Upholding information rights

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Internal Review: IC-362698-C1M9

I write further to your email of 13 March 2025, in which you requested an internal review of the response to your recent information request, processed under the above case reference.

I am a Senior Information Access Officer in the Information Access Team. I can confirm that I have had no prior involvement in the handling of this request. My role is to review the application of the Freedom of Information Act (2000) FOIA in relation to your request.

Section 45 of the Freedom of Information Act 2000 (FOIA) requires the publication of a code of practice, designed to assist public authorities handle requests under the FOIA.

This guide recommends that public authorities put in place an internal review process for FOIA responses, which our guide suggests should be triggered whenever a requester expresses dissatisfaction with the outcome of a request they have made.

Request and response

You requested "any sections of notes of the following meetings that relate specifically to use of the UK's passport and immigration databases for facial recognition: 17 May 2024 – meeting with Home Office 11 July 2024 – meeting with Home Office 14 November 2024 – meeting with Home Office"

The request handler confirmed that we hold information within scope and that this had been withheld in accordance with Section 44 of the FOIA and Section 132 of the DPA, given that we do not have lawful authority to disclose it.

Review

The purpose of this review is to look again at your request and the response that was provided to you, to ensure it was correct, that any exemptions applied were appropriate and that any concerns are addressed.

In your request for internal review you suggest that the gateways at (c) and (f) under Section 132(2) (DPA) are applicable. In terms of the former you state that:

"It is necessary to disclose details of the steps taken in relation to this matter in order for the ICO to fulfil several of its functions. According to the ICO's strategic plan, these include "empowering people to hold government to account" and "driving transparency". The Gov.uk website states the ICO "promotes … data privacy for individuals"."

In terms of the latter, you state that the public interest favours disclosure of the withheld information by:

- "Improving scrutiny and accountability in relation to both the Home Office and the ICO with regards to how they carry out their functions
- Providing improved public understanding of decisions and processes within the Home Office and the ICO – and the reasons for them
- Encouraging better informed public debate about the use of biometrics for law enforcement and the government's use and management of personal data
- Helping to address legitimate public concerns about the management of their personal data and the role of the ICO in protecting their interests
- Helping to ensure public confidence in the government and the ICO"

I will therefore assess whether or not Section 44 of the FOIA and Section 132 of the DPA have been correctly applied, with particular attention to gateways (c) and (f), which concern the regulatory functions of the ICO and the public interest.

Section 44(1)(a) of the FOIA states;

'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it - (a) is prohibited by or under any enactment'

Section 44 is an absolute exemption, and it allows a public authority to withhold information when disclosure is prohibited by or under any enactment. In the response, the request handler explained that section 132(1) of the Data

Protection Act 2018 (DPA), which governs confidentiality of information provided to the Information Commissioner, applied in this instance. The enactment in question is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act.

In respect of the conditions at s132(1):

- The information was provided to the Commissioner in order to carry out his role as regulator of the Information Acts.
- The information relates to an identifiable business
- The information is not, and was not previously, publicly available from other sources.

Having checked the information in scope, I agree with the request handler that the information in scope relates to an identifiable third party and information they have provided to the ICO, in order to carry out its regulatory duties, and is not publicly available from other sources (nor has it been previously).

As the information requested meets the above criteria, we cannot disclose it unless we can do so with lawful authority.

Section 132(2) of the DPA18 provides conditions in which disclosure could be made with lawful authority. I have considered each in turn, below.

"(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,"

We do not have consent to disclose the requested information from the party involved.

"(b) the information was obtained or provided as described in subsection (1)(a)for the purpose of its being made available to the public (in whatever manner)"

The information was not obtained by or provided to the Commissioner as part of his regulatory role in order to make it available to the public and for this reason we are treating it as confidential.

"(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions"

We acknowledge your points about empowering people to hold government to account, driving transparency, and promoting data privacy for individuals. However, the question here, is whether we will still be able to carry out our functions if we do not disclose the paragraph in question. I consider that the answer is yes, and that disclosure of this specific information is not necessary for us to discharge our regulatory functions.

We also need to balance transparency in relation to our work with organisations (such as the government) against our ability to work productively with said organisations to promote compliance, accountability and protection of individual rights. It is my view that these concerns far outweigh any purpose or value that could be served by disclosure in this instance, and I have provided more details about our concerns in relation to this in my points about the public interest gateway at (f) below.

"(d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation"

Gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union.

"(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising"

Disclosure would not be for the purposes of criminal or civil proceedings.

"(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

As is explained by the First-tier Tribunal ruling in Lamb vs Information Commissioner, EA/2010/0018 (in which the Tribunal was asked to consider the ICO's reliance on the equivalent gateway in the Data Protection Act 1998 (under section 59) as preventing disclosure), there is an assumption of non-disclosure and that a high threshold must be met before any disclosure can be made under this gateway:

"Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."

I do not consider that threshold is met here. The Commissioner and his staff risk criminal liability if they disclose information without lawful authority, and having assessed the paragraph in question, I have been unable to identify any compelling reasons why any public interest in this particular content, would override the concerns associated with disclosure at this time.

I cannot comment on specific details within the withheld paragraph as to do so could constitute disclosure of the information (thereby undermining the application of the exemption).

I appreciate that there is a public interest in this topic, and that there is merit in your points about transparency promoting scrutiny and accountability, as well as public understanding, debate and confidence in both the ICO and the government. It is clear that this is an area for which there are public concerns about the management of personal data, which you have also elaborated on.

Nevertheless, there is another side to this, which is that the ICO has to maintain effective relationships with those it regulates as well as the public. Disclosing the requested information, without consent, would signal to the Home Office and other organisations that it is not safe to share information with us confidentially. It would undermine wider regulation efforts as organisations would become more guarded when we engage with them, which may necessitate us having to use our formal regulatory powers to obtain information rather than voluntary engagement. This makes regulation more complex, resource intensive, and significantly less efficient, which is not in the public interest.

We have a track record of being transparent when it is appropriate to do so. We often disclose details about our engagement with stakeholders and other types of

information on our disclosure log. Each case is different and disclosure is considered on a case-by-case basis depending on the information in scope and the circumstances involved.

We also publish advice and guidance on a range of topics as well as details about our position on issues such as biometrics and facial recognition technologies via blogs, the Information Commissioner's opinions, and reports on particular topics, such as this one. We publish concerns raised about particular organisations (including the Home Office) via our complaints and concerns data sets, action we've taken and annual reports. While these do not necessarily relate directly to your area of interest, the publication of such information demonstrates that where we can be transparent with the public, we will do so. However, on this occasion, I do not agree that we are able to do so.

With the above points in mind I agree with the request handler that the right of access under the FOIA is not sufficient to override the concerns mentioned above in this instance. We do not have consent to disclose the information and do not have another legal gateway to make this information available to you. I appreciate that you consider (c) and (f) would be applicable here, but following my assessment of the withheld information, I do not agree that either gateway (or any of the other gateways) offers a sufficiently compelling basis under which to disclose the information.

As such, I consider that we do not have a lawful basis to disclose and do not uphold your request for review. I appreciate that this outcome may be disappointing, and if you remain dissatisfied, I advise following the next steps outlined below.

Complaint procedure

If you are dissatisfied with the outcome of this review you can make a formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000. Please follow the link below to submit your complaint:

https://ico.org.uk/make-a-complaint/

Your rights

Our privacy notice explains what we do with the personal data you provide to us and what your rights are, with a specific entry, for example, for an information requester. Our retention policy can be found here.

Yours sincerely,

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