

Email

# ICO Case Reference: IC-27...

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



Email

From

ICO Casework

To

foia@judicialappointments.gov.uk

Cc

Subject

ICO Case Reference: IC-278867-L1C2

Display Name

ICO to PA - cover to case accepted letter

Date Received

09/01/2024 14:44

Email Address

**9 January 2024**

**Case Reference: IC-278867-L1C2**

**Dear FOI Team,**

**Please see the attached case acceptance letter for your attention.**

Sent on behalf of



Information Commissioner's Office

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

T. 0303 123 1113 [ico.org.uk](http://ico.org.uk) [twitter.com/iconews](https://twitter.com/iconews)

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ATTACHMENTS

File Name	Followed	File Size (Byte...)	
to PA case eligible.docx	No	77,814	

Judicial Appointments Commission  
By email to: foia@judicialappointments.gov.uk

30 April 2024

Dear FOI Team,

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

**Complaint from:** [REDACTED]

**Your reference:** N/A

**Our reference:** IC-278867-L1C2

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 of FOIA**.

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]

**Information Commissioner's Office**

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To read about our commitment to high standards of customer service see our service standards at [www.ico.org.uk/about-the-ico/our-information/our-service-standards/](http://www.ico.org.uk/about-the-ico/our-information/our-service-standards/).

Email

# Complaint from [REDACTED]

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



Email

From

ICO Casework

To

foia@judicialappointments.gov.uk

Cc

Subject

Complaint from [REDACTED] - ICO Case Reference: IC-278867-L1C2

Display Name

ICO to PA - cover to initial letter

Date Received

26/03/2024 15:29

Email Address

**26 March 2024**

**Case Reference: IC-278867-L1C2**

**Dear Sir/Madam**

**Please find attached my investigation letter following a complaint from [REDACTED]. Please note the deadline for your response is 11 April 2024.**

**Yours faithfully**

[REDACTED]

**For information about what we do with personal data see our [privacy notice](#)**

ATTACHMENTS

File Name	Followed	File Size (Byte...)	
ICO to PA - initial investigation lett...	No	394,365	
1 - 1 of 1 (0 selected)			Page 1

26 March 2024

**Case reference number IC-278867-L1C2**

Dear Sir/Madam

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

**Your reference: N/A**

**Complainant:** [REDACTED]

We wrote to you on 9 January 2024 to let you know that we have accepted this case for investigation. I have now been asked to investigate it.

You should now reconsider the way the Judicial Appointments Commission (the 'JAC') has handled this request and respond as detailed below.

**ICO's approach**

On receipt of a complaint under the FOIA, the Information Commissioner will give a public authority one opportunity to justify its position to him, before issuing a decision notice. Please consider the guide for public authorities on the Information Commissioner's website for more information about how we handle complaints:

[http://www.ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide.aspx](http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx)

**The request**

On 28 September 2023 the complainant made the following request for information under the FOIA for:

"(1) There were several cases in which the exemption in s. 36 of the FOIA was used without there being any person authorised to issue a QP's opinion. Please provide the following information:

- (a) Has the Information commissioner [IC] been informed of this?
- (b) If he has been 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 send your response to this request.,

including any advice or guidance given to the JAC by the IC to remedy these situations.

(d) If he 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.

(e) If the IC were not informed, please state why. If this was based on advice received from the JAC's lawyers, please provide details of that advice.

(2) In respect of the cases where QPs were issued without authorisation, please state:

(a) whether the requesters have been informed of this and, if so, how?

(b) if they were informed in writing, please provide me with all the communication passing by or on behalf of the JAC and the requesters.

(c) if they were informed orally, please state when and what they were told and any communication (whether oral or in writing) passing by or between the JAC and the requesters.

(3) Has the JAC disclosed the above matters to:

(a) the JAC commissioners or any single JAC commissioner, whether at any formal or informal meeting? If so, please provide all relevant documents, including copies of the minutes of any meeting.

(b) If the answer to the question in (a) is "NO", please state why not?

(4) Does the JAC consider that it is required to inform any other body about the matters referred to above, such as the Ministry of Justice? If it is, please provide evidence that it has.

(5) If the JAC has obtained legal advice in relation to the above, please provide full details of that advice."

You responded, late on 8 November 2023. For parts 1a) to 1e), you cited section 32(1) of FOIA (court records), relying additionally on section 42(1) (legal professional privilege for part 1e). You said 2a) is not a request for recorded information and that you do not hold the information for parts 2b) and 2c).

For part 3a) you provided a link to the JAC board meeting minutes, explaining that discussions about legally privileged information are not published in the minutes. For part 3b) you said the request is not for recorded information.

For part 4 of the request, you provided some information with section 40(2) (personal information) and section 42 redactions.

For part 5, you cited section 42(1) of FOIA.

