

Freedom of Information Act 2000

Decision notice

Date: 23 January 2018

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant made a request to the Cabinet Office for a copy of a 'DPA Breach Notification Form' it submitted to the Information Commissioner's Office (ICO). The Cabinet Office refused the request under section 31(1)(g) of the Freedom of Information Act 2000 (the Act) and that the balance of the public interest favoured maintaining the exemption.
2. The Commissioner's decision is that the Cabinet Office is entitled to refuse the request under section 31(1)(g) of the Act. No steps are required.

Terminology

3. For this decision notice, "the ICO" will refer to the organisation's functions as a regulator for the Data Protection Act 1998 (DPA) with the responsibility to assess allegations of potential data breaches; whereas "the Commissioner" will refer to the organisation's role under the Act to investigate the Cabinet Office's refusal of the complainant's request.

Request and response

4. On 12 December 2016 the complainant requested information of the following description:

"I would also be grateful to know the date when the Cabinet Office self-reported to the Information Commissioner and I would like to see a copy of that report."

5. On 12 January 2017 the Cabinet Office responded and provided the complainant with the date that it first contacted the ICO in relation the breach, and the date it provided the ICO with the 'DPA Breach Notification Form'. The Cabinet Office refused to provide a copy of the form under section 31(1)(g) of the Act, which permits public authorities to refuse a request where disclosure would prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The Cabinet Office confirmed that the functions in subsection (2) were 31(2)(a) – as disclosure would prejudice the ICO's ability to ascertain whether any person has failed to comply with the law – and 31(2)(c) – as disclosure would prejudice the ICO's ability to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. The Cabinet Office confirmed that the balance of the public interest favoured maintaining the exemption.
6. The complainant requested an internal review on 12 May 2017, following what he described as a period with "various delays" in the Cabinet Office's handling of his correspondence.
7. The Cabinet Office issued its internal review on 8 June 2017, in which it upheld the decision of its refusal notice to refuse the request under section 31(1)(g) of the Act.

Scope of the case

8. The complainant contacted the Commissioner on 4 July 2017 to complain about the way his request for information had been handled. Specifically, the complainant is concerned that the Cabinet Office is using public funds to potentially suppress information that would be of use to the general public.
9. The Commissioner considers the scope of the case to be whether the Cabinet Office is entitled to refuse the request under section 31(1)(g) of the Act. Should the Commissioner find that the exemption is engaged she shall determine the balance of the public interest.

Background to the case

10. The complainant was informed by the Cabinet Office that a data breach had occurred through one of its agents – Kimcell Ltd – and that he might be affected as a result. The complainant asserts that as a result of the breach his email account was compromised, and that he suffered a financial loss of £347.
11. The Cabinet Office provided the withheld information – the 'DPA Breach Notification Form' – to the ICO on 5 October 2016. The ICO concluded its investigation on 13 February 2017 and decided that no regulatory action was required, as the Cabinet Office had already taken steps designed to avoid a repeat data breach.

Reasons for decision

Section 31 – law enforcement

12. The relevant part of section 31 of the Act states that:

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

...

(2) The purposes referred to in subsection (1)(g) to (i) are –

(a) the purpose of ascertaining whether any person has failed to comply with the law,

...

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,"

13. The Cabinet Office refused the request under section 31(1)(g) on the basis that it would prejudice the ICO's ability to carry out its functions that come under section 31(2)(a) and 31(2)(c).
14. Section 31(1)(g) is a prejudice-based exemption. In order to determine whether section 31(1)(g) is engaged the Commissioner will need to be satisfied that the prejudice that is specified in the exemption either

would or would be likely to occur. Should the Commissioner be satisfied that the relevant prejudice would or would be likely to occur she shall then consider whether the public interest lies in disclosing, or in withholding, the requested information. In this decision, the Commissioner has considered the higher threshold of prejudice – ie that the relevant prejudice would occur.

Prejudice test

15. In order to determine whether disclosure would prejudice the cited functions the Commissioner will need to consider the following steps:
 - Whether one of the law enforcement interests protected by section 31 would or would likely be harmed by disclosure of the withheld information.
 - Whether the prejudice claimed is real, actual or of substance. Therefore, if the harm was only trivial, the exemption would not be engaged.
 - Whether there is a causal link between the disclosure and the harm claimed.
 - What is the likelihood of the harm actually occurring is, ie would it occur?
16. In reaching her decision the Commissioner has considered the factors for the prejudice test when the Cabinet Office issued its refusal notice, which was 12 January 2017. This is in accordance with ICO guidance on the prejudice test.¹
17. The Commissioner is satisfied that the Cabinet Office cited the correct subsections from 31(2). The withheld information is a 'DPA Breach Notification Form' in which the Cabinet Office provides details of the breach and the steps it took to try and ensure the breach did not occur again. Under section 55A of the DPA the ICO may serve a civil monetary penalty upon a data controller for failure to comply with the data protection principles. The Cabinet Office submitted the form to the ICO so that the ICO could determine whether the Cabinet Office had failed to comply with the law, and if so whether regulatory action was required.

