

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2019

Public Authority: Information Commissioners Office
Address: Wycliffe House
Water lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information on the diary entries of the Information Commissioner covering a total period of two years. The Information Commissioner's Office (ICO) provided some information, but withheld other information under the exemptions provided by section 21 – accessible to the applicant by other means, section 22 – information intended for future publication, section 36(2)(c) – prejudice to the conduct of public affairs and section 40(2) – personal information. The complainant has challenged the ICO's application of sections 22 and 36(2)(c). During the Commissioner's investigation the ICO withdrew its application of section 36 to the majority of the information to which it had been applied, and also withdrew its application of section 22 to some of the information which that exemption had been applied to.
2. The Commissioner's decision is that the ICO is entitled to withhold the remaining information under the exemptions provided by section 36 and section 22.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. In this case the Information Commissioner is both the public authority which is the subject of the complaint and the regulator of the FOIA. To avoid confusion, when referring to the Information Commissioner in her regulatory role the term 'Commissioner' will be used. When referring to the Information Commissioner as the party subject to the complaint the notice will use the terms 'Information Commissioner' or 'ICO' as appropriate.
5. On 29 January 2018 the complainant requested information of the following description:
 - "1) I would like to request information that sets out all meetings, events and engagements recorded in diaries and calendars for the Information Commissioner Elizabeth Denham for 2017 and 2018. This would be in any diary or calendar used by the Commissioner or maintained by others on her behalf. I am particularly interested in the organisations that the Commissioner has met or is meeting, has spoken to or is speaking to, and the events and meetings she has spoken at or has agreed to speak at. I would not object or appeal if names of individuals other than ICO staff were redacted.
 - 2) I would like to request the names and job titles of any member of ICO staff who attended the CPDP conference in Brussels last week."
6. On 9 February 2018 the ICO clarified with the complainant that his request related to the Information Commissioner's appointments with external bodies as opposed to internal meetings with her own staff.
7. On 27 February 2018 the ICO provided the information captured by the second part of the request.
8. On 8 March 2018 the ICO responded to the first part. It confirmed the ICO held the requested information and disclosed some of that information. However the ICO withheld the remaining information under the following exemptions:
 - Section 21 – information already accessible to the applicant
 - Section 22 – information intended for future publication
 - Section 36(2)(c) – information the disclosure of which would be likely to prejudice the conduct of public affairs
 - Section 40(2) – personal information.

In respect of the information withheld under section 21 the ICO provided links to where the information was published on its website.

9. The complainant requested an internal review of the application of sections 22 and 36 on 12 March 2018. The ICO sent him the outcome of its internal review on 3 April 2018. The ICO upheld its original position.
10. During the course of the Commissioner's investigation the ICO withdrew its application of section 36 to the majority of the information it had been withholding under that exemption. The only information which the ICO continued to withhold under section 36 was that contained in a handful of the past diary entries.
11. The ICO also withdrew its application of section 22 to some of the information being withheld under that exemption.

Scope of the case

12. The complainant contacted the Commissioner on 26 April 2018 to complain about the way his request for information had been handled.
13. The Commissioner clarified the proposed scope of her investigation with the complainant on 19 September 2018.
14. Following the decision of the ICO to disclose additional information, the complainant confirmed that he still wished the Commissioner to serve a decision notice. In particular he remained concerned about the ICO's use of section 36.
15. Therefore the Commissioner considers the matters to be decided are whether the ICO is entitled to withhold any of the remaining information under the exemptions provided by section 22 and section 36(2)(c).

Reasons for decision

Section 36(2)(c) – prejudice to the conduct of public affairs

16. Following the disclosure of the additional information on 9 February 2019 the only information being withheld under section 36(2) was that relating to eight diary entries from the period between September 2017 and January 2018. All of these engagements had taken place prior to the request being made.
17. So far as is relevant section 36(2) of FOIA states that information is exempt if its disclosure:
 - (2)(b) would be likely to inhibit –
 - (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purpose of deliberation, or

(2)(c) would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs.

