

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2012

Public Authority: The Information Commissioner's Office
(‘The ICO’)

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the “Act”), he is under a duty to make a formal determination of a complaint made against himself. 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 (although this right may be restricted by the appellate body in certain circumstances). For the sake of clarity, 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 requested from the ICO the name and details of an individual that worked at a specified data controller that he wrote to in communicating the result of a Data Protection Act assessment.
2. The ICO refused to provide the information because it considered that it was exempt by virtue of section 40(2). It upheld its verdict in its internal review and the complainant complained to the Commissioner to consider this matter in accordance with section 50 of FOIA.
3. The Commissioner finds that the ICO correctly withheld the information by virtue of section 40(2). He requires no remedial steps to be taken.

Request and response

4. On 22 September 2011 the complainant requested the following information from the ICO (in relation to a Data Protection Act ('the DPA') assessment the Commissioner had undertaken under reference **RFA0391148**):

"To enable me to pursue this matter as an individual, can you (the ICO) please provide me with the specific contact (e-mail address) within the [data controller redacted] that you have been dealing with, so I can now contact them to close this case."

5. On 24 September 2011 the complainant slightly broadened his request and asked the ICO for:

"Can I please now very respectfully request the name, official title, and full postal address of the [data controller redacted] individual that you (the ICO) have been in communication with regarding this case."

6. The ICO responded on 11 October 2010. It confirmed that it held the information requested, but considered that the information should be withheld by virtue of section 40(2) [third party personal data]. It explained that the information constituted the named contact's personal data and, that in all the circumstances of the case, it would be unfair to release their name.
7. The complainant requested an internal review on the next day. The ICO communicated the result of its internal review on 8 November 2011. It upheld its position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He considered he was entitled to the information under FOIA.
9. The Commissioner has considered whether the ICO applied section 40(2) appropriately to the withheld information.
10. The ICO has consulted with the relevant data controller and the Commissioner has considered this evidence. The Commissioner has also written to the data controller to enable it to provide further relevant submissions in this case. For clarity, the Commissioner has considered

all the information before him, but will only mention the information that is material to his decision in this notice.

Reasons for decision

Section 40(2)

11. Section 40(2) [‘the third party personal data exemption’] of the FOIA states that:

‘Any information to which a request for information relates is also exempt information if –

(a) It constitutes personal data which do not fall within subsection 40(1); and

(b) Either the first or the second condition below is satisfied.’

12. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if they made a Subject Access request under DPA for it.

13. ‘Personal data’ is defined by section 1(1) of the DPA. The withheld information is the name and contact details of a specific individual that the ICO contacted. The information does constitute the specific individual’s personal data because it relates to an identifiable living individual and connects them to a particular event.

14. In relation to section 40(2)(b) the ICO’s main arguments have been focussed on why disclosure would contravene the first data protection principle and this is what the Commissioner has focussed on.

15. For personal data, the first data protection principle has three components. They are that the disclosure of the information to the public must be:

- fair to the data subject;
- in accordance with one or more conditions in Schedule 2 of the DPA; and
- lawful to the data subject.

16. All three conditions must be satisfied for the first data protection principle not to be contravened and the exemption not to apply. If even

one condition is not satisfied, the first data protection principle would be contravened and the exemption would be applied correctly.

Is the disclosure of the information to the public unfair to the data subject?

17. In accordance with his decision issued on **FS50286813** (Stroud District Council), the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.
18. To do so, he has specifically borne in mind the following factors:
 - Why the ICO holds the information;
 - The individual's reasonable expectations of what would happen to their personal data;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing these details weighed against the effects of disclosure on the data subject.
19. The ICO explained that the information was gathered during its conducting of an assessment into the complainant's DPA complaint (with his internal reference **RFA0391148**) and was used by it internally to address the right contact when it receives such complaints. The ICO notes that its duty was to assess whether or not the data controller (a data controller is the organisation which holds the personal data) has complied with the DPA. The Commissioner is not generally concerned about individual culpability. Instead, he asks the organisation for information about whether or not it complied with its obligations in the DPA and makes an assessment on its compliance with that legislation. The contact at the data controller is an ancillary matter and tends to be the person with the right knowledge in the data controller to answer his enquiries. The person is responsible for their role, but not for the data controller's previous handling of matters.
20. The ICO explained that the individual's expectation in this case was that their information would not be disclosed to the public. The ICO stated that its approach when it receives such requests is to consult with the relevant data controller to determine whether there would be an issue with the disclosure. The ICO undertook such a consultation and the data controller explained, that in the circumstances of this case, it considered that the disclosure of the name would not accord with the individual's expectation and would be unfair to them. It asked the ICO to withhold the information on that basis.