The complainant requested an internal review on 10 November 2023.

You provided an internal review, late, on 21 December 2023 in which you maintained your original position.

### **What you need to do now**

Where possible the Information Commissioner prefers complaints to be resolved by informal means, and we ask both parties to be open to compromise. It is also your responsibility to satisfy the ICO that you have complied with the law. The ICO's website has guidance which you should refer to in order to check whether your original response to the information request was appropriate.

This is your opportunity to finalise your position with the ICO. With this in mind, you should revisit the request. After looking at our guidance, and in light of the passage of time, you may decide to reverse or amend your position. If you do, please notify the complainant and me within the timeframe specified at the end of this letter. This may enable us to close this case informally without the need for a decision notice.

### **█ grounds of complaint**

█ has submitted the following grounds of complaint which I'd ask you to please factor into your investigation response:

"I am not satisfied with the response provided by the JAC. I attach the relevant documents and wish to complain about this to you.

The FOIA request to the JAC was made following the hearing of the oral evidence in EA/2022/0299 & 0300 & 0310, Abbas Mithani vs ICO and the Judicial Appointments Commission. In that case, it became apparent that at no stage, until 10 October 2022, had there been an authorisation in place under section 36 of the FOIA 2000 for the CEO of the JAC to issue Q-P opinions. The witness who gave evidence on behalf of the JAC was asked whether he would "do the right thing" and inform the ICO and the requesters to whom false information was given by the JAC that the Q-P

opinions issued by the CEO were invalid because he had no authority to issue them. He said that he would need to take legal advice in the matter.

The response of the JAC (both original and on review) is untrue and evasive. It is also deliberately designed to block my perfectly legitimate request for information. I deal with this below by specific reference to the questions I asked.

### Question 1(a)-(e)

My question asked whether the JAC had informed the ICO and the requesters (following the hearing of the evidence in Mr Mithani's case) that there had been no authorisation in place until 10 October 2022. I made that request because the witness had said he would take legal advice and decide what the JAC needed to do, having regard to the clearly false impression it had given to the ICO and requesters about the existence of a section-36 authorisation. Up until September 2023, the ICO believed that the authorisation had always been in place, despite Mr Mithani pointing out that this was wrong. It was only in September 2023 that the ICO solicitor appeared to accept that there was no authorisation in place. I am entitled to know whether the JAC had taken steps to rectify the false impression that it gave to the public that its CEO did have authorisation when he did not.

The suggestion that the documents have been filed with the tribunal is false. The tribunal supplied me with all the documents that were filed since the witness gave his evidence. The information is not included in these documents. The JAC has refused to answer a perfectly simple request – to let me know when the documents were filed with the tribunal. This borders on corruption.

Nor has a proper public interest analysis been carried out in the context of the JAC's reliance on section 42. The public interest test in favour of disclosure overrides any issues relating to legal privilege – see the ICO website at <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege>.

### Question 2

The JAC is obliged to let me know whether the information requested by me is in its possession. This not just means information in its actual

information but information which is within its control, such as any information held by its lawyers to which it would have free and unrestricted access. It follows that even if the information is not held by the JAC itself, if it is held by others to which it has free access, the JAC must legally disclose this. It would be remarkable if the advice given to the JAC by its lawyers was not recorded in some form by its lawyers. But even if it were not, I am entitled to a straight answer to this question.

### Question 3

This response is incomprehensible. These are perfectly reasonable requests and should be answered. If the JAC does not have any documentation which relates to the request, it need only say that. Please ask the JAC to stop obfuscating and being economical with the truth.

### Questions 4 and 5

This response is likewise incomprehensible and evasive. The public interest test in section 42 has simply not been conducted. As the lack of authorisation is now redundant, there is no reason why the advice should not be disclosed. The public is entitled to see how the JAC has dealt with the matter.

Finally, the JAC has already confirmed that it has failed to comply with the time limit for responding to an FOIA (section 10 of the FOIA 2000). I invite the ICO to make a finding to that effect and also that it has failed to comply with the requirements of section 16. I further invite the ICO to take appropriate action for those failures."

As he has not made any reference to the section 40(2) redactions in the disclosed information, I have disregarded this aspect.

### **Action required**

In any event, we need the following information from you to reach a decision:

- A copy of the withheld information (clearly marked with which procedural sections of the FOIA exemptions apply).
- Detailed explanations for the parts of the FOIA cited.



## **Section 1 – information not held**

In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

In order to assist with this determination please answer the following questions:

- What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
- Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
- If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
- If no or inadequate searches were done at the time, please rectify this now and let me know what you have done.
- If the information were held would it be held as manual or electronic records?
- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
- If recorded information was held but is no longer held, when did the JAC cease to retain this information?
- Does the JAC have a record of the document's destruction?
- What does the JAC's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the JAC describe the way in which it has handled comparable records of a similar age?
- If the information is electronic data which has been deleted, might copies have been made and held in other locations?
- Is there a business purpose for which the requested information should be held? If so what is this purpose?
- Are there any statutory requirements upon the JAC to retain the requested information?

