

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2013

Public Authority: The Information Commissioner's Office ("ICO")
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information from the ICO which relates to its investigation into a previous case – FER0402796. This concerned a complaint made to the ICO relating to a request for information made to the New Forest National Park Authority (the "NFNPA") by the complainant. The ICO refused to disclose the requested information under section 44(1)(a) of the FOIA, by virtue of section 59(1) of the Data Protection Act 1998 (the "DPA").
2. The Commissioner's decision is that the ICO has correctly applied section 44(1)(a) FOIA in this case.
3. The Commissioner requires no further steps to be taken.

Request and response

4. On 17 April 2012 the complainant requested the following information:
"Would it be possible for me to now have a copy of the full text of the authority's letter to you of 11 November 2011."

5. On 16 May 2012 the complainant received a response from the ICO to the request. It advised that it was not able to provide any further information in respect of the above request.
6. On 27 May 2012 the complainant requested an internal review of the response to the request.
7. On 18 November 2012 the complainant asked as to whether the ICO were in a position to provide the results of its internal review.
8. On 17 December 2012 the ICO provided the complainant with a response in which it stated it would not be providing any further information in respect of the request. It stated that it relied upon section 44 of the FOIA in respect of the information that did not constitute his personal data.

Background

9. A previous request has been made to the ICO for the release of the entire contents of the same letter of 11 November 2011. Full consideration was given to this request and partial consent was obtained from the NFNPA which resulted in the majority of this letter being released with a number of redactions. The complainant's request concerns the remaining redacted information.

Scope of the case

10. The complainant contacted the Commissioner on 19 January 2013 to complain about the way his request for information had been handled stating that he was not satisfied with the response received to the request.
11. Specifically he raised the following issues:
 - (a) Upon what basis is the release of the information likely to prejudice the proper discharge of the function of the ICO as a regulator, particularly in view of the fact that the investigation is over in relation to the previous complaint about the request for information to the NFNPA.
 - (b) What exactly is missing in terms of legal authority in respect of the redacted information?
12. In respect of information that is considered to be the complainant's personal data, this is subject to the provisions of the DPA and will not be

considered in the scope of this decision notice. This information will be considered separately under the provisions of the DPA.

13. Therefore the issue referred to in (a) above will be considered separately by the Commissioner under the provisions of the DPA. Only issue (b) will be considered in the scope of this decision notice.
14. The Commissioner has therefore considered whether the ICO was to correct to withhold the requested information under section 44(1)(a) of the FOIA in relation to the requested information that is not the complainant's personal data.

Reasons for decision

15. Section 44(1)(a) of FOIA states that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited by or under any enactment.
16. In this case the ICO has explained that the enactment in question is section 59 of the DPA. Section 59(1) states that neither the Commissioner nor his staff shall disclose any information which:
 - (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,
 - (b) relates to an identified or identifiable individual business, and
 - (c) is not at the time of disclosure, and has not been available to the public from other sources,unless the disclosure is made with lawful authority.
17. The ICO went on to explain that section 59(2) states that there are five circumstances when the ICO could have lawful authority to disclose this type of information. It explained that this is an exhaustive list. The circumstances are:
 - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
 - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
 - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of –

- (i) any functions under this Act, or
 - (ii) any Community obligation,
- (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or
- (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
18. The ICO confirmed that section 59(1)(a) is satisfied because the information was provided to the ICO for the purposes of the information Acts (these consist of the Data Protection Act 1998 and the Freedom of Information Act 2000). The ICO would not have received the information in the redacted letter had it not been the regulator of the DPA and FOIA and been provided this information as part of the consideration of an alleged breach of that legislation.
19. It went on to explain that as section 59(1)(b) applies to the 'information Acts' the meaning of the word 'business' must be assessed in the context of those Acts and it had concluded that the NFNPA is an identifiable business and section 59(1)(b) is satisfied.
20. It said that in relation to section 59(1)(c), the information has not been disclosed to the public and therefore this does not provide a route to disclosure.
21. In relation to section 59(2)(a), the ICO had previously confirmed that it did not have consent from the NFNPA to disclose this redacted information and in relation to section 59(2)(b) the information was not provided to the ICO for the purpose of being made public. By way of background, a previous request has been made to the ICO for the release of the entire contents of the same letter of 11 November 2011. Full consideration was given to this request and partial consent was obtained from the NFNPA which resulted in the majority of this letter being released with a number of redactions. The complainant's request concerns the remaining redacted information.
22. In relation to section 59(2)(c) the ICO concluded that it is not required to disclose this information in order to discharge a function under the information Acts or a Community obligation and therefore this information could be considered "exempt information".
23. In relation to section 59(2)(d), the ICO confirmed that a disclosure would not be for the purposes of any proceedings.

24. In relation to section 59(2)(e), it stated that the public interest threshold in relation to this request is very high, not least because disclosure in contravention of section 59 by the ICO may constitute a criminal offence (under section 59(3) of the DPA). It confirmed that that it considered that disclosure was not necessary in the public interest on the facts of this particular case. It further stated that it considers that there is a strong public interest in information being provided in confidence to the ICO, to enable it to carry out its statutory duty with information being provided remaining confidential and not being disclosed without lawful authority. In support of its position the ICO submitted that it considered that releasing the requested information in this case would undermine its regulatory functions and powers.
25. The Commissioner has had the opportunity of considering the redacted information. In light of the arguments and submissions presented by the ICO, the Commissioner is of the view that section 44(1)(a) of the FOIA was applied correctly in this case as the information requested is exempt from disclosure under section 59 of the DPA and the grounds for lawful authority are not been established under section 59(2) of the DPA.

Other Matters

26. Part IV of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Guide to Freedom of Information', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing a review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over six months for an internal review to be completed, despite the publication of his guidance on this matter.

Right of appeal

27. 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

28. 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.
29. 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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