

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2016

Public Authority: Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

N.B: This decision notice concerns a complaint made against the Information Commissioner. The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. To avoid confusion 'ICO' has been used to denote the ICO dealing with the request, and 'Commissioner' when discussing the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the ICO for information that it received from the Financial Conduct Authority as part of an investigation into a complaint against that organisation. The ICO refused to disclose the requested information under section 44(1)(a) (prohibitions on disclosure) by virtue of the statutory prohibition in section 59 of the Data Protection Act 1998.
2. The Commissioner's decision is that the requested information is exempt under section 44(1)(a) and he requires no steps to be taken.

Request and response

3. On 21 August 2015 the complainant made a freedom of information request to the ICO which included the following statement:

"Following my telephone conversation with [a member of ICO staff] on 18th August 2015, I now submit a further request for the information being concealed from me, on the grounds that it is in the 'public interest' for that information to now be revealed."

4. The Commissioner understands that this was a request for information passed to the ICO following an earlier complaint the complainant had raised about the Financial Conduct Authority (formerly the Financial Services Authority), including what has been referred to as 'briefing notes provided to Lord Turner'. The complainant has requested this information from the ICO on previous occasions.
5. The ICO responded on 21 September 2015 when it explained that it was refusing the request because it considered it to be a repeated request within the meaning of section 14(2) of FOIA.
6. The complainant subsequently asked the ICO to carry out an internal review. In doing so he argued that the circumstances had changed since his earlier requests and there was a greater public interest in the requested information being released.
7. The ICO presented the findings of its internal review on 27 October 2015. It now acknowledged that section 14(2) had been wrongly applied. It explained that this section could only be relied on where the request is identical or substantially similar to a previous request and the public authority had complied with that request by either disclosing the information or confirming that the information is not held. However, the ICO confirmed that the information was still being withheld as it was exempt under section 44 of FOI by virtue of the statutory prohibition in section 59 of the DPA. The ICO also appear to have treated the request as a subject access request under the DPA. It said that to the extent that any of the information was personal data then it was exempt from the subject access provisions under the DPA exemption in section 31

Scope of the case

8. On 4 January 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner agreed that the scope of his investigation would be to consider whether the requested information was exempt under section 44(1)(a) of FOIA.

Reasons for decision

Section 44(1)(a) – Prohibitions on disclosure

10. Section 44(1)(a) provides that information is exempt if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment.
11. In this case the ICO has said that the relevant statutory prohibition is section 59 of the Data Protection Act 1998 (DPA). This provides that neither the Commissioner nor his staff shall disclose any information which:
 - (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,*
 - (b) relates to an identified or identifiable individual or business, and*
 - (c) is not at the time of disclosure, and has not been available to the public from other sources,*

unless the disclosure is made with lawful authority.
12. Section 59(2) states that there are five circumstances when the ICO could have lawful authority to disclose this type of information. The circumstances are:
 - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,*
 - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,*
 - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of –*
 - (i) any functions under this Act, or*
 - (ii) any Community obligation,*
 - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or*

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

13. The Commissioner has considered the withheld information and is satisfied that section 59 of the DPA applies. The information was clearly obtained by the ICO for the purposes of its investigation of the FCA (the Financial Services Authority as it was then) under the FOIA. The information relates to the FCA (and the former FSA) which is an identifiable business for the purposes of section 59 of the DPA. Finally, the Commissioner is satisfied that the information is not publicly available and therefore he finds that the statutory prohibition was correctly applied.
14. Section 59(2) allows the ICO to disclose information where it has lawful authority to do so. However, the ICO had said that none of these 'gateways' to disclosure applied in this case.
15. It said that section 59(2)(a) did not apply because it did not have the consent of the FCA to disclose the information. Regarding section 59(2)(b), it said that it was clear that the information was not provided for the purpose of its being made available to the public under any provision of the information Acts. For section 59(2)(c) it concluded that it was not required to disclose this information in order to discharge a function under the information Acts or a community obligation. As regards section 59(2)(d) it said that disclosure would not be for the purposes of any proceedings. It explained that proceedings in this context would mean proceedings to which the ICO was a party and it was not aware of any such proceedings.
16. Finally, it concluded that section 59(2)(e) would not provide a gateway to disclosure because in its view any arguments for disclosure would not override the confidentiality it owed to the FCA.
17. The complainant had focused his arguments on why the section 44 exemption did not apply on section 59(2)(e) and had provided detailed submissions on why he considered that disclosure would serve the public interest. It is important to stress at this point that the gateways to disclosure allow a public authority to disclose information at its discretion but it is not for the Commissioner to question how it exercised its discretion. This approach follows the binding decision of the Upper Tribunal in *Ofcom v Gerry Morrissey and the Information Commissioner GIA/605/2010*. That case considered the application of section 44 of FOIA and found (at §60) that when read together FOIA and the Communications Act did not extend the Commissioner's role to testing the reasonableness of Ofcom's decision not to publish the requested information. At §63 the Upper Tribunal says;