In summary you are required to provide a thorough response to the above questions in order to comply with your statutory obligations. The Commissioner will therefore challenge responses and assertions made which fail to satisfactorily address our questions and require a more detailed explanation. The Tribunal has also demonstrated that it is very critical of public authorities who fail to respond adequately to our enquiries. We therefore expect a public authority where appropriate to provide full details of its searches to support its conclusions.

**Sections 8 (valid request) 10 (time for compliance) and 16 (advice and assistance)**

- Please explain why you consider some parts of the request do not constitute requests for recorded information under the FOIA.
- Please explain why the substantive response was provided late.
- Please consider whether you should have provided section 16 advice and assistance in this case and what form that could take.

**Section 32 – court records**

- Please confirm which of the subsections in section 32(1) the JAC is relying on to withhold the requested information.
- Please ensure that you explain which 'court', 'proceedings' or 'inquiry' the court record relates to.
- If the JAC did not create the information which is being withheld on the basis of section 32, please explain how the JAC came to hold this information.

**Section 42 - – legal professional privilege**

It appears that the JAC is relying on the fact that the withheld information is subject to legal advice privilege.

- Please confirm if my understanding is correct.

Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:

- the communications must be made between a professional legal adviser and client;

- the communications must be made for the sole or dominant purpose of obtaining legal advice; and
- the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.
- Therefore, with reference to the above criteria please explain why the JAC believes that the withheld information attracts advice privilege.

[In the event that my understanding is incorrect I have included the following in [] – **please disregard this section if not applicable.**

Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:

- where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;
- the dominant purpose of the communications must be to obtain advice to assist in the litigation; and
- the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.

Therefore, with reference to the above criteria please explain why the JAC believes that the withheld information attracts litigation privilege.]

- Privilege can only attach to communications which remain confidential. Where a privileged communication has been made available to the public or to a third party without restriction any privilege attached to the document will have been lost.
- In light of this please confirm that the JAC is satisfied that the legal advice remains privileged.
- What public interest arguments in favour of disclosing the information were taken into account?
- What public interest arguments in favour of maintaining the exemption were taken into account?

- Please explain why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing of the withheld information. Please include details of any particular weighting exercise that has been carried out.

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

We strongly recommend that your response is guided by recent decision notices, our guidance and our lines to take, which demonstrate the Information Commissioner's approach to the exemptions and procedural sections of the FOIA. These can be found on our website:

- <http://search.ico.org.uk/ico/search/decisionnotice>
- <https://ico.org.uk/for-organisations/>

### **New exemption(s)**

Having revisited the request, you may decide to apply a new exemption. We will consider new exemptions but it is your responsibility to tell the complainant why the new exemption applies and to provide us now with your full submissions.

For the avoidance of doubt, you should now please do the following:

- Consider [REDACTED] grounds of complaint.
- Consider whether to change your response to the information request, and let us know the outcome.
- Send us the withheld information.
- Send us your full and final arguments as to why you think the exemptions apply.
- Answer all of the questions in this letter.

### **Delays**

Please explain why the JAC failed to respond to the request within the statutory 20 working days' time limit. Please also explain why the internal review was not completed within the recommended 20 working days' time limit.

### **Ctd/...**

## Time for response

Please provide your response within ten working days of the date of this letter, that is by **11 April 2024**, ensuring that you fully set out your final position in relation to this request.

Please be aware that in the event of your response not being received by this date the Commissioner will conclude that there are no further submissions that you wish to make on the matter and may proceed to issuing a decision notice on the basis of the arguments you have put forward. He may also choose to use his powers under section 51 to issue an Information Notice which will require you to provide such information.

If the JAC does not wish to add to the arguments already provided to the complainant, I would be grateful if you would advise me of this at the earliest opportunity.

If you have any concerns please contact me at [icocasework@ico.org.uk](mailto:icocasework@ico.org.uk) quoting the above reference or call me on [REDACTED] Please note [REDACTED] and that the beginning of the week is the best time to call should you wish to speak to me. [REDACTED]

Yours faithfully

[REDACTED]  
The Information Commissioner's Office  
[REDACTED]

For information about what we do with personal data see our [privacy notice](#)

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Email

# Deadline Extensions

Regarding

Worked By

Status Reason

R...



Activity Marker



E... Direction



L...



Email

**From** foia@judicialappointments.gov.uk  
**To** ICO Casework  
**Cc** foia@judicialappointments.gov.uk  
**Subject** Deadline Extensions  
**Display Name** PA to ICO - requesting extension - not rcv'd until 16/04/24  
**Date Received** 12/04/2024 09:49  
**Email Address** "FOIA" FOIA@judicialappointments.gov.uk

External: This email originated outside the ICO.

