

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 July 2023

**Public Authority:** Information Commissioner  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

Note: 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 as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Information Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the Information Commissioner dealing with the request, and the term 'Commissioner' denotes the Information Commissioner dealing with the complaint.

### **Decision (including any steps ordered)**

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1. The complainant has requested an unredacted copy of a reprimand issued to the Ministry of Justice. The Information Commissioner's Office (ICO) relied on section 44 of FOIA to withhold the requested information, which concerns statutory prohibition on disclosure.
2. The Commissioner's decision is that the ICO is entitled to rely on section 44(1) of FOIA to withhold the information.
3. It's not necessary for the ICO to take any corrective steps.

## Request and response

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4. The complainant requested an unredacted copy of a reprimand<sup>1</sup> issued to the Ministry of Justice (MoJ) on 24 May 2023. The ICO relied on section 44 of FOIA to withhold the redacted information.
5. The Commissioner advised the complainant that the ICO was entitled to rely on section 44, directing them to a number of other decisions in similar cases where he had upheld the ICO's reliance on section 44.
6. The complainant preferred not to withdraw their complaint but to conclude it through a formal decision.

## Reasons for decision

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7. Section 44(1) of FOIA allows a public authority to withhold information whose publication outside of FOIA would be prohibited by law.
8. The ICO's position is that section 132 of the Data Protection Act 2018 (DPA) prohibits it from disclosing the redacted information under FOIA.
9. Section 132 of the DPA makes it a criminal offence for the Commissioner, or anyone currently or previously employed by his office, to disclose identifiable information that he has obtained during the course of carrying out his functions – unless the disclosure is made with lawful authority. A more detailed explanation is given in the ICO's decision in IC-100988-C1B9<sup>2</sup>.
10. In their request for an internal review, the complainant noted that section 132(1)(b) of the DPA provides that, to fall within the prohibition on disclosure, information must relate to an identified or identifiable individual or business. The complainant argued, first, that the redacted information appeared to relate to a prison which they considered wasn't

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/reprimands/4025227/20230524-reprimand-moj\\_redacted.pdf](https://ico.org.uk/media/action-weve-taken/reprimands/4025227/20230524-reprimand-moj_redacted.pdf)

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4019057/ic-100988-c1b9.pdf>

an individual or business and second, that it wouldn't be possible to identify a specific individual [or business] from some of the redacted information.

11. The ICO had explained in its internal review that the question of whether a public authority can be considered a business for the purposes of FOIA was addressed in *Lampert v Information Commissioner* [2019] UKUT 60 (AAC). This decision in the Upper Tribunal establishes that:

"...the word 'business'...cannot be limited to bodies which are engaged in commercial activity but encompasses anybody engaged in regular professional activities, including all those bodies listed or included in schedule 1 to FOIA which are not-for-profit organisations."
12. The ICO further explained that this interpretation acknowledges that in drafting FOIA, Parliament intended the broader definition of 'business' to cover not merely entities engaged in commercial activity but also any body engaged in its regular professional duties. To determine otherwise would mean that the ICO's regulatory powers would be severely reduced if 'business' were to be interpreted as excluding public bodies engaged in their regular activities.
13. Having established that all elements of section 132(1) apply the ICO went on to consider whether any of the gateways from section 132(2) for lawful disclosure have been met. It was satisfied that they hadn't been.
14. The lawful gateways set out in section 132(2) are intended to set out a limited number of circumstances in which it will not be a criminal offence for the ICO to disclose certain information. Those gateways should therefore be read restrictively.
15. MoJ had provided the requested information to the ICO only for the purposes of the ICO carrying out its regulatory functions and didn't consent to the information's disclosure under FOIA.
16. The ICO said that the only remaining possible gateway would be section 132(2)(f) where disclosure would be necessary in the public interest. The ICO confirmed that if it were not able to receive such information in confidence from public bodies like MoJ then, in fact, the public interest is damaged and the FOIA regime diminished. Disclosure through the ICO as a 'back door' would, in effect, circumvent FOIA's purpose and that in itself would not be in the public interest.
17. In their correspondence to the Commissioner the complainant acknowledged that MoJ is a 'business' but argued that "... the redacted information mentioned there in does NOT related [sic] to identified or identifiable individuals or businesses."

18. In separate correspondence to the Commissioner, the complainant said:

"In both my internal review request and the complaint, I have set out - with respect to each redacted phrase - why in my view and by inference from the sentence context, the redacted phrase is unlikely or even highly unlikely to "relate to an identified or identifiable individual or business". The internal review response rather summarily dismissed this by pointing out that "individual or business" could also incorporate, for instance, a government department which I accept, but this still does not prove in which way the redacts relate to an individual or business (rather than being other information not related to an individual or business)."

19. As the complainant is, the Commissioner is satisfied that MoJ, to whom the reprimand was issued, is a 'business' under FOIA. MoJ provided the Commissioner with the information discussed in the reprimand in the course of the Commissioner carrying out his functions. On that basis alone, section 44(1) is engaged. But to address the complainant's specific argument, the redacted information includes information associated with separate, named bodies or 'businesses' – a specific prison and NHS Foundation Trust. Since they're named in the unredacted reprimand issued to MoJ, those organisations would be identifiable if the information were to be disclosed. The matter in this case is not whether specific individuals could be identified, but whether the prison and the NHS Foundation Trust could be identified and information relating to them therefore put into the public domain.

20. The Commissioner agrees with the ICO that there's no lawful gateway through which the redacted information could be disclosed, and it follows that section 132 of the Data Protection Act 2018 prohibits its disclosure. The Commissioner's decision is therefore that the information is exempt under section 44(1) of FOIA.

## Right of appeal

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21. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

22. 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.
23. 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

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