Upholding information rights

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Internal Review: IC-313521-W6Q9

I write further to your email of 12 July 2024, in which you expressed dissatisfaction with the response to your recent information request, processed under case reference IC-313521-W6Q9.

I am a Senior Information Access Officer in the Information Access Team. I can confirm that I have had no prior involvement in the handling of this request. My role is to review the application of the Freedom of Information Act (2000) FOIA in relation to your request.

Section 45 of the Freedom of Information Act 2000 (FOIA) requires the publication of a code of practice, designed to assist public authorities handle requests under the FOIA.

This guide recommends that public authorities put in place an internal review process for FOIA responses, which our guide suggests should be triggered whenever a requester expresses dissatisfaction with the outcome of a request they have made.

Request and response

You requested the following information:

1. *Correspondence sent by the ICO to Meta, regarding Meta's plans to use Facebook and Instagram user data to train generative AI.*
2. *Correspondence received by the ICO from Meta, confirming that Meta is pausing its plans to use Facebook and Instagram user data to train generative AI. (Regarding S.132 DPA2018: The fact that Meta is pausing its plans is already in the public domain, further and alternatively there is a strong public interest in properly understanding what Meta is doing with user data under the UK GDPR transparency principle)*
3. *Correspondence sent by the ICO to Meta, regarding Meta's use of WhatsApp user data to train generative AI*

The request handler confirmed that we hold information within scope of the first two points of your request, and that this had been withheld in accordance with Section 44 of the FOIA and Section 132 of the DPA.

Review

The purpose of this review is to look again at your request and the response that was provided to you, to ensure it was correct, that any exemptions applied were appropriate and that any concerns are addressed.

I note that in your email you raised two points, each of which I will address below.

In your response, I note you refer to withholding information that is "inextricably connected" to some other information that Meta has provided to the ICO. However, having checked S.132 DPA2018 and in particular the passage you cited, I am unable to find any reference to this "inextricable connection" test. Please could you advise which particular legislative provision or judicial authority you rely on to withhold information that is merely "inextricably connected" to other information that has been provided to the ICO? It seems to me that correspondence sent by the ICO to Meta cannot possibly solely consist of information provided by Meta to the ICO, although some parts of such correspondence may fall within scope of S.132 DPA2018 and could be redacted.

There is not an 'inextricable connection' test in the legislation. As I understand it, the request handler is referring to the fact the information that relates to Meta cannot be readily redacted in the way that you describe, given the extent to which it is contained within the ICO's correspondence. Having checked the information in scope, I agree with the request handler that the majority of this correspondence relates to Meta or information they have provided, and that Section 44 has been correctly applied to this information.

I have reviewed the application of the exemption in full below.

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'

Section 44 is an absolute exemption, and it allows a public authority to withhold information when disclosure is prohibited by or under any enactment. In the

response, the request handler explained that section 132(1) of the Data Protection Act 2018 (DPA), which governs confidentiality of information provided to the Information Commissioner, applied in this instance.

The enactment in question is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act.

In respect of the conditions at s132(1):

• The information was provided to the Commissioner in order to carry out his role as regulator of the Information Acts.
• The information relates to an identifiable business
• The information is not, and was not previously, publicly available from other sources.

The information requested meets these criteria, so we cannot disclose the information unless we can do so with lawful authority. I am satisfied that the criteria above are met in this instance.

Section 132(2) of the DPA18 provides conditions in which disclosure could be made with lawful authority. I have considered each in turn, below.

"(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,"

We do not have consent to disclose the requested information.

"(b) the information was obtained or provided as described in subsection (1)(a)for the purpose of its being made available to the public (in whatever manner)"

The information was not obtained by or provided to the Commissioner as part of his regulatory role in order to make it available to the public and for this reason we are treating it as confidential.

"(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions"

Disclosure is not considered necessary in order to fulfil any of the Commissioner's functions at this time.

"(d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation"

Gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union.

"(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising"

Disclosure would not be for the purposes of criminal or civil proceedings.

"(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

While I appreciate that there is a public interest in how the ICO works with data controllers to promote compliance, there is also a public interest in the ICO being able to work effectively with such organisations. This requires their cooperation and trust. If we were to routinely consider for disclosure all correspondence exchanged with organisations (without consent) in relation to compliance, this would be outside their reasonable expectations, and may also be detrimental to any ongoing engagement work – not only with that particular organisation, but also with others. This could undermine trust in our processes more broadly. This is particularly important here, where the organisation has approached the ICO proactively, and it is in the public interest to encourage organisations to do this without fear that our correspondence with them will be routinely disclosed.

Section 132(3) imposes a criminal liability on the Commissioner and his staff not to disclose information relating to an identifiable individual or business for the purposes of carrying out our regulatory functions, unless we have the lawful authority. The right of access under the FOIA is not sufficient to override these important factors. I do not consider that we have a lawful authority to disclose this information to you. We do not have consent to disclose this information and do not have another legal gateway to make this information available to you.