Good morning [redacted] and [redacted]

**RE: IC-278867-L1C2 and IC-267125-Q5P5**

Please accept my apologies that the JAC have had to delay our response to these investigations.

We had hoped to be able to meet the deadline of 11 April 2024. However, our lawyers are currently reviewing our response drafts.

I apologise for any inconvenience caused and will update you as soon as the lawyers return. We expect this to be today or early next week.

Kind regards,

[redacted] | Judicial Appointments Commission |

M: [redacted]  
[www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk) | [LinkedIn](#) | [Twitter](#) |



From: icocasework <icocasework@ico.org.uk>  
Sent: 09 April 2024 08:41  
To: FOIA <FOIA@judicialappointments.gov.uk>  
Subject: Your email to the ICO - Case Reference IC-267125-Q5P5

**9 April 2024**

**Case Reference: IC-267125-Q5P5**

Dear [REDACTED]

**Thank you for your email of 4 April 2024. I agree to your request for additional time and look forward to receiving your response by 11 April 2024.**

**Yours sincerely,**

[REDACTED]  
[REDACTED]  
**Information Commissioner's Office**

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

T. [REDACTED] [ico.org.uk](mailto:ico.org.uk) [twitter.com/iconews](https://twitter.com/iconews)

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----- Original Message -----

External: This email originated outside the ICO.

Morning [REDACTED]

**My apologies, the timeline for this complaint and the other complaint from the same requester being investigated by [REDACTED] have been confused and as such, could I please request an extension until 11 April 2024 to respond to this request?**

**Kind regards,**

[REDACTED] | **Judicial Appointments Commission |**

**M:** [REDACTED]  
[www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk) | [LinkedIn](#) | [Twitter](#) |



From: icocasework <icocasework@ico.org.uk>  
Sent: 04 March 2024 16:15  
To: FOIA <FOIA@judicialappointments.gov.uk>  
Subject: ICO Case Reference - IC-267125-Q5P5

**4 March 2024**

**Case Reference: IC-267125-Q5P5**

**Dear JAC**

**We have received a complaint about your handling of a number of requests from information from the same complainant, which are being handled under this one case reference.**

**Please see my attached correspondence.**

**Yours sincerely**

**Information Commissioner's Office**

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

T. [REDACTED] F. [REDACTED] [ico.org.uk](http://ico.org.uk) [twitter.com/iconews](https://twitter.com/iconews)

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**For information about what we do with personal data see our privacy notice at [www.ico.org.uk/privacy-notice](http://www.ico.org.uk/privacy-notice)**

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ATTACHMENTS

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| Followed

| File Size (Byte..





Email

# URGENT please - Overdue...

Regarding

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Activity Marker



Direction



O...



Email

From

ICO Casework

To

foia@judicialappointments.gov.uk

Cc

Subject

URGENT please - Overdue investigation response - ICO Case Reference: IC-278867-L1C2

Display Name

ICO to PA - chaser for inv response

Date Received

15/04/2024 11:03

Email Address

**15 April 2024**

**Case Reference: IC-278867-L1C2**

**Dear Sir/Madam**

**I sent you my investigation letter on 26 March 2024, following a complaint from Your response was due on 11 April 2024; I haven't heard anything.**

**Please can you forward your investigation response on receipt of this email; thank you.**

**Yours faithfully**

**Information Commissioner's Office**

**For information about what we do with personal data see our privacy notice at [www.ico.org.uk/privacy-notice](http://www.ico.org.uk/privacy-notice).**

ATTACHMENTS

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## Email

# RE: URGENT please - Over...

Regarding

Worked By

Status Reason

R...



Activity Marker



E... Direction



I...



## Email

**From** foia@judicialappointments.gov.uk

**To** ICO Casework

**Cc** foia@judicialappointments.gov.uk

**Subject** RE: URGENT please - Overdue investigation response - ICO Case Reference: IC-278867-L1C2

**Display Name** PA to ICO - resend of extension request email (not rcv'd)

**Date Received** 15/04/2024 11:17

**Email Address** "FOIA" FOIA@judicialappointments.gov.uk

External: This email originated outside the ICO.

Good morning [REDACTED]

Please see the attached e-mail that was sent to the ICO on Friday detailing some delays pending legal advice.

I will send our response as soon as approvals are in place.

Kind regards,

[REDACTED]

[REDACTED] | Judicial Appointments Commission |

M: [REDACTED]  
[www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk) | [LinkedIn](#) | [Twitter](#) |



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**From:** FOIA <FOIA@judicialappointments.gov.uk>  
**Sent:** 12 April 2024 09:49  
**To:** icocasework  
**Cc:** FOIA  
**Subject:** Deadline Extensions

Good morning [REDACTED]

**RE: IC-278867-L1C2 and IC-267125-Q5P5**

Please accept my apologies that the JAC have had to delay our response to these investigations.