"In short the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of the FoI. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act"

18. This establishes that whilst it may be appropriate for the Commissioner to take into account whether or not (as a matter of fact) a public authority exercised its discretion to disclose in any particular case, it is not for him to question whether that discretion was applied correctly or not.
19. The Commissioner is satisfied that section 59(1)(a) applies and that therefore the information is covered by the statutory prohibition. The ICO, in response to the request, found that none of the gateways to disclosure were relevant in this case and the Commissioner is not required to question that reasoning. Therefore, the Commissioner must find that the section 44 exemption is engaged.
20. The complainant's arguments about the public interest in disclosure essentially challenge the way ICO should have used its discretion to disapply section 59 but the Commissioner cannot question that discretion in this decision notice. However, for the sake of completeness the Commissioner has considered the complainant's arguments that disclosure is necessary in the public interest.
21. The complainant clearly feels that disclosure would shed light on whether banks including Lloyds operated within insolvency law and that the public interest favours greater transparency and accountability in how the FSA and then the FCA carried out its regulatory functions. The Commissioner is also aware that the complainant is pursuing a criminal case related to the issues which led to his approaching the FSA and feels that the information will help him in his case.
22. The Commissioner has considered the complainant's arguments and whilst he is unable to discuss the contents of the withheld information in this notice he would say that having reviewed the information he finds that the arguments for disclosure carry less weight than he suggests. Certainly when balanced against the confidentiality the ICO owes to the

FCA and other public authorities, there is no compelling case for disclosure.

23. The ICO has explained that the public interest threshold in relation to this request is very high, not least because disclosure in contravention of section 59 by the ICO may constitute a criminal offence (under section 59(3) of the DPA). In the hearing of *Lamb v Information Commissioner EA/2009/0108*, the Information Tribunal stated:

Although a determination under section 59(2)(e) is based on a public interest test it is very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."

24. In this case there is clearly a public interest in allowing the ICO to receive information from the organisations it regulates in confidence. In responding to the request the ICO stressed that disclosing confidential information which it received for the sole purpose of adjudicating on a section 50 FOIA complaint, would have a significant and detrimental impact on its ability to investigate complaints and maintain the confidence of public authorities. The Commissioner agrees with its conclusion that there is a clear and significant public interest in not undermining the operation of the FOI regime.
25. The ICO explained that when investigating complaints it relies on the co-operation of 'complained about' organisations in responding to its enquiries. It said that if it were to release all the information it receives from them, this would be likely to deter them from voluntarily providing information, thereby prejudicing its ability to investigate complaints. It added that this was particularly relevant when it receives copies of information which has not been disclosed in response to an information request. In order to decide whether the information should have been disclosed, it will usually need to see it. Therefore, if it were to disclose this to a requester, this would negate the process and undermine the ability of a public authority or data controller to (legitimately) refuse to disclose information. It would also be more likely to make public authorities much more reluctant to entrust such information to the ICO in future, it said.

26. As the ICO has very clearly explained, disclosure of information which it receives during the course of an investigation would seriously undermine its regulatory functions. It is important to remember that in this case the complainant has already requested this information from the FCA and the Commissioner has ruled that the FCA was correct to withhold the information. It would be unreasonable and illogical if the FOIA were to allow requests to the ICO to become another route for applicants to obtain the information they want. As the ICO noted in its internal review, requests of this kind are an inappropriate use of FOIA. In the Commissioner's view any legitimate interest in disclosure is very heavily outweighed by the public interest in protecting the ability of the ICO to receive information in confidence from public authorities and data controllers.
27. The Commissioner has decided that the section 44(1)(a) is engaged by virtue of section 59 of the DPA.

Right of appeal

28. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Paul Warbrick
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SK9 5AF