

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2024

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

Decision (including any steps ordered)

1. The complainant has requested information about cookie compliance work carried out by the Information Commissioner's Office ('the ICO'). The ICO advised that it was relying on section 31(1)(g) of FOIA (law enforcement) to withhold the requested information for questions one and two, and section 44 (prohibition on disclosure) for questions three and five.
2. The Commissioner's decision is that the ICO was entitled to rely on sections 31(1)(g) and 44 of FOIA to withhold the requested information for these questions.
3. The Commissioner does not require further steps.
4. 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 Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'the ICO' is used to denote the Information Commissioner dealing with the request, and the term 'the Commissioner' denotes the Information Commissioner dealing with the complaint.

Request and response

5. On 8 February 2024, the complainant wrote to the ICO and requested information in the following terms:

"I write further to your recent press release entitled Commissioner warns UK's top websites to make cookie changes:

<https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2024/01/ico-warns-organisations-to-proactively-make-advertising-cookies-compliant/>

I also write further to this press release from November 2023:

<https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/11/commissioner-warns-uk-s-top-websites-to-make-cookie-changes/>

In November's press release, the ICO committed to publishing details of companies that have not addressed the ICO's concerns in January 2024. However, I am unable to find these details on your website.

Please can you provide me with the following information regarding the ICO's latest actions underlying the press releases:

1. A list of names of the organisations that the ICO has written to regarding cookies non-compliance, together with the corresponding website URLs.

2. For each of those organisations, please indicate what the current status of that organisation's cookies compliance is (for example, the organisation has changed their cookies banners to be compliant, has committed to reach compliance within the next month, has refused to make the changes requested, or has failed to respond to the ICO's correspondence).

3. January's press release states: "We can already see the ripple effect of our intervention with many organisations making changes to cookie banners without receiving a letter from us." Please provide any evidence you hold to show that this is the case, including a list of relevant organisations and website URLs.

4. Please provide any policy or other document you hold, specifically in the context of the ICO's cookies compliance intervention, that sets out what enforcement action the ICO will take if an organisation does not improve their cookies compliance (i.e. reprimand, penalty notice or enforcement notice and under PECR or UK GDPR).

5. Please provide the source through which the ICO establishes what the UK's top websites are.”
6. The ICO responded on 7 March 2024. It stated that it held the requested information but advised that it was relying on section 31(1)(g) of FOIA (law enforcement) to withhold the information requested in questions one and two, section 44 (prohibition on disclosure) for question three and section 43 (commercial interests) for question five. It provided a response to question four.
7. Following an internal review the ICO wrote to the complainant on 9 April 2024. It stated that it was upholding its position.

Scope of the case

8. The complainant contacted the Commissioner on 11 April 2024 to complain about the way their request for information had been handled.
9. When providing its submission, the ICO advised the Commissioner that it was no longer relying on section 43 of FOIA as it considered that section 44 of FOIA also applied to question five.
10. The Commissioner therefore considers that the scope of his investigation is to determine whether the ICO was entitled to rely on sections 31 and 44 of FOIA to withhold the requested information for questions one, two, three and five respectively.

Reasons for decision

Section 31- law enforcement

11. Under subsection 31(1)(g) of FOIA information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2).
12. In its initial response and its submission to the Commissioner, the ICO has cited subsection 31(2)(a), which is the purpose of ascertaining whether any person has failed to comply with the law and subsection 31(2)(c), which is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
13. The ICO has explained that it exercises a number of statutory functions for the purpose of ascertaining whether a data controller or public

authority has failed to comply with the law, and or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation. These regulatory functions are set out in statute within the data protection legislation – namely the UK General Data Protection Regulation (UKGDPR) and the Data Protection Act 2018 (DPA18), as well as in this case the Privacy and Electronic Communications Regulations 2003 (PECR).

14. In this case the information withheld for questions one and two concern a list of organisations and analysis of their cookie compliance. The ICO has explained that the information requested relates to ongoing work it is conducting into the 'adtech' sector and cookie compliance. It stated that its enquiries with these organisations are ongoing and that releasing the requested information at this time could prejudice its ability to conduct its investigation fairly and in an appropriate manner.
15. The ICO signposted to a recent blog post on this area of work¹ that states: "Where organisations ignore the law, they can expect to face the consequences. We are reviewing responses received from organisations that have not made changes and determining which cases to prioritise for enforcement action."
16. The ICO explained that it frequently engages with organisations on a voluntary basis via written enquiries, without the need for use of its formal regulatory powers. Conducting enquiries on this footing requires fewer resources and the ICO believes it encourages the sharing of information and fosters good stakeholder relationships, in a way that the use of formal powers may not. The ICO therefore considers that disclosing names of the organisations it has engaged with, and information provided in confidence, would likely have a damaging effect on its stakeholder relationships and deter organisations from engaging on a voluntary basis in future.
17. The ICO explained that in writing to organisations, it has already experienced various degrees of challenge and pushback to its approach. In particular, the ICO has received concerns from organisations about being named as one of the organisations written to, whether under FOIA or otherwise. It explained that the organisations contacted have often responded to its letters through legal representatives and that at least one organisation has suggested that disclosure of its name under FOIA would be prejudicial to its commercial interests.

