

19 April 2024

IC-296836-K4G1

Request

"We noted with interest your Review of Femtech, and your follow on blog on the 8th of Feb 2024 which provided a brief insight into the findings of this Review. I am writing to ask whether the full results of the Review are going to be made public, or whether it might be possible to get access to (an anonymized) version of these for research purposes?"

We received your request on 20 March 2024.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

Our response

We have considered your request to be for the internal report about our review of fertility apps. We can confirm we hold this information.

Please find attached our final report.

You will note that redactions have been made. We have withheld the following information:

- Specific details of our investigation;
- Names of the apps we investigated, along with any information that could identify them;
- The section on our engagement with stakeholders;
- Sections that would reveal sensitive information about our investigation.

This information has been withheld under the exemptions at sections 31 and 44 of the FOIA. We explain this in further detail below.

We hope the information we have been able to provide is helpful to you.

FOIA section 31

Some of the information is exempt from disclosure under section 31(1)(g) of the FOIA. This is an exemption relating to information which, if disclosed, would or would be likely to cause prejudice to our ability to regulate the laws we oversee.

Specifically, 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)."

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 ..."

Clearly, these purposes apply when the Information Commissioner is considering whether or not data controllers have met their obligations in respect of data protection legislation.

The exemption at section 31 is not absolute, and we must therefore consider the prejudice or harm which may be caused by disclosure of the information you have sought, as well as applying a public interest test by weighing up the factors in favour of disclosure against those in favour of maintaining the exemption.

We find that disclosure would be likely to prejudice our ability to conduct investigations in the future. The redacted information contains detailed information about our investigatory process and about our engagement with specific named apps. Disclosure of this information would be likely to damage our relationship with data controllers and would reveal information that data controllers could use to evade our regulatory powers.

The public interest factors in disclosing this information are:

- Transparency in the way we have carried out our investigation;
- Transparency in the way apps have responded to our enquiries;
- The public interest in assisting with research in an area of interest to the wider public.

The public interest factors in withholding the information are:

- It is important that we maintain the trust of organisations when engaging with us on investigations such as this one;
- There is public interest in organisations feeling like they can be open and honest with us without fear their comments will be made public;
- The public interest in not revealing the specific investigatory approach we tool and tools that are available to us. Knowledge of this information could lead organisations to evade future investigations.

Having considered these factors we have taken the decision that the public interest favours disclosure.

FOIA section 44 (& DPA s132)

Information provided to us by external stakeholders has been withheld under the provisions of section 44 of the FOIA which places prohibitions on disclosure. This exemption is an absolute exemption, which does not require a consideration of the public interest test of the type required by the qualified exemptions.

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'

The enactment in question is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act. This 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 the circumstances in which a disclosure can be made with lawful authority, however we find that none of them apply here. As a result the information is exempt under the FOIA and withheld from our response.

Next steps

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

You can read a copy of our full [review procedure](#) on our website.

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint](#) through our website.

Your information

Our [privacy notice](#) explains what we do with the personal data you provide to us, and sets out [your rights](#). Our [Retention and Disposal Policy](#) details how long we keep information.

Yours sincerely



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