We had hoped to be able to meet the deadline of 11 April 2024. However, our lawyers are currently reviewing our response drafts.

I apologise for any inconvenience caused and will update you as soon as the lawyers return. We expect this to be today or early next week.

**Kind regards,**

[REDACTED]  
[REDACTED] | Judicial Appointments Commission | **M:**

[www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk) | [LinkedIn](#) | [Twitter](#) |



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**From:** icocasework <icocasework@ico.org.uk>  
**Sent:** 09 April 2024 08:41  
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**Subject:** Your email to the ICO - Case Reference IC-267125-Q5P5

9 April 2024

Case Reference: IC-267125-Q5P5

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Yours sincerely,

[Redacted]  
[Redacted]

Information Commissioner's Office

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

T. [Redacted] [ico.org.uk](http://ico.org.uk) [twitter.com/iconews](https://twitter.com/iconews)

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Morning [Redacted]

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Kind regards,

[Redacted] | Judicial Appointments Commission | M:  
[Redacted]

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---

**From:** icocasework <icocasework@ico.org.uk>

**Sent:** 04 March 2024 16:15

**To:** FOIA <FOIA@judicialappointments.gov.uk>

**Subject:** ICO Case Reference - IC-267125-Q5P5

4 March 2024

**Case Reference: IC-267125-Q5P5**

Dear JAC

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information from the same complainant, which are being handled under this one case reference.

Please see my attached correspondence.

Yours sincerely

[Redacted signature]

Information Commissioner's Office

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

T. [Redacted] F. [Redacted] [ico.org.uk](http://ico.org.uk) [twitter.com/iconews](https://twitter.com/iconews)

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## Email

# Your email to the ICO - Ca...

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



## Email

### From

ICO Casework

### To

foia@judicialappointments.gov.uk

### Cc

### Subject

Your email to the ICO - Case Reference IC-278867-L1C2

### Display Name

ICO to PA - email ack re extension request etc

### Date Received

15/04/2024 11:52

### Email Address

**15 April 2024**

**Case Reference: IC-278867-L1C2**

Dear

**Thank you for your prompt reply – I didn't receive your email from Friday.**

**I note that you have requested a short extension and that you are aiming to provide your investigation response early this week.**

**Yours sincerely**

**Information Commissioner's Office**

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## Email

# RE: Your email to the ICO ...

Regarding

Worked By

Status Reason

R...



Activity Marker



E... Direction



I...



## Email

**From** foia@judicialappointments.gov.uk

**To** ICO Casework

**Cc** foia@judicialappointments.gov.uk

**Subject** RE: Your email to the ICO - Case Reference IC-278867-L1C2

**Display Name** PA to ICO - cover to inv response

**Date Received** 18/04/2024 10:25

**Email Address** "FOIA" FOIA@judicialappointments.gov.uk

External: This email originated outside the ICO.

**Good morning** [REDACTED]

**Thank you for your patience whilst approvals were sought.**

**Herewith our response to this investigation.**

**Please let me know if you require anything further.**

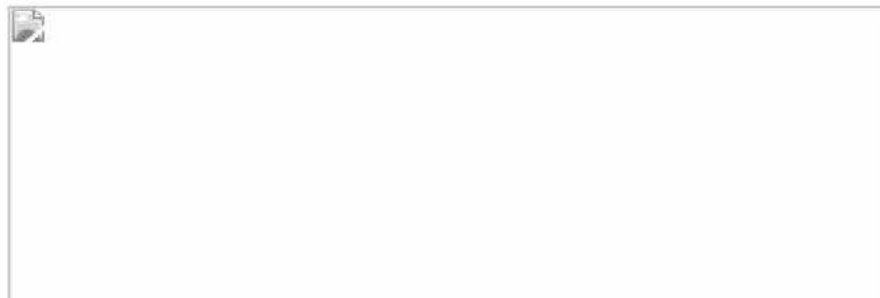
**Kind regards,**

[REDACTED]

[REDACTED] | **Judicial Appointments Commission** |

**M:** [REDACTED]

[www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk) | [LinkedIn](#) | [Twitter](#) |





**Judicial Appointments Commission**  
5<sup>th</sup> Floor  
Clive House, 70 Petty France  
London  
SW1H 9EJ

E [REDACTED]@judicialappointments.gov.uk

M [REDACTED]

<https://www.judicialappointments.gov.uk>

**Official Sensitive**

[REDACTED]

Via e-mail: icocasework@ico.org.uk

17 April 2024

Dear [REDACTED]

Thank you for your email dated 26 March 2024 in which you set out the parameters of your Information Commissioner's Office (ICO) investigation.