21. After being asked for further information to support its position, the data controller provided the Commissioner with a copy of a document called 'working assumptions' which it explained were known to all of its members of staff. The data controller was also a public authority under FOISA and therefore determined as a business priority that it was important to develop such 'assumptions' to enable it to comply with its obligations under that legislation. It explained that while these 'working assumptions' are just that and every case is considered on its own facts, it considers that they influence the expectations that their staff have and inform why they would be reasonable.
22. These 'working assumptions' outline three distinct situations which are considered by the data controller when deciding whether personal information about staff members would be disclosed. The material provision explains that requests targeted about a specific individual require careful handling to ensure the health and safety of its staff. A subdivision of this category discusses what should happen in relation to a request about staff involved in a particular piece of work. This explains that the process is to consult those staff and the working assumption would be to withhold the information if there is any indication that the request may lead to harassment or undue external pressure. It also provides the reasons for its position. It explained that the protection of the health and safety of its staff were of paramount importance and that it considered that there was an important balance to be made between accountability on one hand and employment responsibilities (including the moral duty to protect their staff). It is clear that the guidelines indicated that it would not always be regarded as fair to identify members of staff where they did not have control or responsibility for the public authority's compliance with legislation. The guidance also explains that its policy is to be considered within its context. The data controller ensures that individuals who engage with the public do so in their own names (except in limited circumstances).
23. In this case the individual was consulted by the data controller and they objected to the disclosure of their information in strong terms. The ICO explained that it considered that the reasonable expectation of the individual in this case was that they would neither anticipate nor expect their information to be released into the public domain by the Commissioner, particularly given the policy in place and the opinion of the individual themselves. In addition, the individual, given their role, has an informed knowledge of their rights under the DPA and therefore the Commissioner is satisfied that the lack of consent is fully informed.
24. The ICO confirmed that it considered that the disclosure of the information would be likely to cause the named individual both damage and distress. The data controller explained that the complainant was a persistent correspondent and tended to address individuals personally

rather than address the organisation that they work for. It explained that the complainant had knowledge of the data controller and had written intemperate correspondence to other specific individuals that attacked them on an inappropriate and personal level. The Commissioner has considered examples of such correspondence that were submitted by the complainant around the time of the request and considers that the data controller was right that they would be seen by any objective observer as being both inappropriate and offensive. Furthermore, the Commissioner notes that the communications are copied widely by the complainant to other individuals and departments. In the Commissioner's view, the wide dissemination of alleged sensitive personal data of staff members (and other allegations) can be reasonably said to exacerbate the distress to individual staff members of the data controller.

25. The ICO also received a notice from the relevant individual made under section 10 of the DPA. This requested that the ICO stopped processing their personal data and, in particular, that it did not disclose their name to the public (including the complainant) as a result of an information request. The Commissioner did not receive the said notice before the date of the request and thus the notice is not determinative in this case. However, it offers strong evidence that the individual had genuine reservations about the disclosure of their information, that they expected that the information would not be disclosed and supports the ICO's argument that they would experience damage and distress through the disclosure.
26. The ICO also explained that it considered that it owed the member of staff a duty of confidentiality and the disclosure of information would be a contravention of it. This also adds weight to its argument that the disclosure of the withheld information would not be fair.
27. When assessing the legitimate interests of the public, the Commissioner considers that members of the public will have a natural, and legitimate, interest in knowing how the ICO as a body deals with an assessment and the actions that it takes. The Commissioner considers that there is also a weighty public interest in knowing the process by which the ICO undertakes its responsibilities and for the ICO openness and accountability are key parts of its remit as the Regulator of the FOIA.
28. The complainant has also argued that he has a legitimate interest in obtaining the information because he requires it in order to obtain an apology from the relevant individual to draw the matter to a close. The Commissioner considers that the DPA does not offer any individual the right to an apology and thus this argument has little weight. As noted above, compliance with the legislation is the data controller's responsibility as a body and not solely an individual's responsibility.

29. He also reflects that the assessment marks the conclusion of his duties under section 42 of the DPA and the complainant has a freestanding right under section 8 of the DPA to go to court to obtain further remedies should the court deem them appropriate. In the Commissioner's view, the fact that the issue has been considered by the ICO as Regulator and the availability of an appropriate forum further mitigates the public interest in disclosure in this case.
30. In conclusion for this factor, he considers that the legitimate interests of the public in obtaining the name, do not come close to countering the damage and distress that would be experienced by the data subject in this case.
31. It follows that overall, the Commissioner concludes that the disclosure of the disputed information would be unfair. He is satisfied that in this case the disclosure would be against the reasonable expectations of the data subject, be a breach of their confidentiality and would cause them unwarranted and unjustified damage and distress.
32. It follows that disclosure would contravene the first data protection principle, the third party personal data exemption has been applied correctly and the information should **not** be disclosed in this case.
33. As disclosure is not fair, the Commissioner does not need to consider the other aspects of the first data principle. He also need not consider any of the other data protection principles.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Gerrard Tracey
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