

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 April 2017

**Public Authority:** Information Commissioner's Office

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

**Note:** This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

### Decision (including any steps ordered)

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1. The complainant has requested training materials used by the Information Commissioner's Office. The public authority provided the majority of the requested information but withheld information in its audit toolkit on the basis of section 36(2)(c) of the FOIA – that disclosing the information would prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that the ICO has correctly engaged the section 36(2)(c) exemption and the public interest favours maintaining the exemption. She requires no steps to be taken.

### Request and response

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3. On 15 June 2016, the complainant made a request to the Information Commissioner's Office ("ICO"). The ICO responded on 22 June 2016 asking for clarification of some parts of the request: copies of all information relating to how the ICO conducts information governance for itself and all information relating to practical steps the ICO takes to fulfil the aims set out in ICO Information Governance Strategy. The ICO explained these were broad requests that would cover a large volume of information and offered some advice and assistance in order to narrow the scope of the requests.
4. The complainant responded on 23 June 2016 and reformulated his request in the following terms:

***"ICO in-house training material***

*I wish to be provided with copies of all ICO in-house training material for staff relating to the Freedom of Information Act 2000 (FOIA), Environmental Information Regulations 2004 (EIR) and Privacy and Electronic Communication Regulations 2003 (PECR). In particular, I believe there is a workbook for both the FOIA and EIR.*

*I would also like to be provided with any training material the ICO holds which may have been provided by external training providers or other bodies*

***ICO Information Governance material***

*I no longer require any information in relation to information governance or ICO posts related to this activity.*

***ICO audit material***

*I appreciate that the audit guide provides an overview of the ICO's audit process but to clarify what I require, if a person is appointed to the role of Auditor or Lead Auditor at the ICO I very much doubt that they are handed only a copy of the audit guide to learn how to do their job, the ICO must provide additional material to their staff to aide them in learning and performing their audit job. Therefore I wish to be provided with this additional material."*

5. The ICO responded on 22 July 2016. With regard to the first part of the request for training materials, the ICO provided the training documents to the complainant with some information redacted under section 40(2). For the second part of the request – audit material – the core documents and training material were provided to the complainant. Some information was withheld under section 36(2)(c).

6. Following an internal review the ICO wrote to the complainant on 24 August 2016, specifically focusing on the information withheld from the audit material as set out in the request for an internal review. It stated that it upheld the decision to withhold this information on the basis of section 36(2)(c) of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 25 August 2016 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the ICO has correctly applied the provisions of section 36(2)(c) to withhold information, specifically the audit toolkits.

### **Reasons for decision**

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#### **Section 36 – prejudice to the effective conduct of public affairs**

9. The ICO cited section 36(2)(c), which provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The Commissioner's approach is that section 36(2)(c) should also be cited only where the prejudice identified would not be covered by any of the other exemptions in Part II of the FOIA.
10. This exemption can only be cited on the basis of a reasonable opinion from a specified qualified person. The qualified person in this case was the ICO's Deputy Commissioner.
11. The task for the Commissioner when deciding whether this exemption is engaged is to reach a conclusion on whether the opinion of the qualified person was objectively reasonable. This exemption is also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. As to whether this exemption is engaged, the first issue to cover here is whether this exemption was cited on the basis of an opinion from a qualified person. The ICO has stated that the exemption was cited on the basis of an opinion from its Deputy Commissioner. On this basis, the Commissioner accepts that the opinion was given by a valid qualified person.

13. The next step is to consider whether that opinion was reasonable. The ICO has supplied a copy of the submissions prepared for the qualified person in order to assist in the formation of their opinion. This shows that the reasoning for citing section 36(2)(c) was that the disclosure of the information in the audit toolkits would affect the effective conduct of data protection audits by the ICO and would therefore prejudice the effective conduct of public affairs.
14. The information in question is the audit toolkit which contains a number of questions to be asked by auditors. The submission advised the qualified person that disclosing this information would allow data controllers the opportunity to prepare answers in advance of an audit preventing the ICO from seeing an accurate picture of data protection compliance and undermining the ICO's work in improving compliance amongst data controllers.
15. The submissions to the qualified person also put forward the more general prejudice to the ICO audit function that would result from disclosure. It was argued that providing data controllers with all the tools to conduct a data protection audit would reduce the number of organisations agreeing to an ICO audit.
16. The submission advised the qualified person that prejudice *would* result through disclosure, rather than *would be likely* to result. Therefore there should be a real and significant likelihood of this prejudice occurring rather than a remote possibility. The question here is, therefore, whether it was reasonably objective for the qualified person to hold the opinion that there was a real and significant likelihood of prejudice occurring.
17. Having viewed the withheld information, the Commissioner recognises that the audit toolkit contains detailed information including example questions, testing strategies and evidence to be sought. Releasing this information would allow data controllers to undertake detailed preparations in advance of an ICO audit, allowing for staff to be briefed and policies to be added or amended. This would not allow the ICO to get an accurate view of data protection practices and would not be in the interest of either the data controllers or the ICO.
18. On balance, the Commissioner accepts that the qualified person's opinion in this case was objectively reasonable. The exemption provided by section 36(2)(c) is therefore engaged.
19. The next step is to consider the balance of the public interest. Having accepted that the opinion of the qualified person that prejudice would result was reasonable, the role of the Commissioner here is not to challenge or reconsider the conclusion on the reasonableness of that

opinion. Instead, her role is to consider whether the public interest in disclosure outweighs the concerns identified by the qualified person.

20. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to disclose information that would undermine the ability of the ICO to conduct audits without prejudice so that data protection compliance can be improved. In terms of how much weight this argument should carry; it will depend on the severity, extent and frequency of the prejudice occurring.
21. In this case, the Commissioner considers there is a genuine risk of the disclosure of this information altering the behaviour of data controllers who are being audited. A data controller with access to details of the questions, strategies and evidence that the ICO's auditors are trained to look out for would be likely to change its behaviour in order to achieve a favourable audit.
22. Accepting that disclosure would have a real risk of changing behaviours and result in the ICO being unable to obtain a true picture of data protection practices of data controllers; the Commissioner also accepts the argument that this would also prejudice both the data controllers by preventing them from getting an audit that will help improve their practices and would prejudice the ICO by inhibiting the drive to improve data protection practices in the sector. This would not be in the public interest as it is important that organisations have suitable data protection policies and processes in place to handle personal data in a fair, secure and accurate way. Disclosing information which might inhibit this would not be in the public interest.
23. Turning to factors in favour of disclosure of the information, the ICO has acknowledged there is a public interest in the disclosure of information which may add further transparency to the audit process.
24. The Commissioner notes that the ICO has disclosed all of the requested information, including information used as training material for auditors, and this does go some way to meeting the public interest in transparency. It is only that information which the ICO considers to be most likely to prejudice its ability to improve information rights practices which has been withheld.
25. The Commissioner, by accepting the exemption is engaged, has acknowledged there is a strong argument for withholding this information. She considers there is a strong possibility disclosing the remaining information would provide data controllers with an insight into the questions and strategies employed by ICO auditors, making it more difficult for the ICO to get a clear picture of an organisations data

protection practices and genuinely help to improve its handling of personal data.

26. As there are no compelling arguments for disclosing the information and there is one substantial and weighty argument in favour of maintaining the exemption, the Commissioner has concluded that in this case the arguments in favour of withholding the remaining information outweigh the arguments in favour of disclosure.
27. The Commissioner therefore concludes that the ICO has correctly withheld this information under section 36(2)(c).

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**