**Question 1**

The requester made the following request at Question 1:

- (1) There were several cases in which the exemption in s.36 of the FOIA was used without there being any person authorised to issue a QP's opinion. Please provide the following information:*
- (a) Has the Information commissioner [IC] been informed of this?*
  - (b) If he has been 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 send your response to this request., including any advice or guidance given to the JAC by the IC to remedy these situations.*
  - (d) If he 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.*
  - (e) If the IC were not informed, please state why. If this was based on advice received from the JAC's lawyers, please provide details of that advice.*

The FOI response stated the following:

*The Information Commissioner (IC) is aware of the JAC's position. However, this information is considered exempt from disclosure under section 32(1) of the FOIA. This exemption is due to it being held in a court record.*



*Section 32(1) protects information from disclosure if it is held in the custody of the court for the purposes of proceedings in a specific cause or matter. Presently, a matter related to your request is under consideration in the First Tier Tribunal. Regarding question 1(e), in addition to the application of the s.32 exemption, legal advice is also exempt from disclosure under section 42(1) of the Freedom of Information Act.*

Following a request for internal review, the internal reviewer supported the initial FOI response and explained that the ICO was informed of the issue with regard to s.36 authorisation by the appellant in extant proceedings in the First-Tier Tribunal (General Regulatory Chamber). The ICO provided a submission to the Tribunal explaining its position on that issue, in advance of the hearing in September 2023.

The internal reviewer noted that based on the answer to question 1(a), that question 1(e) does not arise. The review confirmed that the JAC does not hold legal advice in a recorded format in relation to this matter. However, the reviewer did consider the public interest test and found that the public interest in maintaining legal professional privilege would outweigh the public interest in disclosure in the circumstances of this case.

Having reviewed both the initial FOI response and the subsequent internal review response, I find that the JAC's application of the section 32(1) exemption was correct. It is noteworthy, and you will no doubt be aware, that the court case referred to by the requester is still ongoing.

For the avoidance of doubt, there is no recorded legal advice in relation to question 1(e), as stated in the internal review response. Based on the format of the request, question 1(e) does not actually arise as a request. Therefore, a section 42 exemption is not necessary. However, I have reviewed the application of the public interest test and find it to be applied correctly.

## **Question 2**

The requester made the following request at Question 2:

*(2) In respect of the cases where QPs were issued without authorisation, please state:*

*(a) whether the requesters have been informed of this and, if so, how?*

*(b) if they were informed in writing, please provide me with all the communication passing by or on behalf of the JAC and the requesters.*

*(c) if they were informed orally, please state when and what they were told and any communication (whether oral or in writing) passing by or between the JAC and the requesters.*

The FOI response stated the following:

*Q(2)(a): The FOIA does not mandate a public authority to create information in response to a request if the requested information is not already recorded. This question does not appear to be a request for recorded information or documents and therefore, there is no requirement to create information in response to this request.*

*Q(2)(b): In relation to this question, the JAC do not hold any information in the scope*

*of your request.*

*Q(2)(c): As above, the JAC do not hold any information in the scope of your request and there is no requirement to create information in response to this request.*

Following a request for internal review, the reviewer supported the initial FOI response. Having reviewed the initial FOI response and the subsequent internal review response. I find the questions to have been answered correctly.

### **Question 3**

The requester made the following request at Question 3:

*(3) Has the JAC disclosed the above matters to:*

*(a) the JAC commissioners or any single JAC commissioner, whether at any formal or informal meeting? If so, please provide all relevant documents, including copies of the minutes of any meeting.*

*(b) If the answer to the question in (a) is "NO", please state why not?*

The FOI response stated the following:

*Q(3)(a): Regarding your query at Q(3)(a), the JAC commissioners are aware of the JAC's position. This information is typically shared during the JAC board meetings. The minutes of these board meetings are accessible on our website at the following: (<https://judicialappointments.gov.uk/about-the-jac/board-minutes/>).*

*However, it is important to note that the JAC does not document any discussions or details related to legal matters during these board meetings. This specific segment falls under legal privilege, and consequently, any discussions about ongoing litigation are not included in the published meeting minutes available on our website. It is essential to clarify that there is no obligation under the FOIA to generate information that was not recorded in the minutes.*

*Q(3)(b): This question is not a request for recorded information and is, therefore, outside the scope of the FOIA.*

The internal review agreed with the FOI response and also noted that question 3(b) was obsolete given the answer at question 3(a). Having reviewed the initial FOI response and the subsequent internal review, I find that the JAC responded correctly to this question.