To the extent that any of the correspondence that falls within scope does not directly reference Meta or information they have provided (which in my opinion is minimal) I consider that the exemption at Section 31(1)(g) applies. This is because disclosing details about our engagement with them in relation to the topics cited in the request (including the nature, extent and timing of our correspondence) could be prejudicial to our regulatory work.

In particular, 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:

- the purpose of ascertaining whether any person has failed to comply with the law, and
- the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

These purposes apply when the Information Commissioner is considering whether or not a data controller has complied with its obligations as laid out in data protection legislation.

I am satisfied that section 31(1)(g) is engaged in respect of some of the information you have requested, as disclosure of this information would be likely to prejudice our ability to effectively carry out our regulatory function.

When data controllers engage proactively with the ICO, this means that we can work productively with them to promote compliance. Data controllers need to be confident that details of these interactions will not be made public unless it is appropriate to do so. If this is not the case, the effect could be detrimental to the efficacy of our regulatory functions, and may also jeopardise any regulatory action we decide to take in the future.

Disclosure of details about the nature, extent and timing of the ICO's communications with Meta in relation to the topics cited in the request, would be likely to prejudice our ability to engage productively with them in the future on these and other topics. It could also jeopardise the ICO's ability to discuss similar matters with other data controllers and is likely to result in other parties being reluctant to engage with the ICO more broadly.

Furthermore, routinely disclosing details about our correspondence with data controllers, particularly where they have contacted us proactively, would be likely to discourage open communication, making it more difficult to promote compliance and to regulate effectively.

Section 31(1)(g) is not an absolute exemption, and is therefore subject to a public interest test. This means we must consider whether the public interest

favours withholding or disclosing the information you have asked for. In this case the public interest factors in disclosing the information requested are:

- The understandable and legitimate interest of the public in understanding how the ICO is working with Meta in relation to the topics described in your request, including the nature and extent of any correspondence we have had with them
- Increased transparency in the way in which the ICO works with stakeholders

The factors in withholding the name of the data controller are:

- There is a strong public interest in the ICO not disclosing information relating to proactive engagement with specific data controllers unless it is appropriate to do so. If this information is routinely disclosed data controllers may be less willing to contact the ICO proactively in future
- There is also public interest in ensuring that data controllers engage with us fully and candidly—this applies to both current and future stakeholder engagement work. If there is concern that details of our engagement work will be routinely disclosed, this may inhibit open discussion.
- There is a public interest in ensuring that the ICO can work productively with data controllers more broadly. For example, if information relating to stakeholder engagement is routinely disclosed this may impact on our regulatory work at a wider level. Data controllers may be less likely to report concerns or engage with us openly during investigations for example, if they fear that information may be disclosed when it is inappropriate to do so.

Having considered these factors I have taken the decision that the public interest in withholding the information you have requested outweighs the public interest in disclosing it at this time.

With this in mind I do not consider that any of the correspondence can be disclosed, and that the exemptions at both Section 31 and Section 44 apply.

Meta has made a public blog post about pausing its plans to use user data to train its generative AI here: https://about.fb.com/news/2024/06/building-ai-technology-for-europeans-in-a-transparent-and-responsible-way/ Meta also confirms it has received specific requests from the ICO in that same post. It is therefore not clear to me why you say that information, merely confirming that Meta has paused its plans, is not in the public domain. I appreciate some other information in correspondence falling within scope of Question 2 may be covered

by S.132 DPA2018, however it seems to me that this can be redacted from the disclosure instead of disclosing nothing at all.

In this point you appear to be suggesting that as Meta has confirmed their engagement with the ICO on this matter, we should disclose any parts of our correspondence that relate to this. According to our guidance on this matter:

You should not conclude that you can disclose the requested information because there is already information or related information in the public domain. You need to make a decision on a case-by-case basis, depending on the exact content of the information and context of the disclosure.

And:

The key point to determine is whether the requested information would reveal anything new beyond what is already known to the public.

I am satisfied that the specific information you have requested from the ICO is not in the public domain, and that the details you have linked to do not provide a basis for us to disclose any parts of our correspondence in relation to this matter.

With this in mind I agree with the request handler that the information should be withheld in full. However, as mentioned above, I partially uphold your request for review on the basis that it can be argued that some (albeit minimal amounts) of the information may not be fully covered by the exemption outlined at Section 44. I am satisfied that Section 31(1)(g) covers the remainder. I appreciate that this outcome may be disappointing, and if you remain dissatisfied then I advise following the next steps outlined below.

Complaint procedure

If you are dissatisfied with the outcome of this review you can make a formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000. Please follow the link below to submit your complaint:

https://ico.org.uk/make-a-complaint/

Your rights

Our privacy notice explains what we do with the personal data you provide to us and what your rights are, with a specific entry, for example, for an information requester. Our retention policy can be found here.

Yours sincerely,

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