

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 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 initially requested information relating to the change of the ICO's privacy notice following the introduction of the General Data Protection Regulations (GDPR) in May 2018.
2. The Commissioner's decision is that the ICO ("the ICO") failed to respond to a number of requests within 20 working days and has therefore breached section 10 of the FOIA.
3. Furthermore, the ICO did not comply with section 1 of the FOIA as it failed to confirm to the complainant what information it held.
4. The Commissioner requires the ICO to take the following steps to ensure compliance with the legislation.

- Issue a substantive response, under the FOIA, to the outstanding requests listed in the Annex at the end of this notice.
5. The ICO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Background

6. The GDPR were introduced in May 2018 and the Data Protection Act 1998 subsequently amended to the Data Protection Act 2018 (DPA). Various elements within the GDPR required data controllers to make changes to existing policies and procedures, including the ICO.
7. The complainant initially contacted the ICO with regard to a matter under the GDPR and the processing of his personal data. The associated complaint has been dealt with separately. However, when considering this case the Commissioner has also reviewed that information.

Scope of the case

8. The complainant contacted the Commissioner on 18 November 2018 to complain about the failure, by the ICO, to respond to his requests for information.
9. The complainant provided the Commissioner with detailed submissions relating to his initial concerns and his follow-up correspondence with the ICO. For brevity they have not all been included in this decision notice.
10. The scope of this notice and the following analysis is to determine whether the ICO has complied with its obligations under the FOIA.

Request and response

11. On 28 May 2018, the complainant raised a complaint relating to the processing of his personal data and the ICO's privacy notice:

*"What I am unclear about from your privacy notice and the application process is, if you intend to publish my name and address on your website and if so under what lawful basis. I understand why I am required to register but I am unclear whether and why you need to publish my name and address on a website. Please can you explain whether you intend to publish my name and address on your website and also how this fact can be determined from your privacy notice and **on what lawful basis you will be doing so.**" (Commissioner's emphasis)*

12. The ICO responded to this and stated that it had reviewed the information provided within its privacy notice and amended the wording. It also stated that it was continuing to publish the register in reliance on the 'public task' legal basis at Article 6(1)(e) of the GDPR¹.

13. On 25 June 2018, the complainant wrote to the ICO and requested information in the following terms:

"You say you have updated your privacy notice. I would be grateful if you could provide a list of the differences between the old notice, which I do not have a copy of, and the new one. I have seen the new notice at

<http://ico.org.uk/global/privacy-notice/pay-a-data-protection-fee/> ..."

14. The ICO responded to the request on 14 December 2018. It stated that it did not hold a list of changes to the Privacy Notice, but provided a 'website update' form which reflected the relevant changes.

15. In his email to the ICO of 25 June 2018, the complainant also asked:

Is it your contention that the use of a PO Box is compliant with The Data Protection (Charges and Information) Regulations 2018?

Turning to the matter of your lawful basis for publishing my personal data. You are maintaining that this is under the lawful basis of 'Public task'. But you have failed to adequately address my points in my original email regarding this. In particular you have not given any reference to a statute in law which gives you this publishing right, in your email reply you simply refer to Article 6(1)(e) of the GDPR but as you know this merely introduces the Public task lawful basis. It is not the specific law needed for this particular case. Recital 41 of the GDPR does say that you do "not necessarily require a legislative act adopted by parliament but your legal basis or legislative measure must be clear and precise in its application should be foreseeable to persons subject to it. You have failed to do this. Moreover your own guidance notes state "For accountability purposes, you should be able to specify the relevant task, function or power, and identify its basis in common law or statute. You should also ensure that you can demonstrate that there is no other reasonable and less intrusive means to achieve your purpose"

You simply haven't done this and I invite you to do this again now"

16. On 29 July 2018, the complainant also asked:

¹ <http://www.legislation.gov.uk/ukpga/2018/12/section/8/enacted>

"What does the ICO think is the purpose, under the new legal framework, of the register of fee payers?"

"Currently my address on the register is listed as "withheld". Do you plan to maintain it like this, including on any re-enabled facility to download the entire register? Will this continue once you've introduced the email address option? i.e. can I continue to have my domestic residential and email address withheld from the published register? If so do you plan to offer this facility to others who object or during the registration process?"

