

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2019

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

Decision (including any steps ordered)

1. In this case the Information Commissioner is both the public authority which is the subject of the complaint and the regulator of the FOIA responsible for investigating the complaint. The notice will use the term Information Commissioner's Officer (ICO) when referring the Information Commissioner as the public authority subject to the complaint and the term Commissioner will be used to refer to her as the regulator.
2. The complainant has requested information about a named individual and his company which he believes may be held by the ICO as part of its investigation into the use of data analytics for political purposes. The ICO relied on the exclusion from the duty to confirm whether the information was held provided by section 31(3). This was on the basis that to either confirm or deny the information was held would, or would be likely to prejudice its regulatory functions.
3. The Commissioner's decision is that the ICO is entitled to rely on section 31(3) to refuse to either confirm or deny it holds the requested information.
4. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

On 6 July 2018 the complainant requested information of the following description:

"It has been reported and acknowledged by [individual A], in evidence to the DCMS Select Committee on Fake News, that [individual B]'s company [Company Z], as well as sending personal data scraped from Facebook to Cambridge Analytica, sent the same data (or more of it) to a company set up by [individual A] in Malta called [Company Y].

As well as investigating the sharing and use of personal data between and by [Company Z] and Cambridge Analytica, are the ICO investigating the sharing, transfer and use of personal data, between [Company Z] and [Company Y] and whether or not [individual A]'s reported certification of such data's destruction to Facebook was true or not? Have the ICO made contact with the Maltese, Office of the Information and Data Protection Commissioner in relation to this matter? In each case, if not why not.

I would ask the ICO to disclose all correspondence, documentation, information and communications, of any kind, related to the above matter."

5. On 30 July 2018 the ICO responded. It refused to either confirm or deny the requested information was held. The ICO cited the exclusion provided by section 31(3) of FOIA, by virtue of section 31(1)(g) and section 31(2)(c), as the ICO's basis for doing so. That is, confirmation or denial would prejudice the ICO's function for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
6. The complainant requested an internal review on 6 August 2018. The ICO sent him the outcome of the internal review on 4 September 2018. The ICO upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner 4 September 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers that the matter to be decided is whether the ICO is entitled to rely on section 31(3) to refuse to confirm or deny the information is held.

Reasons for decision

Section 31(3) exclusion from the duty to confirm or deny under the law enforcement exemption

9. Section 31(3) of the FOIA states that the duty to confirm or deny the requested information is held does not arise if to do so would, or would be likely to prejudice any matters mentioned in section 31(1).
10. Section 31(1) provides that information is exempt if its disclosure would, or would be likely to prejudice any of the law enforcement purposes which are then listed in paragraphs (a) to (i). Paragraph (g) of which introduces a further list of activities by stating that information is exempt if its disclosure would, or would be likely to prejudice the exercise of the functions of any public authority for any of the purposes specified in subsection (2). These functions are listed in paragraphs (a) to (j) of subsection (2). Included at paragraph (c) of that list is the function for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
11. In summary, by citing the exclusion provided by section 31(3) of the FOIA, by virtue of section 31(1)(g) and section 31(2)(c), the ICO is claiming that to confirm or deny whether it holds the information would, or would be likely to prejudice the exercise of its functions for ascertaining whether it would be justified in taking some form of regulatory action.
12. When considering if the exclusion applies it is important to recognise that a public authority can consider the impact of either confirming, or denying the information was held and is not limited to the impact of the response it would in fact be required to provide if the exclusion did not exist. So regardless of whether it holds the information or not, a public authority can consider whether confirming the information was held would be likely to prejudice its regulatory functions.
13. The prejudice to a public authority's regulatory functions will usually depend on how a request is phrased. In this case the request very directly asks whether the ICO is investigating a particular individual and his business. Furthermore the request asks very specific questions about the nature of any such investigation and particular actions that the ICO may have taken as part of that investigation. Therefore if the ICO was in a position where it had to confirm the requested information was held, this would inevitably reveal that that individual was under investigation, together with certain aspects of how the ICO was pursuing that investigation.
14. For the exclusion to be engaged the Commissioner must consider whether revealing this would, or would be likely to prejudice a regulatory function of the ICO. The Commissioner notes that in this case

the ICO is applying the exemption based on the lower test, i.e. that the prejudice to its regulatory functions would only be likely to occur.

