Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**22 June 2022**
Public Authority:	**The Information Commissioner**
Address:	**Wycliffe House** **Wilmslow** **SK9 5AF**

Decision (including any steps ordered)

1. The complainant has requested a dataset of open casework. The Information Commissioner ("the ICO") relied on section 21 (reasonably accessible) and section 22 (intended for future publication) of FOIA to withhold the information.

2. The Commissioner's decision is that the ICO has not demonstrated that section 22 applies and is therefore not entitled to rely on the exemption. The Commissioner also considers that the data prior to Q2 of 2019-20 was reasonably accessible to the complainant at the point the request was responded to and thus exempt from disclosure.

3. The Commissioner requires the ICO to take the following steps to ensure compliance with the legislation.

    - Disclose, to the complainant, any relevant data from the ICE360 casework system for Q3 2019-20, Q4 2019-20, Q1 2020-21, Q2 2020-21 and Q3 2020-21. The data should be provided in in the same format as the published data for Q4 2020-21 and Q1 2021-22, so as to allow for comparison.

4. The ICO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Jurisdiction and nomenclature

5. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, in his capacity as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority – a duty confirmed by the First Tier Tribunal. 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.

6. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

Request and response

7. On 1 June 2021, the complainant requested information of the following description:

> "Please send me the following information from your database(s) of FOI and EIR complaints. For each FOI/EIR complaint you have received I would like the following:
>
> a) your reference number
> b) date complaint received
> c) date case allocated to case officer
> d) date case closed
> e) reason for closure of case (eg DN issued, complaint withdrawn, etc)
> f) date DN issued, if one was
> g) reference number of any DN issued
> h) the name of the public authority involved
> i) the public authority's sector (eg central government, NHS, etc)
> j) whether the case involved FOI or EIR or both
>
> "Ideally I would like this information dating back to 1 Jan 2005."

8. On 29 June 2021, the ICO responded. It stated that it did not hold data prior to the 2014-15 financial year and that all data from that point until the end of the 2018-19 financial year was already reasonably accessible to the complainant – it therefore relied on section 21 of FOIA to withhold this information. In respect of data more recent than March 2019, it relied on section 22 of FOIA as it intended to publish the information.

9. On 8 July 2021 the complainant decided not to seek an internal review of that response but instead made a fresh request for information in the following terms:

> "[1] Please send me a list of the field names used in your complaints management database.
>
> "[2] Please send me a spreadsheet containing the following information from your database of complaints. Please note that the form in which I would like to receive this material is for it all to be contained in one spreadsheet (either Excel or csv is fine). For each FOI/EIR complaint you have received since 1 April 2014 I would like the following information where it is available:
>
> a) case reference number
> b) case type
> c) whether the case involved FOI or EIR or both
> d) date complaint received
> e) current status of the complaint
> f) date case closed, where the case has been closed
> g) the outcome of the case (eg DN issued, complaint withdrawn, etc), where applicable
> h) any information in the column titled 'Decision Primary Reason'
> i) any information in the column titled 'EIR technical breach'
> j) any information in the column titled 'Exception'
> k) any information in the column titled 'FOI technical breach'
> l) any information in the column titled 'Exemption'
> m) any information in the column titled 'Worked By'
> n) the name of the public authority involved
> o) the public authority's sector
> p) the sub-sector"

10. The ICO responded to this request on 9 August 2021. It provided the complainant with a list of open cases and some further information within the scope of element [1] but, in respect of cases that were closed, it again relied on either section 21 (for pre-March 2019 data) or section 22 of FOIA (for post-March 2019 data) to withhold the information.

11. On 18 August 2021, the complainant sought an internal review in respect of the ICO's reliance on section 22 of FOIA. The ICO completed its internal review on 31 August 2021. It upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 1 September 2021 to complain about the way his request for information had been handled.

13. The complaint has not disputed that the pre-March 2019 data is already reasonably accessible to him.

14. The data for Q4 2020-21 and Q1 2021-22 is now published on the ICO website (although it was not at the point that the ICO issued its refusal notice). The Commissioner has therefore excluded this information from the scope of his investigation.

