the caseworker need not ask for copies of the authorisation. Please provide full details of this.*

*c) Has or does the IC intend to inform the requesters directly of this fact? If so, please let me know whether the requesters have been informed of this and, if so, how.*

*d) Does the IC consider that it is required to inform any other body about the breaches referred to above? If it is, please provide evidence that it has.*

In relation to this element of your request, we have only considered guidance directly relating to authorisation of the qualified person to be in scope.

Our [section 36 guidance](#) can be found on our website. We also have a [form for recording the qualified person's opinion](#). This information is withheld under section 21 of the FOIA because it is reasonably accessible to you.

In general terms, we assume that a qualified person is authorised unless they are in a junior position, have a job title not expected of a qualified person, or a name we do not recognise.

We have carried out reasonable searches for any internal information held about the authorised qualified person. Please find attached the internal guidance and policy advice we have located.

*7. If the IC obtained legal advice in relation to the above, please provide full details of that advice.*

We do not hold information in scope of this element of your request.

### **FOI review procedure**

If you are dissatisfied and wish to request a review of our decision or make a complaint about how your request has been handled you should write to the Information Access Team at the address below or e-mail [icoaccessinformation@ico.org.uk](mailto:icoaccessinformation@ico.org.uk).

Your request for internal review should be submitted to us within 40 working days of receipt by you of this response. Any such request received after this time will only be considered at the discretion of the Commissioner.

If having exhausted the review process you are not content that your request or review has been dealt with correctly, you have a further right of appeal to this office in our capacity as the statutory complaint handler under the legislation.

To make such an application, please write to our Customer Contact Team at the address given or visit our website if you wish to make a complaint under the FOIA.

### **Your information**

Please note that our [Privacy notice](#) explains what we do with the personal data you provide to us and what your rights are. This includes entries regarding the specific purpose and legal basis for the ICO processing information that people that have provided us with, such as an [information requester](#).

The length of time we keep information is laid out in our retention schedule, which can be found [here](#).

Yours sincerely



Information Commissioner's Office



Information Access Team  
Information Commissioner's Office  
Wycliffe House, Water Lane, Wilmslow, Cheshire  
SK9 5AF

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From: [REDACTED]@ico.org.uk  
To: icocasework@ico.org.uk;  
CC:  
Subject: RE: ICO Case Reference: IC-272439-J4B6  
Direction: Incoming  
Date Received: 26/03/2024 14:27

Hello [REDACTED]

Apologies for the slight delay in my response.

I will take each of the original request points in order and explain my consultations, searches and decision making:

Question 1

**FOIA s.44 - Prohibition on disclosure**  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Question 2

**FOIA s.44 - Prohibition on disclosure**  
[REDACTED]

[REDACTED]

### Question 3

In my initial response I had interpreted this part of the request to be for any complaints about the JAC's application of s36 specifically relating to the issue of the QP authorisation, and that since this had arisen and been resolved in the Tribunal case, this meant there was no information held.

However, the complainant further clarified his point in the internal review request, to mean any complaints about section 36 in general prior to the matter having been raised at Tribunal. In our internal review we explained that there were two DNs relating to s36 and that these could be accessed on our website.

I have reviewed the cases held on ICE to see if any other complaints had been made that did not result in a DN, and can confirm that there is no other information held. The requester has therefore been provided with the requested information and there is nothing further held.

### Question 4

The ICO does not have the power to rescind a DN. This is a matter for the Tribunal. There is therefore no information held in relation to this part of the request.

### Question 5

As above.

### Question 6

For this part of the request I consulted with the FOI Policy team and FOI Managers.

FOI Policy provided me with the information they had found on FOI knowledgebase that they thought may be relevant to the request: this is the s36 LTT and the policy advice from September 2023, both of which I provided in my response.

FOI Policy also provided me with several other LTTs and policy advice notes on the topic of s36, but which did not fall in scope of the request. These topics related to the application of s36 (eg the chilling effect argument, or the evidence required to demonstrate the QP opinion is reasonable, to take two examples) and not to the technical question of whether the PA holds authorisation for the QP.

I also undertook searches on the FOI knowledge base for 'section 36' and 'qualified person'. Again, most of the information related to the application of the exemption itself rather than the technicality of the QP authorisation.

### **FOIA s.44 - Prohibition on disclosure**

For example, there are 17 pages of results for 'section 36', many of which are FIT and UT policy reviews not relevant to this request. I did a dip sample of cases and did not find any. FOI Policy told me that "*although there will be many cases relating to different aspects of s36, there are unlikely to any on cases where there was no authorised QP.*"

Having reviewed the request and our response again I am satisfied that the requester has had all of the requested information and there is nothing further held.

I hope this information has been helpful. Do feel free to give me a call or send an email if you need further clarification on any point.

Regards



Logo



Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow,  
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