

12 September 2024

IC-325402-S9D7

Request

"I would like to make an FOI request about the Commissioner's decision to publish his intention to fine Advanced Computer Software Group Ltd. Please note that my request does not concern the investigation itself, just the decision to publicise the intention to fine.

1) who decided to publicise the decision?

2) recorded information that shows why the decision was taken - this should include notes of meetings or internal correspondence about the decision and in particular should include any recorded information that shows whether those making the decision consulted the Commissioner's "Communicating our Regulatory and Enforcement Activity Policy", and which of the specific criteria on pages 8 - 9 of that document was deemed to apply to this case
https://ico.org.uk/media/1890/ico_enforcement_communications_policy.pdf

We received your request on 14 August 2024.

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

Our response

We hold information in scope of your request.

The decision to publish was made by Stephen Bonner.

Please find attached two emails from Stephen Bonner that fall in scope of the second part of your request. Some redactions have been made, which we explain in further detail below.

The email of 1 August was written in response to legal advice. Please note that the subject line of the email states "subject to legal privilege" only because the email was written in response to legal advice. The unredacted information is not subject to legal privilege.

The legal advice has been withheld in full under section 42 of the FOIA.

Information withheld

FOIA Section 42

The email containing legal advice has been withheld in full 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.

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 a high-profile decision that we have chosen to publicise;
- the public interest in disclosing whether the ICO's policy on communicating regulatory action was a factor in the decision.

The public interest factors in favour of maintaining the exemption include:

- 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 clients and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public.

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

FOIA Section 40(2)

Some of the redacted information consists of personal data. The name of one member of staff has been redacted because they are not in a public-facing role. We have also redacted Stephen Bonner's mobile phone number. We find that disclosure of this information would breach the data protection principles of fairness and transparency, taking into consideration our policy of disclosing staff information. We do not find that disclosure of this information into the public domain is necessary for the purpose of this request.

FOIA Section 31

We have redacted one internal email address, and one sentence relating to the decision that references details of our investigation.

Disclosure of the email address would be likely to prejudice our ability to perform our regulatory functions. Disclosure would leave us vulnerable to phishing or other cyber-attacks, spam, or an increased volume of irrelevant correspondence which it would take us time to process.

Disclosure of information about the open investigation into Advanced Computer Software Group would be likely to prejudice our ability to conduct the investigation in an appropriate manner. It is likely that disclosure at this stage would discourage our ongoing discussions with Advanced Computer Software Group.

With this in mind, we have then considered the public interest test for and against disclosure.

In this case the public interest factors in disclosing the information are –

- increased transparency about a high profile investigation resulting in proposed regulatory action;
- increased transparency in the factors involved in our decision to publicise the notice of intent.

The factors in withholding the information are –

- the public interest in maintaining organisations' trust and confidence when dealing with the ICO;
- the public interest in the ICO being able to conduct investigations appropriately without information being prematurely disclosed;
- the public interest in organisations being open and honest in their conversations with us without concerns about information being prematurely disclosed.

Having considered all of these factors we have taken the decision that the public interest in withholding the information outweighs the public interest in disclosing it at this time.

FOIA section 44

Some information was provided to us by Advanced Computer Software Group and we do not have lawful authority to disclose it. The information 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