¹ [ICO launches "consent or pay" call for views and updates on cookie compliance work | ICO](#)

18. The ICO added that, whilst a number of organisations have disputed its position in respect of cookie compliance, its approach so far has seen almost 80% of the organisations contacted changing their practices, as referenced in the aforementioned blog post.
19. The ICO considers that if it were to disclose the names of the organisations concerned and its view on their compliance status, it would be likely to face much stronger and sustained legal challenge to its position on cookies particularly from those organisations with significant legal resource available to them.
20. The ICO stated that disclosure of the requested information would likely also lead to lower compliance and much lower levels of positive engagement with the ICO, particularly in light of the objections already received to its stance on cookies and disclosure under FOIA. It stated that this would be likely to tie up time and resources from both its investigative and legal teams, prejudicing its ability to effectively carry out its regulatory function. It considers that this could potentially force the ICO to resort to its formal regulatory powers, which would again damage stakeholder relationships and require additional staff time and resource.
21. The ICO has explained that being able to engage with organisations on an informal footing in the first instance has prevented them from adopting an entrenched position in respect of their use of cookies. This has enabled the ICO to improve compliance and more effectively fulfil its regulatory function. Through this informal approach organisations have acceded to ICO requests to change their cookie practices in spite of differences in position with regards to their compliance.
22. The ICO has argued that if it were to disclose the names of the organisations concerned at this stage, and its views on their compliance, its ability to engage positively and productively with both the organisations already written to, and those in the next phases of this work would be harmed.
23. The ICO added that, during each phase of work on cookie compliance it will be re-checking the compliance of each organisation already contacted. It considers that disclosing the names of those organisations already written to may damage and inhibit the effective and productive relationships it has established with those organisations, should it need to contact them again concerning their compliance in future.
24. The ICO has explained that this is especially relevant, as a number of organisations have moved to a 'consent or pay' model for their websites, a model which the ICO is still developing its regulatory position on. To disclose the names of the organisations at this juncture would be likely

to adversely affect the ICO's ability to carry out any such further investigation in a fair and appropriate manner and may pre-emptively disrupt positive working relationships established with the organisations concerned. The ICO considers that end result of this is likely to prejudice its ability to effectively carry out its regulatory functions in ascertaining whether an organisation has failed to comply with the law and or ascertaining whether circumstances exist or may arise which would justify regulatory action.

25. In its submissions, the ICO has confirmed that it considers disclosing the information 'would be likely' to prejudice the above purposes.
26. The Commissioner is satisfied that the ICO has regulatory functions that are capable of being harmed.
27. The information withheld under section 31(1)(g) directly relates to a call to action exercise on cookie compliance, conducted to prompt data controllers to review their data protection practices concerning the use of cookies to ensure they are compliant with the data protection legislation.
28. However, for the exemption to be engaged there must be a clear causal link between disclosure of the information and the stated prejudice. Whilst it is apparent to the Commissioner that the information can be linked to the statutory functions cited, he must also consider how disclosing the information might prejudice these functions either now or in the future.
29. The primary argument advanced by the ICO is that disclosing the names and cookie compliance details of organisations may disrupt the voluntary flow of information and the ways in which data controllers or public authorities interact with the ICO in the future.
30. The Commissioner notes that the work carried out on cookie compliance so far has been done in the voluntary manner described in paragraph 16.
31. As such the Commissioner cannot dismiss the argument that disclosing the requested information may have an impact on the ways in which organisations engage with the ICO. In many cases the ICO's engagement with organisations on such topics is voluntary and disclosing information which may affect data controllers proactively engaging with the ICO may affect the quality and uptake in these areas of work; therefore having a prejudicial effect on the functions at subsections (a) and (c) of section 31(2).
32. The Commissioner will now go on to consider the public interest test.

Public interest test

Factors in favour of disclosure

33. The ICO acknowledges that there is public interest in promoting openness and transparency on its work as regulator into the compliance of organisations with relevant legislation.
34. It added that there is understandable public interest in being able to see the organisations who have been identified in its work on cookie compliance and its progress in improving cookie compliance.
35. In their request for an internal review, the complainant has argued that: "There have been longstanding concerns about the ICO's apparent failure to take formal enforcement action in respect of cookies compliance and unlawful profiling for behavioural advertising purposes. Since Parliament enacted PECR in 2003 (and subsequently strengthened in 2019 by using the GDPR's definition of consent), the ICO has published 0 monetary penalties and 0 enforcement notices in this area, despite widespread evidence of serious non-compliance. Publishing the requested information would enable the public to establish how effectively the ICO is now enforcing the law through its latest efforts."
36. The complainant has also argued that other organisations are more likely to take steps to improve their compliance proactively if the ICO shares specific examples of compliant and non-compliant organisations and websites.

