

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 November 2018**

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

Decision (including any steps ordered)

1. The complainant has requested a copy of an information notice. The ICO provided the complainant with a redacted copy of the information he had requested. The redactions were made under section 31(1)(g) with subsection (2)(a) and (c) and 40(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the ICO has correctly applied section 31(1)(g) with subsection 2(a) and (c) and section 40(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 20 November 2017 the complainant requested information of the following description:

"A copy of decision notice RFA0691497."

5. The ICO sought the following clarification:

"It may be helpful to explain that the ICO would only issue a decision notice in relation to a freedom of information complaint 'FS50' case not a data protection 'RFA' case. I have consulted internally in relation to

RFA0691497 and can confirm that no decision notice is held, an information notice is held.

Please let us know if you would like to request a copy of that information notice?"

6. The complainant submitted a refined request on 05 December 2017 which stated:

"Yes, I would like a copy of that information notice."

7. On 18 December 2017 the ICO responded. It confirmed it held information falling within the scope of the request but refused to disclose that information under section 31(1)(g) with subsection (2)(a) and (c) FOIA.
9. The complainant requested an internal review on 19 December 2017. The ICO sent the outcome of its internal review on 22 January 2018. It provided the complainant with a redacted copy of the information he had requested. The redactions were made under section 31(1)(g) with subsection (2)(a) and (c) and 40(2) FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 22 March 2018 to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the ICO was correct to withhold the redacted information under section 31(1)(g) with subsection 2(a) and (c) and section 40(2) FOIA.

Reasons for decision

12. The ICO has argued that some of the redacted information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority the functions set out in 31(2) of FOIA.
13. The purposes that the ICO has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2):
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,

- (c) Ascertaining whether circumstances would justify regulatory action;
14. In order for section 31(1)(g) of FOIA to be engaged, the ICO must be able to demonstrate that the potential prejudice being argued relates to at least one of the interests listed above.
 15. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
 16. The ICO has stated that it believes the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the ICO to discharge, it still requires the ICO to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
 17. The Commissioner has sought to test the validity of these arguments by considering the following questions; Is the ICO formally tasked with ascertaining whether any person has failed to comply with the law or whether circumstances would justify regulatory action? What stage had the investigation reached when the request was submitted? Does the ICO have powers to compel engagement in the regulatory process and, if so, do these mean the chances of prejudice occurring are effectively removed?
 18. The ICO explained that disclosure of the redacted parts of the information notice would be likely to prejudice law enforcement. The ICO carries out a number of regulatory functions which are set out in statute within the Data Protection legislation. At the time of the request the legislation which was in force was the Data Protection Act 1998 (DPA). The ICO exercises a number of statutory functions for the purpose of ascertaining whether a data controller has failed to comply with the law and/or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to the DPA.
 19. A considerable proportion of the ICO's regulatory work is concerned with ascertaining whether data controllers have complied with the statutory requirements placed upon them by DPA.
 20. In this case the ICO withheld a paragraph from the body of the notice and Annex 1 in its entirety under section 31(1)(g) with subsection (2)(a) and (c) FOIA.

21. The ICO said that disclosure would be likely to compromise its ability to investigate and therefore affect the discharge of its regulatory function in vital areas, including its ability to influence the behaviour of data controllers and to take formal action.
22. The Commissioner considers that the ICO is formally tasked with regulatory functions to ascertain whether any person has failed to comply with the law or whether circumstances would justify regulatory action. Given the nature of the requested information, an information notice, the ICO needed to take formal action in that case in order to fulfil its regulatory functions. The ICO does not however always have to rely upon its formal powers and regularly relies upon the co-operation of the data controller's it regulates and the free and frank sharing of information.
23. The Commissioner considers the likelihood of prejudice occurring, that is by affecting the ICO's ability to discharge its regulatory functions in vital areas such as the use of data analytics in politics, including its ability to influence the behaviour of data controllers and to take formal action, is real and significant given the timing of the request. As the investigation to which the information notice relates was live at the time of the request, disclosure of the redacted information would be likely to prejudice the ongoing investigation. This is because the redacted information provides details of the direction of the investigation when conclusions relating to the issues were yet to be determined. The Commissioner therefore considers section 31(1)(g) with subsection (2)(a) and (c) are engaged in this case. She has therefore gone on to consider the public interest arguments.

