

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 July 2018

**Public Authority:** The Information Commissioner's Office (ICO)

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a complaint he believes has been made to the ICO. The ICO refused to confirm or deny whether the requested information was held under section 40(5) FOIA.
2. The Commissioner's decision is that the exemption at section 40(5) FOIA is applicable in this case and therefore the ICO was correct to neither confirm nor deny if the information requested is held. She requires no steps to be taken.

#### Request and response

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3. On 26 November 2017 the complainant requested information of the following description:

*"Please can I request the following information that may be held by your organisation:*

*- Copy of a report whereby it has been suggested by [named individual] that I sent [named individual] sensitive information about [named individual].*

*- The result of any investigation into the alleged breach of data protection by [named individual]."*

4. On 8 December 2017 the ICO responded. It refused to confirm or deny whether the requested information was held under section 40(5) FOIA.

5. The complainant requested an internal review on 11 December 2017. The ICO sent the outcome of its internal review on 22 December 2017. It upheld its original position.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 5 October 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the ICO was correct to neither confirm nor deny whether the information requested is held under section 40(5) FOIA.

## **Reasons for decision**

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### **Section 40(5)**

8. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
9. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
10. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
11. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a complaint or some form of action. If to do so would contravene data protection principles, for example because it would be

unfair, then the public authority is not obliged to confirm or deny that it holds the information.

*If held, would the information be personal data?*

12. The Commissioner has first considered whether the requested information would be the personal data of any person.
13. The Data Protection Act 1998 (DPA) (which was the legislation in place at the time of the request) categorises personal data as data that relates to a living individual from which that individual can be identified. If held, the information would relate to the fact that a named individual had made a complaint to the ICO.
14. Therefore, the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public that a particular named individual had made a complaint to the ICO.

*Would confirming or denying the information is held breach any of the data protection principles?*

15. If confirming or denying whether the information is held would contravene the first data protection principle, that personal data should be processed fairly and lawfully, section 40(5)(b)(i) is applicable.
16. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
17. In this case confirming or denying whether the information is held would communicate whether or not a named individual had submitted a complaint to the ICO.
18. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
19. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only confirm or deny it holds information under the FOIA if it could do so to any member of the public who requested it.
20. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.

21. The ICO considers that it is within the reasonable expectations of complainants that their identity would remain confidential. While the ICO proactively discloses information about complaints, this does not contain any personal identifiers and also its decision notices do not include the name of the complainants.
22. The ICO explained that its fair processing information states that “we usually have to disclose the complainant’s identity to whoever the complaint is about.” If a complaint had been made, disclosure of the name of the complainant as part of investigating a complaint, will be limited to the complained about party and not the public at large.
23. The ICO considered whether any of the conditions in schedule 2 would allow the ICO to confirm or deny whether the information is held.
24. The ICO considered the “legitimate interests” condition. It does not believe that it could satisfy the requirements of this condition, especially the requirement concerning the fairness of the processing.
25. In light of the fair processing information available to complainants the ICO does not consider that it would be within their reasonable expectations of complainant’s for their names to be put in the public domain just because they raised a complaint about a public authority/data controller with the regulator. As such, it would be unfair to confirm or deny whether an individual made a complaint to the ICO.
26. The ICO considers that confirming or denying to a requester whether a named individual made a complaint may cause the complainant an unjustifiable level of distress. Such confirmation or denial may also impact on the trust and confidence that complainants in general have about the confidentiality of the information they share with the ICO.
27. The ICO does not consider that there is an overriding public interest in confirming or denying if this information is held, it is hard to see that this would be beneficial to the wider public. It recognised the legitimate interest of the public in having access to information but maintains that the balance lies with protecting the rights and freedoms of data subjects.
28. In this case the Commissioner is satisfied that confirming or denying whether the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the ICO is entitled to refuse the request on the basis of section 40(5)(b)(i) of the FOIA.

## Right of appeal

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29. 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)

30. 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.
31. 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.....**

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