### **Question 4**

The requester made the following request at Question 4:

*(4) Does the JAC consider it is required to inform any other body about the matters referred to above, such as the Ministry of Justice? If it is, please provide evidence that it has.*

The FOI response stated the following:

*Regarding your query at Q(4), the first part of your question pertains to general policy*

*decisions rather than a request for recorded information. There is no requirement to create information in order to respond to this request.*

*However, I can confirm that the Ministry of Justice are aware of the JAC's position and I provide the supporting email chain and a submission made to the then relevant Minister by the Ministry of Justice in relation to the granting of the authorisation. The submission is a PDF titled "submission". The email, which relates to communication between the JAC and officials within the MoJ, is a PDF titled "emails". The individual names of staff have been redacted and where there is specific legal advice, that has been withheld under Section 42(1) of the Freedom of Information Act.*

The internal reviewer agreed with the initial FOI response that the request at question 4 is not a request for recorded information but rather a general policy question. The internal review confirmed that organisations are not required to answer a question if they do not already have the relevant information in a recorded form. Whilst the internal reviewer recognised the importance of transparency and accountability, it stated that protecting the principle of legal professional privilege is also in the public interest and ultimately concluded that the public interest test favoured maintaining legal professional privilege.

I would also add that legal entitlement to free and frank legal advice persists irrespective of the Qualified Person authorisation status, and that there is no time limit on the use of legal professional privilege.

Having reviewed the initial FOI response and subsequent internal review, I find that, in order to be as helpful as possible, the JAC made disclosures in the initial FOI response that were not specifically requested. I have attached the unredacted information as requested. However, please note that the JAC maintain that section 42 is engaged in relation to this.

### **Question 5**

The requester made the following request at Question 5:

*(5) If the JAC has obtained legal advice in relation to the above, please provide full details of that advice*

The FOI response stated the following:

*For the avoidance of doubt, in relation to Q(5), it is important to clarify that legal advice falls under the exemption from disclosure according to section 42(1) of the Freedom of Information Act. Consequently, details regarding any legal advice cannot be provided.*

The internal reviewer agreed with the response provided in the initial FOI. The reviewer went on to outline that, in this case, the public interest in maintaining legal professional privilege outweighs the general public interest in transparency and accountability.

Again, I will add that legal entitlement to free and frank legal advice persists irrespective of the Qualified Person authorisation status, and that there is no time limit

on the use of legal professional privilege. I provide the requested withheld information within scope of this request.

**FOI response timescale:**

I can confirm that the FOI response was late. The initial FOI response was due to be sent to the requester by 26 October 2023. The requester was informed on 19 October 2023 that our response would be delayed, an apology was offered and the requester was informed that they could expect a response on 3 November 2023. On 3 November 2023, the requester was informed that our response would be delayed, again an apology was offered and the requester was informed that they could expect a response by 8 November 2023. The response was sent on 8 November 2023.

The internal reviewer also noted that the FOI response was delayed and apologised on behalf of the JAC.

The delay was due to the fact that given the complex nature of the request and ongoing litigation, the JAC sought legal advice before sending the response.

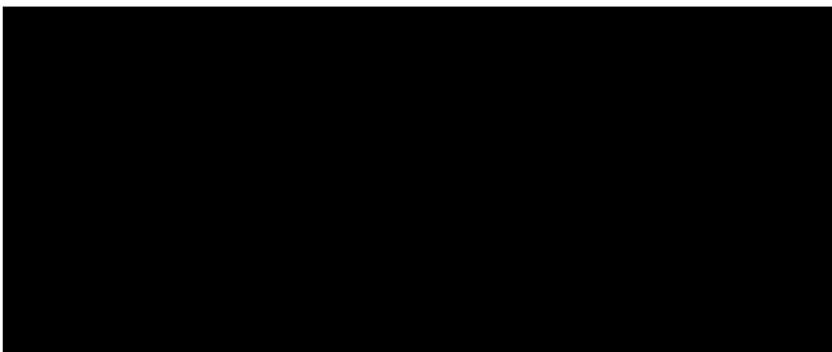
The request for internal review was made on 10 November 2023, on 8 December 2023, the internal reviewer contacted the requester and noted that the requester could expect a response by 22 December 2023. The internal review response was provided on 21 December 2023. The JAC note that ICO guidelines suggest an internal review should be responded to in 20 working days. However, it is also noted that:

*There may be circumstances where you require more time to complete an internal review, for example if you need to address complex issues, consult with third parties or consider substantial amounts of information.*

*In these circumstances you should inform the requestor that you will need more time and provide a reasonable target date. This should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary.*

I can confirm that this internal review involved complex issues and consult with our legal advisers. Therefore, the requester was informed of an adjusted timeline, not in excess of 40 working days from the date of the internal review request.