¹ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf see paragraph 40

18. Furthermore, the Commissioner is satisfied that the prejudice is real, and that there is a causal link between disclosure and the cited prejudice. The ICO considers that in order to carry out an effective, timely and efficient regulatory function it must have time to consider whether a breach of the DPA has occurred. In order to best achieve this it is required to keep the information confidential before any decision has been reached, so disclosure of the withheld information would impact on the ICO's ability to carry out an effective and timely investigation. Therefore, the Commissioner concludes that the prejudice is real, and there is a causal link between disclosure and the prejudice cited.
19. Finally, the Commissioner is satisfied that disclosure would cause the prejudice cited. The consideration of whether regulatory action is required is a sizeable part of the ICO's work. In the 2016/17 financial year the ICO received 2,565 self-reported incidents, and these came from a large number of data controllers across various sectors.² Were it to be known to that the notification forms would be disclosed in response to a request under the Act then it would impact upon the ICO's ability to carry out effective and timely investigations into potential breaches of the DPA.
20. The Commissioner has determined that disclosure of the requested information would prejudice the ICO's ability to ascertain whether any person has failed to comply with the law, and its ability to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. Therefore, section 31(1)(g) is engaged by virtue of the prejudice that would occur to subsections 31(2)(a) and 31(2)(c). As the Commissioner has found that the exemption is engaged she shall now consider the balance of the public interest test.

Public interest test

21. As the Commissioner based her considerations on the risk of prejudice occurring at the time of the Cabinet Office's refusal notice – ie when the Commissioner's investigation was still on-going – she must also base the public interest arguments at that time as well.

² <https://ico.org.uk/media/about-the-ico/documents/2014449/ico053-annual-report-201617-s12-aw-web-version.pdf>

Arguments to support disclosure of the withheld information

22. The complainant considers that the Cabinet Office is liable for his financial loss. He has stated to the Commissioner that he requires the withheld information in order to assist any legal action he might take against the Cabinet Office to recover this money.
23. There is a public interest in the ICO publishing information which would help to demonstrate that it is complying with its statutory duties by overseeing the performance of data controllers. The publication of this information would be evidence that the ICO is providing an appropriate standard and quality of public service, and would demonstrate accountability.
24. As the Cabinet Office is a public body funded by the UK Government, there is an inherent argument for transparency in knowing the extent of the Cabinet Office's data breach. Further, the steps it took to address the breach were sufficient in the ICO's view to negate the need for further regulatory action. Disclosure of the withheld information would provide transparency on what these steps were, and show how the Cabinet Office reacted to a potential failure to comply with the law.

Arguments to support maintaining the exemption

25. There is a strong public interest in allowing the ICO to be able to carry out detailed investigations into whether data controllers have not complied with the law, and whether further regulatory action is required. Releasing information vital to this investigation during an on-going investigation – or soon after a decision has been reached – would impede the ICO's ability to carry out its regulatory functions.
26. Section 59(1)(a) of the DPA states the following:

"(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

unless the disclosure is made with lawful authority."
27. The Commissioner considers that this section confers an expectation on data controllers that information supplied to the ICO in relation to potential data-breaches will be kept confidential whilst an investigation is on-going. The complainant's motive for obtaining the information is to resolve a personal grievance, which lacks the wider public interest that would be necessary to justify disclosure being made with "lawful authority".

28. The Commissioner notes the complainant's motive, but notes that were she to take legal action against the Cabinet Office in relation to the alleged financial loss then she would have rights of access under civil litigation disclosure. The Commissioner cannot say if the complainant would obtain the withheld information through this method, but it would ensure that the document was provided only to her and not to the world as it would happen through disclosure under the Act.

Balance of the public interest test

29. The Cabinet Office's notification form sent to the Commissioner shows that a sizeable number of individuals were potentially affected by the breach. The Commissioner acknowledges that there are arguments for transparency and accountability to show the extent of the breach, and what action the Cabinet Office took to resolve matters.
30. However, the Commissioner considers that the complainant's interest is very much a personal one. The complainant alleges that Cabinet Office is responsible for the financial loss, but by her own admissions this is not something she can guarantee. Disclosure under the Act would prejudice the ICO's ability to investigate alleged data breaches, which is one of the ICO's main functions. This would have consequences that far outweigh any arguments for transparency and accountability.
31. The Commissioner's decision is that the balance of the public interest test favours maintaining the exemption. No steps are required.

Right of appeal

32. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Gerrard Tracey
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