15. The Commissioner considers that the scope of his investigation is to determine whether the ICO was entitled to rely on section 22 of FOIA to withhold the data for the period after March 2019. As it was not clear from the correspondence whether the complainant was aware that the data for Q1 and Q2 of 2019-20 was published on the website at the point the ICO issued its refusal notice (it does not seem to have been published at the point the request was made), the Commissioner has also considered whether the ICO was entitled to rely on section 21 of FOIA to withhold this information.

Reasons for decision

16. Section 22(1) of FOIA states that:

> "Information is exempt information 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)."

17. In order for the exemption to be engaged, the public authority does not need to have a specific fixed date for publication, it need only have a settled intent, at the time of the request, to publish the requested information at some point in the future or after other pieces of work have been progressed or completed.

18. As has been noted above, the datasets for the two most recently-completed quarters at the time of the request have now been published. As is also noted, complete data from 2014/15 to Q2 2019-20 was already published at the time of the request. Therefore the ICO was relying on section 22 to withhold datasets for five quarters: these being Q3 2019-20, Q4 2019-20, Q1 2020-21, Q2 2020-21 and Q3 2020-21.

Did the ICO have a settled intent to publish the information?

19. The ICO explained to the Commissioner that, prior to the pandemic, it had published data of this kind for each quarter-year on a rolling basis. However, due to the pandemic and other pressures on the organisation, this work had been put on the back burner.

20. The ICO further explained that:

> "At the time of the request in July 2021, data sets were available up to and including March 2019. Whilst we acknowledge that the most recent data sets available at that time were 18 months old, this delay was due to the process involved in publication and not a lack of intention to publish the data.
>
> "We advised in our response to a previous request…that we were working on the next batch of data sets covering the period of April-September 2019 and expected to publish those within the next month. We subsequently did publish those at the end of July, with the full set being available on our website around 30 July. We subsequently removed those from our website in December 2021, however I do not believe that this effects [sic] the application of the exemption…
>
> "…Following this, we started work on publishing the subsequent batch of data sets which would have covered the period of October 2019 to March 2020…
>
> "Further discussions around the practicalities of publishing data sets for subsequent periods determined that multiple technical issues caused by the gradual transfer of casework from the previous system (CMEH) to the current system (ICE) over the course of 2020, balanced against the importance of catching up on the publication schedule, so that the most recent and relevant data sets could soon be made available well in advance of their retention date, determined that the best strategy in continuing this work would be to progress immediately to working on publication of data sets for the period of January 2021 onwards.

"I would draw your attention to the fact that data sets are now available for the period of January-June 2021 on the ICO website here.

"The evidence provided clearly shows that we had a settled intention to continue to publish data sets in chronological order at the time of the request, that we did publish a further batch of data sets following the request which were available for approximately four months, and that we were actively working on providing the next batch up to around September 2021, when we had to rethink this due to circumstances that we had not foreseen prior to this point. Had these issues not have arisen we would have continued to publish in chronological order as we had done for many years.

"Further, at the point when the decision was taken not to continue to publish data sets in chronological order, it was taken in favour of concentrating our efforts on publishing more recent data sets in which there was a stronger public interest, and we have since demonstrated our commitment to this by publishing the first batch of data sets for 2021. We regret that there was a period of 5 quarters for which data was never made available, however this was certainly not anticipated at the time we responded to this request."

21. To support its argument, the ICO provided several chains of emails which showed staff discussing a batch of data that was due for publication. The earliest email is dated 30 July 2021 – which is after the request was made, but prior to the ICO issuing its refusal notice.

22. Whilst the Commissioner accepts that these emails do not prove definitively that there was a settled intent to publish the information at the time of the request, he still considers that they are contemporaneous and therefore should be given due regard. The Commissioner also notes that, prior to the request (and particularly prior to the pandemic), the ICO did publish such information on a rolling basis – which would suggest that, all other things being equal, this data would have been published in due course.

23. The fact that the ICO **subsequently** changed its mind and decided not to publish the five datasets in question does not mean that it did not have a settled intent **at the time of the request** to publish the information. The internal correspondence does show issues being highlighted – but this only occurred after the refusal notice had been issued.