Factors in favour of maintaining the exemption

37. The ICO has argued that its needs to continue to encourage organisations, and other data controllers in potential future enquiries, to engage with it as regulator.
38. It explained that there is a need to ensure the confidentiality of the enquiries it has undertaken. Disclosure of the names while its enquiries are ongoing would be likely to undermine the effectiveness of this process, and its ability to conduct this work fairly and in an appropriate manner.
39. The ICO explained that it has a demonstrable history of sharing information about its work when it is appropriate to do so. It added that it has published regular updates on its work in this area through blog posts and is likely to do so again, which it considers goes some way to addressing the public interest in transparency about its work.

40. In its submission to the Commissioner the ICO stated: "In our view disclosure would have a substantial and detrimental impact on our ability to operate as an effective regulator. There is a clear and significant public interest in not undermining the operation of the ICO as regulator of information rights legislation. In our view the public interest in transparency around our work in this area is met by the regular updates we publish on our website, and the public interest in disclosure is heavily outweighed by the public interest in protecting the ability of the ICO to carry out our function as regulator effectively and efficiently."

Balance of the public interest test

41. The Commissioner accepts there is value in the disclosure of information that increases transparency and may increase understanding of cookie compliance, and how organisations are complying with this. However he agrees that there is a stronger public interest in the ICO being an effective regulator, being able to assess if breaches of data protection legislation have occurred and further action is needed, and being a regulator that organisations want to willingly engage with.
42. The Commissioner therefore considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsections 31(2)(a) and 31(2)(c) for the information withheld in relation to questions one and two.

Section 44 – prohibitions on disclosure

43. Section 44(1)(a) of FOIA says that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it's not subject to the public interest test.
44. In its response to the complainant, the ICO explained that the enactment that prohibits it from disclosing the requested information in question three (and latterly question five) under FOIA is the Data Protection Act 2018 (DPA), specifically section 132(1) of part 5 of that Act.²

² <https://www.legislation.gov.uk/ukpga/2018/12/section/132>

45. In their request for an internal review the complainant has argued that: "The public can easily navigate to the publicly available websites to ascertain if they have made changes to comply with the ICO's cookies expectations, using an internet page archiving service if necessary. As such, the information requested is reasonably available to the public from other sources and S.132 does not apply."
46. The Commissioner has taken account of these arguments and agrees that a member of the public could freely inspect the cookie arrangements on the websites of a range of organisations. However, the information the ICO actually holds is not otherwise publicly available and this area of work is directly connected to the ICO's regulatory functions.
47. The Commissioner has reviewed the information the ICO is withholding.
48. In its submission to the Commissioner, the ICO considered the applicable conditions of section 132(2) in which disclosure could be made with lawful authority. It confirmed that in respect of condition (a) it did not have consent of the organisation to disclose the information. For condition (b), the ICO did not obtain the information as part of its regulatory role in order to make it available to the public. For condition (c) it considers that disclosure is not necessary in order to fulfil any of his functions. For condition (f), the ICO does not consider it necessary or justifiable to disclose the requested information as there is no compelling public interest to do so. The ICO explained that the Commissioner and his staff risk criminal liability if they disclose information without lawful authority. It stated that the right of access under FOIA is not sufficient to override these important factors.
49. In terms of question five, the ICO advised that although it originally relied on section 43 of FOIA, it considers that the information requested also falls under section 44 of FOIA. It explained that it had obtained the requested information for the sole purpose of carrying out its function as regulator of the Information Acts, it relates to an identifiable business and is not publicly available through other sources.
50. The Commissioner is satisfied that the conditions set out in section 132(1) have been met. Namely that: (a) the information was provided to the Commissioner in order to carry out his role as regulator of the Information Acts, (b) the information relates to an identifiable business, and (c) the information is not, and was not previously, publicly available from other sources.
51. The Commissioner also accepts the ICO's arguments that none of the gateways for lawful disclosure provided by section 132(2) of the DPA have been met.

52. As noted, section 44 is an absolute exemption and isn't subject to the public interest test.
53. Since the above criteria have been met, the Commissioner is satisfied that the ICO correctly applied section 44(1)(a) of FOIA to the information withheld in questions three and five.

Other matters

54. In their complaint to the Commissioner, the complainant expressed dissatisfaction with the brevity of the ICO's internal review response, particularly as their request for internal review had been detailed. The Commissioner has reviewed the internal review response and finds that it meets the standards set out in the section 45 Code of Practice.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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