15. When considering whether a prejudice based exclusion such as that provided by section 31(3) is engaged the Commissioner will consider whether the concerns raised by the public authority relate to the interests which the exclusion is designed to protect (i.e. in this case whether confirmation would be likely to prejudice the ICO's regulatory activities), whether that prejudice claimed would be real, actual or of substance, and whether the public authority is able to demonstrate a causal link between disclosing whether the information is held and that prejudice.
16. The ICO has advised the Commissioner that under the Data Protection Act 1998 (DPA 98), the General Data Protection Regulations (GDPR) and the Data Protection Act 2018 (DPA 18) it has a number of regulatory functions. Where the ICO considers it is appropriate to do so, it has the power to take regulatory action to ensure the provisions of that legislation are adhered to. The Commissioner is satisfied that the ICO has statutory functions which involve investigating concerns about how personal data is being processed in order to ascertain whether it is appropriate to take regulatory action against the person processing that personal data, known as the data controller.
17. At the time of the request, the fact that the ICO was investigating the use of data analytics for political purposes was already in the public domain. That is not to say however that all details of the investigation were known including, for example, the breadth of the investigation, or whether the actions of particular data controllers were being looked into. The ICO argues that to reveal any details about its ongoing investigation, such as whether or not it was pursuing the lines of enquiry suggested by the request, would prejudice its investigation. If the ICO was to routinely confirm or deny whether a named organisation was under investigation it would provide the opportunity for that organisation to become more defensive, or allow those persons connected, or potentially connected to the investigation to take steps to alter, conceal, or destroy relevant records. The ICO believes that to confirm whether the individual and companies named in the request were part of its investigation would be likely to create a real risk of distracting from and causing interference with its investigative process.
18. The Commissioner finds that the prejudice being alleged by the ICO does relate to the interests which the exclusion is designed to protect.
19. The ICO also argues that where confirming whether information is held would reveal the involvement of a particular party in an investigation it is justified in adopting a consistent approach to its application of the

exclusion from that duty to either confirm or deny the information is held.

20. The Commissioner considers it entirely plausible that individuals would act in the way described by the ICO if they became aware of they were under scrutiny before the ICO had formally contacted them and, if necessary, taken steps to secure evidence. The Commissioner also recognises that there can be a need for consistency in a public authority's application of the exclusion. If, for example, a public authority only used the exemption where the information was in fact held, this pattern of response could be easily detected and the public authority's use of the exclusion would be taken to infer the information was held. This would defeat the purpose of the exclusion.
21. In light of the arguments discussed above the Commissioner is satisfied that the ICO has demonstrated that there is a causal link between complying with the duty to confirm or deny that the information is held and the likely to prejudice the ICO's investigatory processes. This in turn would be likely to prejudice the ICO's functions in respect of ascertaining whether regulatory action was justified. The Commissioner is also satisfied this prejudice would be real and of substance. The exclusion provided by section 31(3) is engaged.

Public interest test

22. The exclusion is subject to the public interest test. This means that a public authority will still be required to either confirm or deny the information is held unless, in all the circumstances of the case, the public interest in maintaining the exclusion from that duty outweighs the public interest in disclosing whether the information is held.
23. The ICO has recognised that confirming or denying the information is held would allow the public to better understand the scope of the investigation to which the request relates. This, it accepts, would increase the transparency and accountability of the ICO's regulatory activities. The ICO also recognises that there is a particularly strong public interest in it being accountable for its investigation into the use of data analytics for political purposes.
24. The Commissioner notes the nature of the investigation and the importance of the issues it raise in terms of both of personal privacy and the democratic process. It is also important that a regulator is seen to acting fairly and exercising its regulatory powers proportionately.
25. The ICO has also set out its public interest arguments in favour of maintaining the exclusion. It considers there is a public interest in maintaining the integrity of its investigations and therefore the effectiveness of its regulatory functions. To reveal whether the ICO was interested in a particular individual as part of a wider investigation,

whilst that investigation was still ongoing, would be likely to seriously undermine that investigation.

26. The Commissioner notes that given the significance of the investigation in question, there is an increased public interest to ensuring it is rigorous and robust and that the ICO is effective in its regulation of the processing of personal data in this area.
27. Another concern of the ICO's is that confirming whether information of this type is held is likely to hinder its ability to conduct investigations as it sees fit, without undue external influence, which, it says, might affect its decision making or divert resources in the future.
28. The Commissioner does acknowledge that the investigation to which this request relates was very high profile. Therefore disclosing to the world at large whether the ICO was pursuing the lines of enquiry suggested by the request would have attracted a great deal of media attention and commentary from other quarters. This could have limited the freedom of the ICO to develop its investigations as it believed best.
29. The Commissioner also considers that in some circumstances it would be unfair, even damaging, to an individual or company to disclose, or allow it to be inferred, that they are the subject of an investigation, prior to it being established that there is a need for any regulatory action. Such disclosure may also deter the voluntary cooperation with the ICO's investigations in the future.
30. When weighing the public interest in maintaining the exclusion against the public interest in disclosure, the Commissioner recognises the importance of the ICO being accountable for the rigour and impartiality of how it exercises its regulatory powers. However there are occasions where the transparency required to fully satisfy that public interest would be at the cost of the effectiveness with which the ICO carries out those regulatory functions. Given the regulation of the data protection laws is one of the ICO's core functions, to undermine the ability to perform such functions to the extent that the Commissioner finds is likely to happen if the ICO was required to confirm whether the information was held, is a very strong public interest argument in favour of maintaining the exclusion from that duty. Therefore the Commissioner finds that the public interest in favour of maintaining the exclusion outweighs the public interest in disclosure. The ICO is entitled to rely on paragraph 31(3) to refuse to confirm whether the information is held.

Right of appeal

31. 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

32. 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.
33. 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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