

16 January 2025

IC-354060-G7H2

## **Request**

Your request relates to a letter withheld from disclosure by the BBC, referenced in a recent Decision Notice (IC-327202-L7N3):

"1...Does the ICO hold, for whatever reason, a copy of this letter. It may be that the ICO accessed a copy of the letter when it considered the complaint lodged by myself on 14 August 2024.

2...If the ICO does for whatever reason hold a copy of this letter can you please disclose it to me. "

We received your request on 31 October 2024.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

## **Our response**

We hold the information you have requested. The BBC provided us with a copy of the requested letter during the course of our investigation into the complaint.

We are withholding the information under the provisions of section 44 of the FOIA. This exemption places prohibitions on disclosure. It is an absolute exemption, which does not require a consideration of the public interest test of the type required by the qualified exemptions.

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"

The enactment in question is the Data Protection Act 2018 (DPA) and specifically section 132(1) of part 5 of that Act. This states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

(b) relates to an identified or identifiable individual or business, and

(c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources,

unless the disclosure is made with lawful authority."

Section 132(2) lists the circumstances in which a disclosure can be made with lawful authority. We find that none of them apply here.

In your email you argue that there are strong public interest arguments for disclosure of the letter, particularly given the public concern around the circumstances of the BBC's interview with Princess Diana.

Section 44 of the FOIA is an absolute exemption, and therefore does not require consideration of the public interest. Section 132 of the DPA does provide a gateway to disclosure relating to the public interest. We will therefore explain our consideration of this in more detail.

Section 132(2)(f) allows for disclosure of information where:

"having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest."

However, as noted by the First-Tier Tribunal in *Lamb v Information Commissioner* (EA/2009/0108), this is not the same as the public interest test set out in the FOIA:

"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."

In this case, the requested letter was provided to the ICO by the BBC for the sole purpose of assessing the BBC's application of an exemption to withhold it. It

would not be an appropriate use of the FOIA to circumvent an exemption in this way. It would be entirely unreasonable of us to obtain information from a public authority only to then disclose it ourselves after we agreed with the authority's use of an exemption to withhold it.

This position is supported by a previous [decision notice](#) issued in relation to a similar request:

"It is the Commissioner's view that requests to the ICO itself for information it received in confidence for the purposes of carrying out its functions as regulator and for withheld information supplied by public authorities purely so it can make an assessment of the application of a particular exemption is an inappropriate use of the FOIA. It cannot have been the intention of the FOIA to provide another route to applicants for them to try and obtain the recorded information they require."

In this case we find that the high threshold set by section 132(2)(f) is not met and we do not have lawful authority to disclose the information. It would therefore be a criminal offence for us to do so. As a result the information is exempt under the FOIA and withheld from our response.

## **Next steps**

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full [review procedure](#) on our website.

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint](#) through our website.

## **Your information**

Our [privacy notice](#) explains what we do with the personal data you provide to us, and sets out [your rights](#). Our [Retention and Disposal Policy](#) details how long we keep information.

Yours sincerely



Information Access Team  
Information Commissioner's Office  
Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF  
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