18. Section 36(2) is unique in that it depends on the reasonable opinion of qualified person in order to be engaged.
19. When considering the application of section 36 the Commissioner will:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was reasonable.
20. In the case of the ICO the person designated as its qualified person is the Information Commissioner herself. The ICO has provided a copy of a completed pro-forma setting out the arguments for and against the application of section 36(2)(c) which was signed by the Information Commissioner on 26 February 2018 to confirm that it was her opinion that disclosing the information would be likely to prejudice the conduct of public affairs. That the opinion related to all the information which was originally withheld under section 36(2), including that which is still being withheld.
21. It is clear that the conditions set out in the first three bullet points of paragraph 19 have been satisfied.
22. It should be noted that the qualified person's opinion was that disclosing the information would only be likely to prejudice the conduct of public affairs. The term 'would be likely' is taken to mean that there is a real and significant likelihood of the inhibition envisaged occurring, even if this falls short of being more likely than not.
23. It is now necessary to consider whether the qualified person's opinion was a reasonable one. When considering reasonableness the Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.
24. The pro-forma signed by the Information Commissioner indicates that she had sight of the information captured by the request. Furthermore, given the nature of the information captured by the request, it is clear

she would have been aware of its contents and be in a position to reach a view as to its sensitivity. The past diary entries to which the ICO is still applying section 36(2)(c) relate to meetings or phone calls that the Information Commissioner had held with parliamentarians. It is understood from the submissions provided by the ICO, that the qualified person considered disclosing who these contacts had been with, whilst the new Data Protection Bill was passing through parliament would erode the safe space required by both the Information Commissioner and the parliamentarians with whom she met, when considering and shaping the progress of the Bill. The Bill ultimately became the new Data Protection Act 2018 in May 2018. The ICO considers it is reasonable for the Information Commissioner to be able to arrange to meet or to discuss the Bill without the risk of unnecessary scrutiny.

25. The Commissioner considers the argument to be a logical one and that therefore it cannot be said that the qualified person's opinion was absurd or irrational. The Commissioner finds that the exemption is engaged.

Public interest test

26. Section 36 is subject to the public interest test as set out in section 2 of the FOIA. Its application means that although the exemption is engaged, the information can only be withheld, if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
27. When considering the public interest in favour of maintaining section 36 the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is likely that there would be some prejudice to the conduct of public affairs. It is noted that the qualified person applied the exemption on the basis that the prejudice was only 'likely' to occur, rather than the higher threshold of likelihood, ie that the prejudice 'would' occur. Although some weight is given to the qualified person's opinion the Commissioner will go on to consider the severity, extent and frequency of that prejudice before weighing that against the value in disclosing the information.
28. The request was received at the time when the ICO was preparing for the introduction of the EU wide General Data Protection Regulation (GDPR) and the Data Protection Act 2018, which would introduce national measures to compliment the GDPR. The new legislation would affect many aspects of how organisations could process personal data. The ICO has argued that it would therefore be logical for parliamentarians to consult with the Information Commissioner regarding the passage of the Data Protection Bill so that parliamentarians better understood the practical implications of

proposals and so that the ICO could be prepared for changes in the legislation.

