

26 April 2024

IC-296932-L3T7

Request

You asked us for:

"1 - A copy of documents, emails, or analysis conducted by the ICO; or materials relied upon and/or considered by the ICO in creation of DPIA's - in relation to your processing of data under Part 3 of the Data Protection Act 2018 using Microsoft Cloud Services which indicates or evidences that Microsoft shall or shall not process any personal data outside of the UK - including any transfers conducted for support purposes or as a function of their provided software and services.

AND;

2 - A copy of documents, emails, analysis conducted by the ICO or the DESC parties which have been disclosed to you, or similar information in your possession which indicates or evidences that Microsoft may process DESC related personal data outside of the UK - or conduct transfers for support purposes or as a function of their provided software and services.

AND;

3 - A copy of any guidance provided by the ICO to the DESC partners re their processing of personal data for a Law Enforcement purpose for the DESC project if this has been issued, or an expected date of publication if the ICO intend to publish this."

We received your request on 27 March.

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

Our response

We do hold information within the scope of your request.

- 1) Please find attached information that we hold in respect of this part of your request.

Some information has been withheld, which is correspondence between our internal legal department and the Commissioner's private office in which confidential legal advice was sought and provided in respect of the use of Microsoft Cloud Services by the ICO for law enforcement purposes. This information is exempt pursuant to s.42 FOIA.

Some redactions have also been made pursuant to s.40(2) FOIA, this is the personal data of third parties. Further explanation of this is provided below.

- 2) Please find attached information that we hold in respect of this part of your request.

Some information has been withheld, which is correspondence between our internal legal department and the ICO Scotland Office and between our internal legal department and Commissioner's private office concerning advice that the ICO intended to provide to the partners of the DESC project about the use of Microsoft Cloud Services for law enforcement purposes. This information is exempt pursuant to s.42 FOIA.

Additionally, some documents provided to us by Police Scotland, and some correspondence that we received from the Scottish Police Authority in the course of our providing them with advice as the regulator, have been withheld, as we are legally prohibited from disclosing them under s.132 DPA and they are therefore exempt from disclosure under s.44 FOIA.

Some redactions have also been made pursuant to s.40(2) FOIA, this is the personal data of third parties. Further explanation of this is provided below.

- 3) Some information which potentially falls within the scope of this part of your request is included within the bundle for question two as these categories overlap. Additionally, I attach copies of advice distributed to the

DESC partners by the ICO on 4 April. This is technically out of scope as it post-dates your request, but we have provided it by way of advice and assistance and in the interests of transparency. The copy provided was sent to Police Scotland, but the same letter was sent on the same date to all of the DESC partners, being Police Scotland, the Scottish Police Authority, the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and the Scottish Government. It was also copied to the Scottish Biometrics Commissioner.

S.42 FOIA

I can confirm that we hold some information which is subject to legal professional privilege and is withheld from our response in accordance with section 42 of the FOIA.

Section 42(1) of the FOIA states:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

There are two types of privilege covered by the exemption at section 42. These are:

- Litigation privilege; and
- Advice privilege.

We find that the information in scope of your request is subject to advice privilege. This covers confidential communications between the client and lawyer, made for the purpose of seeking or giving legal advice.

The issue of the use of cloud services for law enforcement purposes has raised complex legal concerns requiring detailed analysis. As a result, there has been lengthy and in-depth discussions between the ICO departments conducting this work and the ICO's internal legal advisors to ensure that the ICO is able to adequately advise data controllers including the DESC partners, as well as ensure that the ICO is suitably advised in respect of its own processing.

These confidential discussions have been ongoing since the ICO first became aware of the issue in 2022 and have continued up to April 2024, when the ICO issued its formal advice to the DESC partners, which it was unable to provide until that time due to the complex nature of these discussions.

Section 42 is not an absolute exemption, so we must consider whether the public interest favours withholding or disclosing the information.

The factors in favour of lifting the exemption include:

- The public interest in the ICO being open and transparent;
- The public interest in transparency about the issues raised around using cloud services for law enforcement purposes, which has attracted media attention;
- The inherent public interest in issues around how law enforcement bodies process personal data.

With the public interest factors in favour of maintaining the exemption including:

- The disclosure of legally privileged information threatens the important principle of legal professional privilege;
- Maintaining openness in communications between client and lawyer to ensure full and frank legal advice;
- The disclosure of legal advice could have a chilling effect on both policy officers and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public;
- The advice is recent and relates to matters which are still live in that the ICO is still being approached for advice on this topic by data controllers and will continue to refer to the legal advice it has received on this topic in order to assist them.

Taking into account the above factors we conclude that the public interest lies in maintaining the exemption.

s.44 FOIA

Some information has been withheld under section 44 of the FOIA.

Section 44(1)(a) states;

'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment'

The enactment in question is the Data Protection Act 2018. Section 132(1) of part 5 of that Act states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

(b) relates to an identified or identifiable individual or business, and

(c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources,

unless the disclosure is made with lawful authority."

The withheld information was provided to us by Police Scotland and the Scottish Police Authority in support of their seeking advice from the ICO as the data protection regulator, they are identifiable from it, and we do not have lawful authority to disclose it.

Section 132(2) lists circumstances in which a disclosure can be made with lawful authority, however none of them apply here. As a result the information is exempt from disclosure.

s.40(2) FOIA

You will see that some of the third-party personal data has been redacted in our response.

Section 40(2) of the FOIA exempts information if it is personal data belonging to an individual other than the requester and it satisfies one of the conditions listed in the legislation.

We find that the condition at section 40(3A)(a) applies in this instance: that disclosure would breach one of the data protection principles. The principles are outlined in the General Data Protection Regulation (GDPR) with the relevant principle on this occasion being the first principle as provided by Article 5(1): that personal data shall be processed lawfully, fairly and in a transparent manner.

We do not consider that disclosing this information into the public domain is necessary or justified. There is no strong legitimate interest that would override the prejudice to the rights and freedoms of the relevant data subjects. We have therefore taken the decision that disclosing this information would be unlawful, triggering the exemption at section 40(2) of the FOIA.

This concludes 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



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