24. Whilst publication had clearly been delayed by some considerable time, the Commissioner is satisfied that, at the point the request was made,

the ICO intended to publish the five remaining datasets and held the information with a view to that publication.

Was it reasonable in the circumstances to delay publication?

25. Even where a public authority has a settled intent to publish particular information at a future date, it must still disclose it in response to a FOIA request unless it is reasonable in all the circumstances to wait until its preferred date.

26. Where a public authority needs to complete a great deal of preparatory work, where publication needs to take place in a specific context or after certain other tasks have been completed, it is likely to be reasonable to withhold the information. However, the Commissioner will also take account of the delay that would occur if the requestor were required to wait – the longer the delay, the greater the responsibility on the public authority to justify why such a delay remains reasonable.

27. The ICO explained that the delay was reasonable because:

> "We do acknowledge that we were further behind with our publication schedule than we would like and that we did not yet have any further firm dates for publication of the remaining data sets however as explained above, however we did have an established process in place which we were committed to progressing with.
>
> Furthermore, we did not apply s.22 with the intention of delaying the work required to publish the data sets, and the evidence provided shows that we were actively working on progressing it at the time of the response. This shows that our pre-existing process was the most efficient and expedient manner in which we could make the data available and we would not have been able to complete this any faster had we decided to provide the data sets in response to the request. Additionally, given the number of requests we were handling at the time, and the fact that we were still dealing with impact of the pandemic, we would not have been able to dedicate any more resources to producing the data sets in response to this request. This would have meant diverting them away from handling other requests, which would have been detrimental to our compliance rates and the service we were able to provide to the public at large. We therefore concluded that reliance on s.22 was reasonable in the circumstances."

28. When the Commissioner challenged the ICO to explain the work involved in preparing these datasets for publication, the ICO responded to say:

> "The data sets we published at the time from our previous case management system comprised not only FOI/EIR complaint cases, which the requester had asked for details of, but also data protection

complaint cases. The process of checking for personal data which I have outlined above does not just concern removing the 'last worked by' column, which we acknowledge can be achieved quickly, but checking all of the data contained within the spreadsheet, not just for personal data, but also for errors, and for any sensitive cases which should not be published (such as those which led to an investigation still ongoing at the time of publication, or complaints about domestic CCTV).

"Personal data may sometimes appear in the 'Submitted about party' column, where either this had been entered on the system in error, or in the case of data protection complaint cases where the submitted about party was a sole trader. These require correcting and/or checking against specific criteria in place at the time to determine whether personal data was disclosable.

"We also acknowledge that FOI/EIR complaint cases can be separated from other cases to produce a discrete data set, and that the process or consulting and checking is less laborious for these cases as the likelihood of sensitive cases being included or personal data appearing in error is lower, however this is still possible and these data sets do still require rigorous checking for this and for possible inaccuracies.

"We do not feel therefore that it would have been reasonable to attempt to produce separate FOI/EIR data sets in order to respond to this request, as this would still have required substantial diversion of resources and would inevitably mean that publication of other case types would have been delayed as a result, and there is also significant public interest in those cases."

The Commissioner's view

29. The Commissioner accepts that the ICO now appears to have no intent to publish the remaining five datasets – but that does not mean that section 22 cannot apply, nor does it have any bearing on how reasonable it would have been, at the point the ICO issued its refusal notice, to wait until the intended publication date.

30. However, in the Commissioner's view, in all the circumstances it was not reasonable for the ICO to delay publication until its intended publication date.

31. Firstly, the ICO has not demonstrated that the amount of work required to produce the information the complainant requested is significant.

32. The ICO has highlighted an issue with producing equivalent data for data protection complaints – and the Commissioner accepts that, because of the nature of this work and the manner in which complaints are

recorded, this does present issues. However, the ICO has also admitted that these issues do not apply, to any significant extent, to FOIA or EIR complaints.

33. The ICO has also not demonstrated, to the Commissioner's satisfaction, why it is unreasonable for publication of FOIA and EIR data to take place before the equivalent work for data protection has been carried out.