Public interest test

Arguments in favour of disclosing the information

24. The ICO provided the following public interest arguments in favour of disclosure:
 - Increased transparency in the way the ICO conducts its strategic investigations.

- Increased transparency in relation to organisations processing of personal data for political campaigns.
- The heightened public interest in this investigation because it relates to the processing of personal data by political parties.
- The public interest in the outcome of this investigation, particularly given the number of people it potentially affects and the high profile of some of the organisations involved.

Arguments in favour of maintaining the exemption

25. The ICO provided the following public interest arguments in favour of maintaining the exemption:

- The public interest in maintaining the ICO's ability to fully perform its regulatory role, and ensuring that organisations are not deterred or inhibited from participating fully and candidly with our investigations. It considers that this would likely be undermined by the release of an Information Notice, particularly before the conclusion of an investigation.
- The public interest in maintaining the ICO's ability to perform its regulatory role with specific reference to this case. Information Notices are a tool the ICO can use to obtain information from an organisation, where informal attempts have failed or where it needs to understand it's processing with a view to achieving compliance. Where an Information Notice is appealed to the Information Rights Tribunal, release of the Information Notice prior to the appeal outcome could prejudice those proceedings.
- The public interest in the Information Commissioner not disclosing information into the public domain under FOIA without consent or without another lawful basis on which to do so.
- There is a public interest in maintaining the ICO's ability to conduct investigations as it sees fit without undue external influence and with the ability to make decisions without a high degree of scrutiny which might affect its decision making or divert resources.
- The ICO is regularly providing reports and blogs on the investigation into the use data analytics in politics which goes some way towards satisfying the public interest in this high profile issue without damaging our ability to investigate fairly, thoroughly and proportionately.

Balance of the public interest

26. The Commissioner considers that there is a strong public interest in the ICO operating openly and being accountable in its effectiveness in carrying out its statutory functions, particularly in relation to such a high profile issue.
27. The Commissioner does also consider that there is a strong public interest in not disclosing information which would be likely to impede the ICO's ability to carry out its functions effectively.
28. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(a) and (c) FOIA was correctly applied in this case to the information redacted under this exception.

Section 40(2)

29. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
30. As explained above the Data Protection Act 1998 (DPA) has now been superseded by the Data Protection Act 2018, however at the time of this request the 1998 legislation was in force and so this is the correct legislation to refer to. Personal data was defined in section 1(1) of the DPA as:

"data which relate to a living individual who can be identified –
 - (i) from those data, or
 - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."
31. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

32. The ICO explained that the withheld information is the name of its contact at the data controller.
33. The Commissioner considers that the information redacted under section 40(2) FOIA, is information from which the data subject would be identifiable and would therefore constitute personal data.
34. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.
35. The ICO does not consider that it would be within the reasonable expectations of the individual that their name will be put in the public domain. The person in question is a contact at the data controller and his name has no bearing on the core of the information notice.
36. It does not have a schedule 2 condition that it can rely on to disclose the name of the individual. It has not sought the consent of the individual as it does not consider that it is necessary or practical. In the absence of consent it considered the "legitimate interests" condition. It does not believe that it could satisfy the requirements of this condition, especially the requirement concerning the fairness of the processing.
37. When considering the legitimate interests condition it specifically looked at:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); any legitimate interests in the public having access to the information; and,
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
38. The ICO does not consider that it would be fair to disclose the name of the individual simply by virtue of them being a contact at the data controller. Any public interest is in the content of the notice itself, the withheld name does not assist in understanding of the issues in this

particular case so the ICO does not see any strong argument in favour of disclosure.

39. Based upon the ICO's submissions relating to the reasonable expectations of the data subject and the lack of any legitimate wider public interest in disclosure of the name of the contact, the Commissioner considers section 40(2) FOIA was correctly applied to the information redacted under this exception.

Right of appeal

40. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Pamela Clements
Group Manager

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