29. By accepting the exemption is engaged the Commissioner has accepted that this is a potential outcome of the diary entries being disclosed. The Commissioner notes that at the time the request was made, the Bill was still progressing through parliament. Therefore the issues discussed at the meetings and in the phones calls referred to in the withheld diary entries, were still very much live. This is when the need for safe space is greatest for those either developing government policy, or those developing positions in respect of that policy. Similarly the ICO would need safe space in which to develop its own position in respect of proposals in the Bill. This greatly increases the severity of the harm that would be caused by disclosure.
30. The Commissioner notes however that the diary entries only identify the parliamentarians who the meeting or phone call was with. They do not explicitly identify the subjects to be discussed. Although it can be argued that this reduces the severity of the erosion of safe space, the nature of the discussions could still be inferred from the identities of the parliamentarians.
31. The new legislation involved very significant changes to the law on the processing personal data. The regulation of that legislation is one of the main functions of the ICO and therefore to disclose information that could interfere with the ICO's preparation for those changes, or that could hinder the Information Commissioner's role in consulting with parliamentarians on the issues those changes raised, would severely prejudice the public affairs conducted by the ICO. However it should also be pointed out that such landmark changes to data protection legislation are infrequent. Therefore, looking beyond the implementation of this legislation, the need for future discussions between the Information Commissioner and parliamentarians on similar issues would be infrequent and it is noticeable that the ICO has not argued that there would be any chilling effect.
32. Nevertheless the Commissioner is satisfied that there would be a significant risk that the safe space required by the ICO to fulfil important functions in respect of its regulation of data protection laws would be eroded if the disputed information was disclosed. This harm now has to be balanced against the value in disclosing the information.
33. The ICO has recognised that disclosure would provide a clear understanding of precisely who the Commissioner had met with. This would provide a level of transparency in relation to the range and nature of her external meetings and there is a public interest in such transparency. The ICO expanded on this point, saying that disclosure would help demonstrate that the Information Commissioner was

complying with her duties to oversee the legislation she enforces and meeting her goals through targeted engagement and influence.

34. The complainant's public interest arguments were presented at the stage when the ICO was withholding a significant amount of the information on future meetings. However many of the points raised are equally applicable to the withholding of the details of meetings with parliamentarians which had already taken place. He argued that at a time when data protection laws were undergoing the biggest changes for twenty years, it is in the public interest to know who the Information Commissioner is meeting with and to see whether any organisation is receiving special treatment or disproportionate access. He was of the opinion that the decision to withhold the information did not properly take account of the Information Commissioner's role as regulator of the FOIA. He considered it inappropriate for someone who he described as the "regulator of transparency" to keep secret the fact that meetings had taken place.
35. The Commissioner appreciates that there is some merit in the complainant's arguments. There is undoubtedly a public interest in the ICO being transparent about the Information Commissioner's role and one would naturally expect the ICO to champion openness. The Commissioner also recognises that there is a value in disclosing who the Information Commissioner was meeting with for the purpose of influencing a piece of legislation that would have a significant impact on the privacy rights of individuals; this is an area of increasing importance within our society.
36. However the importance of these issues also increases the need for parliamentarians to be fully briefed on the potential impact of proposals within the Bill and equally the ICO needed to be properly prepared for the planned changes so that it would be able to provide the best possible guidance to the organisations it regulates. The provision of good guidance would be an important factor in helping organisations prepare for the changes and so for successful implementation of the legislation. Therefore the Commissioner considers that the public interest in preserving the safe space required by the Information Commissioner to effectively consult with parliamentarians outweighs the public interest in disclosing who those parliamentarians were. The Commissioner finds that the ICO is entitled to rely on section 36(2)(c) to withhold those diary entries.

Section 22 – information intended for future publication.

37. Section 22(1) states that information is exempt if –

- a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - b) the information was already held with a view to such publication at the time when the request for information was made, and
 - c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph a).
38. The ICO continues to apply section 22 to a number of diary entries for future speaking engagements. This is on the basis that it is the established practice of the ICO to publish all the Information Commissioner's speeches, together with information on who the speech was delivered to, on its website, once the engagement has taken place. This would effectively provide access to the information recorded in the Information Commissioner's diary in respect of those speaking engagements.
39. It is important to note that although a public authority must hold the information with a view to its publication at the time of the request, the exemption does not require a set publication date to be in place. Therefore the fact that the ICO did not provide fixed dates for publishing the details of the speeches does not prevent it being able to rely on section 22. It is possible that the ICO simply updates the 'Information Commissioner's speeches' page of its website to include the latest speaking engagements on an ad hoc basis, or the updates might be included as part of regular, routine maintenance of the website. All that is necessary is that the ICO has a settled commitment to publish.
40. From the ICO's website it is clear that it is the usual practice for the ICO to publish the details of the speaking engagements along with the speeches themselves. Furthermore, the Commissioner is satisfied that the information to which the ICO has maintained its application of section 22 to, has now all been published. The Commissioner is therefore satisfied that at the time of the request the ICO did have a settled intention to publish the diary entries which it is continuing to withhold under section 22.
41. However before concluding the exemption is engaged the Commissioner must consider whether it reasonable in all the circumstances that the information should be withheld until it published in accordance with the ICO's usual practice. The ICO has argued that it is reasonable to allow it to publish the information in its chosen format, including a transcript of the speeches, and that to present the material in this way requires time to prepare and check the accuracy of the information.