34. The Commissioner accepts that there is a certain degree of symmetry to publishing across all functions at the same time, but when one particular area of the ICO's work appears to take so much longer, it cannot be reasonable to expect all other areas to wait. Whilst this may generate some queries if different areas of the organisation publish to different timescales, the ICO has a perfectly rational explanation as to why data protection complaints data is likely to take longer.

35. Furthermore, the Commissioner also notes that the ICO publishes its data for FOIA and EIR complaints as a separate dataset anyway, with a separate spreadsheet and a separate webpage. This would suggest that the ICO is happy to have its datasets segregated by function.

36. Clearly, some consideration has to be given to the pandemic. The wording of the exemption makes clear that the public authority is entitled to consider "**all** the circumstances." In the midst of a pandemic, a diversion of resources will be more difficult to justify.

37. However, the Commissioner notes that, when the complainant made his first request, in June 2021, the most recent data was more than two years old – meaning that, even before the pandemic hit, the ICO was already only publishing data that was a year old. The burden of the pandemic is not sufficient reason to render the likely delay before the ICO intended to publish this data as "reasonable".

38. Furthermore, the Commissioner accepts that there is a public value to data which would demonstrate the extent to which the pandemic has affected the ICO's caseload.

39. In decision notice FS50720387 the Commissioner did not accept that it was reasonable for HM Treasury to withhold information that was between four and seven months old at the time of the request – when it was supposed to be published monthly.[1] The oldest data being

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259585/fs50720387.pdf

requested here was almost two years old at the point the request was made.

40. The Commissioner notes that there is no legal obligation upon the ICO to publish this information and that it does so voluntarily and in the interests of transparency. That in itself is a laudable aim, but the information is of most interest to the extent that it reflects the ICO's current workload. It defeats the purpose of publishing the data in the first place if it is only published too late to be of significant value.

Remedial steps

41. Where the Commissioner finds that a public authority has incorrectly relied upon an exemption to withhold information, he will usually order that information to be disclosed in full (except to the extent that the public authority has correctly applied another exemption to it).

42. In this case, the ICO's submission made clear that it may have difficulty recreating the requested information if it were asked to do it today. This was partially due to the transition between case management systems – meaning that some cases will have been duplicated across systems – and also the impracticality of accessing information from its old system – either because the files are now stored in a manner that does not allow for the previous reports to be run or because the files have been deleted entirely, in line with the ICO's retention policy.

43. Having identified a breach, the Commissioner was of the view that the complainant should receive as much information as possible, but accepted that there were practical difficulties involved and that issuing a decision notice with which the ICO could not comply would not provide a satisfactory outcome for anyone.

44. The Commissioner wrote to the complainant on 16 June 2022, explaining that he was minded to find that section 22 was not engaged and inviting the complainant to suggest how the issue might best be resolved.

45. The complainant graciously agreed to restrict the information he was seeking to only that which could be provided from the ICE360 casework system – whilst accepting that this would mean that he would only receive partial data for this period. The Commissioner considers that this is a reasonable suggestion and has drafted a remedial step accordingly.

Section 21 – reasonably accessible

46. Section 21 of FOIA allows a public authority to withhold information if that information is already "reasonably accessible" to the person who has requested it.

47. At the time of the request, data from 2014 to the final quarter of 2018-19 was published on the ICO's website – although this has now been removed. The complainant has not disputed that this information was available to him at the time of the request.

48. At some point between the request being made and the ICO issuing its refusal notice, data from the first two quarters of 2019-20 were published on the ICO's website. The ICO did not refer explicitly to this data being available (having not been available when the complainant submitted his first request of 1 June 2021) but it did refer him to the page where the published data could be found.

49. The ICO supplied the Commissioner with copies of the correspondence exchanged with its communications team regarding the uploading of the data. This correspondence indicate that the data was uploaded around the end of July 2021.

50. Whilst it is no longer published, the Commissioner does accept that, on the balance of probabilities, the data from Q1 and Q2 of 2019 was published on the ICO's website and therefore reasonably accessible to the complainant at the point the ICO issued its refusal notice. The ICO was therefore entitled to rely on section 21 of FOIA 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: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.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 .....

Roger Cawthorne
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