Yours sincerely,



## Email

# Your email to the ICO - Ca...

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



## Email

From

ICO Casework

To

foia@judicialappointments.gov.uk

Cc

Subject

Your email to the ICO - Case Reference IC-278867-L1C2

Display Name

ICO to PA - email ack of receipt of inv response etc

Date Received

22/04/2024 08:40

Email Address

**22 April 2024**

**Case Reference: IC-278867-L1C2**

Dear

**I've received the JAC's investigation response, withheld information and unredacted emails, thank you. I'll review them in detail and contact you should I need to.**

**Yours sincerely**

**Information Commissioner's Office**

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Email

# URGENT please - incomplete investigation re...

Regarding

IC-278867... Worked By

Status Reason

Sent



Activity Marker

Direction

Outgoing

Email

**From** ICO Casework

**To** [Redacted]

**Cc** foia@judicialappointments.gov.uk

**Subject** URGENT please - incomplete investigation response - ICO Case Reference: IC-278867-L1C2

**Display Name** ICO to PA - need full inv response

**Date Received** 23/04/2024 12:02

**Email Address**

23 April 2024

Case Reference: IC-278867-L1C2

Dear [Redacted]

I've started drafting the decision notice in this case and have also left you a voicemail. Your investigation response addresses each part of [Redacted] request, but doesn't answer the majority of questions I asked in the attached investigation letter, namely the section 1 do not hold, sections 8, 16 and part of section 32 questions. Please can you reply and have these with me by the end of this week.

My voicemail was left before I'd read the investigation response in any detail – for part 1(e) you've said no recorded legal advice is held, but then you've gone on to uphold the public interest arguments for section 42 which doesn't make sense – an exemption and PIT considerations can't be applied to information that is not held. You'll need to respond to the section 1 do not hold questions for part 1(e) please.

[Redacted] thank you.

Yours sincerely

[Redacted]

Information Commissioner's Office

[Redacted]

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ATTACHMENTS

File Name	Followed	File Size (Byte...)	
ICO to PA - initial investigation lett...	No	394,365	
PA to ICO - investigation response ...	No	1,367,160	

1 - 2 of 2 (0 selected) Page 1

Email

# URGENT PLEASE - Remin...

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



Email

From

ICO Casework

To

foia@judicialappointments.gov.uk; [REDACTED]

Cc

Subject

URGENT PLEASE - Reminder for reply - ICO Case Reference: IC-278867-L1C2

Display Name

ICO to PA - reminder/threat of IN

Date Received

29/04/2024 08:38

Email Address

**29 April 2024**

**Case Reference: IC-278867-L1C2**

Dear [REDACTED]

**I haven't received any response from you as to whether you intend to respond in full to my investigation letter relating to [REDACTED] complaint.**

**If I haven't heard from you by midday today, I will have no option other than to issue an information notice which will compel the JAC to respond; thank you.**

**Yours sincerely**

**Information Commissioner's Office**

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ATTACHMENTS

File Name

Followed

File Size (Byte...)



Email

# Your email to the ICO - Ca...

Regarding

Worked By

Status Reason

S...



Activity Marker



Direction



O...



Email

From

ICO Casework

To



Cc

Subject

Your email to the ICO - Case Reference IC-278867-L1C2

Display Name

ICO to PA - email ack

Date Received

29/04/2024 12:06

Email Address

**29 April 2024**

**Case Reference: IC-278867-L1C2**

Dear

**Noted, thank you.**

**Yours sincerely**



**Information Commissioner's Office**



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----- Original Message -----

External: This email originated outside the ICO.

**Good morning,**

**The JAC plan to respond in full to each of the points raised in your investigation letter.**

**You will appreciate that, given the complex nature of this particular request, we will need to ensure our response is approved by senior leaders and our legal advisers.**



**We hope to have a fully approved response for you by Friday 3 May. If we are able to provide you with a response sooner, we will do so.**

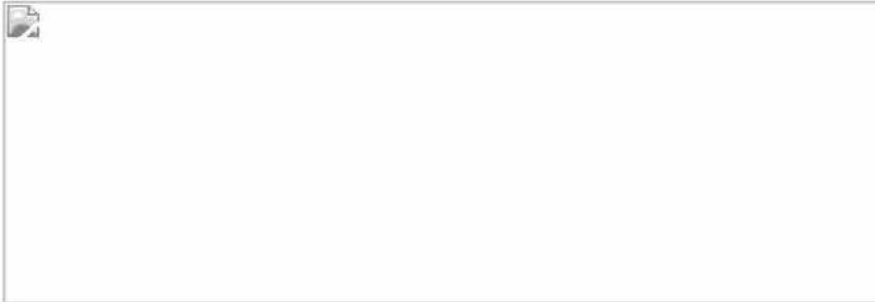
**Kind regards,**

[Redacted]

[Redacted] | **Judicial Appointments Commission** |

**M:** [Redacted]

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