42. The ICO has also argued that when undertaking speaking engagements the Information Commissioner is a guest of the body hosting the event. The host body may have its own plans for advertising strategy for the event. In order to maintain professional relationships with these stakeholders it is appropriate to allow that body to take the lead in the publicity for the event.
43. The Commissioner accepts the two points made above and given there does not appear to be any significant delay in updating the ICO's website once a speaking engagement has taken place, she is satisfied that it is reasonable to withhold the information until it is published. In reaching this conclusion the Commissioner has taken into account the fact that there does not appear to be any pressing need to disclose the information sooner in the interests of transparency. The Commissioner finds that the exemption is engaged.

Public interest test

44. Section 22 is subject to the public interest test. Therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the diary dates that are still being withheld under section 22.
45. To some extent the public interest arguments reflect the consideration of whether it is reasonable to wait for disclosure until the planned publication date under section 22(1)(c).
46. The ICO has recognised that there is a public interest in disclosing information regarding the stakeholders at whose events the Information Commissioner was scheduled to speak as this provides transparency of her commitments and of how she is performing her duties. However this interest is largely served by publishing the details after the event has taken place. As previously stated there is little delay in publishing the material after the event. The Commissioner notes that at the time of writing this notice, the details of speeches delivered only two and a half weeks earlier were already on the ICO website. That is not to say that the event had not been in the Information Commissioner's diary for some time before that.
47. Account also has to be taken of the fact that the Information Commissioner's appearance at any event is most likely to have been published by the event organiser in advance. Therefore to some extent the information will have already found its way into the public domain well before the ICO publishes it. This serves the public interest in transparency whilst preserving the freedom of the event organiser to manage the publicity for their event.

48. The complainant argues that advance publication of the Information Commissioner's speaking engagements would allow wider scrutiny of her commitments. The Commissioner recognises that, in theory, this may allow the public to reach their own view on whether the Information Commissioner is prioritising which stakeholders to meet with appropriately whilst there was still the possibility of the public influencing those priorities. The complainant makes the point that this was particularly important at the time of the request, ie when major changes to data protection legislation were about to be implemented and there was a heavy demand from organisations for the Information Commissioner's time.
49. The Commissioner recognises that there can be a value in disclosing information whilst issues are still live and the information can be used to influence decisions or, as in this case, the priorities a public authority gives competing demands on its time. The Commissioner also recognises that at the time of the request, there were many calls on the Information Commissioner's time and that the Information Commissioner could not accept all the invitations she received; some stakeholders would therefore be disappointed. However the Commissioner considers that it would be going too far to suggest this indicated there were flaws in the way the Information Commissioner was exercising her discretion as to which invitations she accepted and that this warranted additional scrutiny of her future commitments.
50. In light of this the Commissioner does not accept that there was any pressing need to disclose the future diary dates. The public interest therefore lies in favour of the ICO preserving the right of those hosting events to manage their own publicity and in the ICO having the time to publish comprehensive details of the event, including the transcript of the speech presented, in line with its established practices. The Commissioner finds that the ICO is entitled to rely on section 22 to withhold the information.

Right of appeal

51. 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

52. 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.
53. 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

Rob Mechan
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