

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2019

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her 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 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested information associated with an event held by the ICO. The ICO addressed part of the complainant's request, released some information that had been requested and withheld other information under sections 31 (law enforcement), 40 (personal data), 43 (commercial confidentiality) and 44 (prohibitions on disclosure).
2. During the Commissioner's investigation, the ICO withdrew its reliance on sections 31, 43 and 44. It released some of the requested information, but continued to withhold some under section 40(2).
3. The Commissioner's decision is as follows:

- The ICO can rely on section 40(2) to withhold the remaining information that the complainant has requested; it is the personal data of third persons and disclosing that information would not be lawful.
 - The ICO breached section 1(1)(b) and section 10(1) with regard to the information it disclosed on 13 November 2019, as it did not communicate this information to the complainant within 20 working days of the date of his request.
4. The Commissioner does not require the ICO to take any remedial steps.

Request and response

5. On 4 February 2019 the complainant wrote to the ICO and requested information in the following terms:

"[1] The ICO is holding a sandbox workshop event in London on 6 February. I would like to request a full list of all those attending the meeting, including the organisations that they represent.

[2] I would also like to information about whether an individual or organisation was invited by the ICO, or whether they booked a place."

6. The ICO responded on 4 March 2019. The ICO addressed the second part of the request. It released some information relevant to the first part of the request (details of ICO staff listed for attendance at the event in question) and withheld other information (external speakers and delegates and the organisation that they represent) under sections 31, 40, 43 and 44 of the FOIA.
7. Following an internal review the ICO wrote to the complainant on 23 April 2019. It partially upheld the complainant's complaint in relation to the ICO's reliance on the section 40 exemption. The ICO maintained its position with regard to the remaining exemptions it had applied.
8. As a result of his complaint to the Commissioner, the ICO reconsidered its handling of the request and issued the complainant with a fresh response on 13 November 2019. It confirmed it was no longer withholding in full the attendance list the complainant had requested and withdrew its reliance on sections 31, 43 and 44. The ICO released some more of the requested information; namely the names of external organisations represented and the names of some external delegates. The ICO continued to withhold some of the information under section 40(2).

Scope of the case

9. The complainant first contacted the Commissioner on 28 May 2019 to complain about the way his request for information had been handled.
10. Following the ICO's fresh response to the complainant of 13 November 2019, the complainant confirmed that he is dissatisfied with the length of time it took for him to receive information he had requested, and the ICO's reliance on section 40(2) to withhold the remaining requested information.
11. The Commissioner's investigation has therefore focussed on the ICO's application of section 40(2) of the FOIA to some of the requested information and the ICO's compliance, or otherwise, with section 1(1) and 10(1) with regard to information it disclosed.
12. In order to come to a decision the Commissioner has considered the ICO's communications with the complainant, as well as the complainant's communications to her. She has been prepared to contact the ICO for further information if necessary.

Reasons for decision

Section 40 – personal data

13. The ICO has now released the names of its staff who attended the event that is the focus of the complainant's request, the names of organisations represented at that event, and the names of some of the external delegates who attended. Those individuals appeared in a video about the event, along with their names, and this video is available on the ICO's YouTube page. Their personal data is therefore already in the public domain. The ICO has withheld the names of other external delegates who attended the event under section 40(2) and whose names are not featured in the above video or elsewhere.
14. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA').

Is the information the personal data of a third person?

16. Section 3(2) of the DPA defines personal data as: *'any information relating to an identified or identifiable living individual'*.
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The information comprises the names of certain external delegates who attended an event that the ICO hosted. The Commissioner is satisfied that this information is those individuals' personal data for the reasons given above.
21. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

Is a condition under section 40(3A) satisfied?

22. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The ICO considers that disclosure would contravene principle (a) under Article 5(1) of the GDPR.
23. Article 5(1)(a) of the GDPR states that: *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.
24. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
26. The lawful basis most applicable is GDPR basis 6(1)(f) which states:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

27. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects, that is the external delegates in this case.
28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

29. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
30. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. The information in this case has been summarised above. The Commissioner accepts that the complainant's interest in the event in question is entirely legitimate. As is the wider societal benefit of the ICO being open and transparent. She is less clear that the interest in the names of particular individuals who attended the event, specifically, is a legitimate interest. The complainant does not make a case for this in his internal review request or complaint to the Commissioner.
32. With regard to the ICO's reliance on section 40(2), in his request for an internal review on 3 April 2019 the complainant noted that the ICO had stated in its refusal that disclosing delegates' identities would be unlawful because attendees were not informed that their identities

would be disclosed. He goes on to point out that the event was filmed by the Information Commissioner's Office staff. He said that several attendees were interviewed and named on screen, and wide shots of the room clearly identified multiple attendees at the meeting, a number of whom were not ICO staff. The resultant film had been published on the ICO's Twitter feed.

33. The complainant considered that this "fatally undermined" the premise of the ICO's refusal under section 40, because delegates were identified and in some cases named, and images of them were published online.

Is disclosure necessary to meet the legitimate interests?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner does not consider that disclosure is necessary in this case. She considers that disclosing particular individuals' names would be overly intrusive and unnecessary to fulfil the legitimate interest in disclosure, such as it is.
36. To a large degree the Commissioner considers that the complainant's interests, and the interests associated with general openness and transparency, have been satisfied through the information that the ICO has now released in response to the complainant's request ie the names of its staff who attended the event, the names of the organisations represented at the event and the names of certain of the delegates from those organisations. The complainant's central argument that some delegates' names are in the public domain through a video available online has been addressed in that those names have now been released to the complainant.
37. The Commissioner therefore does not find that disclosing the disputed information is necessary to meet the legitimate interests in this case. It has therefore not been necessary to carry out the third test and balance the legitimate interests against the data subjects' interests or rights and freedoms.
38. The Commissioner is satisfied that there is no Article 6 basis for processing and so disclosing the withheld information would not be lawful.

39. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
40. The Commissioner has therefore decided that the ICO was entitled to withhold the disputed information under section 40(2) of the FOIA by way of section 40(3A)(a). This being the case it has not been necessary to consider the remaining conditions under section 40(3A), 40(3B) or 40(4A).

Section 1 – general right of access to information held by public authorities / Section 10 – time for compliance

41. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
42. Section 10(1) of the FOIA obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
43. The complainant submitted his request on 4 February 2019. The ICO communicated some of the information it holds to the complainant within 20 working days but did not communicate all the non-exempt information it holds until 13 November 2019. The ICO therefore breached section 1(1)(b) and section 10(1) of the FOIA on this occasion.

Right of appeal

44. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

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