On 21 August 2018, the complainant sent a further email to the ICO stating:

"Your email solution makes no sense to me whatsoever. It just doesn't seem like it's been thought through properly. You tale [sic] about giving data controllers the option, but how? When they register or renew? I suppose you could do it then, although of course I would argue that you have to give people, who are registering as data controllers as individuals, the option of neither their postal address nor their email address being published. But given how you're referring to whether I object I assume your plan sounds like you intend that it would apply to everyone on the register. But then how would this be achieved? Do you plan to email everyone on the register and ask them if they want their email address to be published rather than their postal address, giving them the option of as you suggest registering a new email address? Or do you just intend to start publishing the existing email address they've provided? My recollection of the registration process was that I had to give an email address in the context of providing contact details and I thought it said that it wouldn't be published. Can you confirm this?"

17. On 17 December 2018 the ICO responded and stated:

"We would note that the FOIA gives the right to access recorded information held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold. We consider the above correspondence from you to be questions, enquiries or requests for explanation/justification as to decisions we have made, and they were responded to as such, in the normal course of business. It is unclear, what, if any, recorded information is being requested here and we therefore do not consider these points to be valid requests for information under section 8 of the Act.

You may wish to consider our guidance on requesting information from public authorities, which includes advice on how to word your requests

to get the best results. This can be found here: <https://ico.org.uk/your-data-matters/official-information/>

For instance, you may wish to request copies of policies or procedures in respect of these matters, rather than an explanation as to why these policies or procedures are in place.

We have written to you separately on Friday 14 December regarding your question about changes to the Privacy Notice.

We also note that the majority of your correspondence relates to concerns you have about our processing of your personal data and the register of data protection fee payers. We understand that you have raised a complaint with the Commissioner under data protection legislation in respect of these matters and this would appear to be the more appropriate avenue for you to satisfy your concerns in this regard."

18. The complainant responded the same day and explained to the ICO that one of his requests from 28 May 2018 had not been interpreted correctly. He further explained that this had been answered in a narrow sense on 25 June 2018 but that it was his follow up to that response that had not been answered, that is:

"Turning to the matter of your lawful basis for publishing my personal data. You are maintaining that this is under the lawful basis of 'Public task'. But you have failed to adequately address my points in my original email regarding this. In particular you have not given any reference to a statute in law which gives you this publishing right, in your email reply you simply refer to Article 6(1)(e) of the GDPR but as you know this merely introduces the Public task lawful basis. It is not the specific law needed for this particular case. Recital 41 of the GDPR does say that you do "not necessarily require a legislative act adopted by parliament but your legal basis or legislative measure must be clear and precise in its application should be foreseeable to persons subject to it. You have failed to do this. Moreover your own guidance notes state "For accountability purposes, you should be able to specify the relevant task, function or power, and identify its basis in common law or statute. You should also ensure that you can demonstrate that there is no other reasonable and less intrusive means to achieve your purpose"

"You simply haven't done this and I invite you to do this again now"

19. The complainant stated that he was not asking for an explanation or justification as to a decision, but for the ICO to specify the basis in

common law or statute that its own guidance said it should be able to specify².

"This is to ask the clear basis in law which the ICO are relying on to publish the register under the public task lawful basis."

20. The complainant also commented that he could not understand the relevance of the ICO response to his question *"When did you start publishing the register again?"*. He also expressed his dissatisfaction that the matter had been going on for almost 7 months.

21. By way of example the complainant highlighted the following:

- Three of the seven FOI requests he had complained to the Commissioner about were sent to the ICO on 29 November 2018. He had been advised *"I have contacted the ICO and asked it to respond to your requests within 10 working days. If it fails to do this, a decision notice will be issued requiring it to respond"* yet only one of these three FOI requests was responded to within 10 working days.
- The one answered request within the time limit was answered 172 days after it was originally asked.
- *"No decision notice was issued with regard to the other two requests from 29 November 2018. Given the obvious conflict of interest the ICO has in all of this I would have thought it was prudent to carefully follow these rules"*.
- The further three of seven FOI requests complained about, which were sent on 3 December 2018, were arguably not answered within 10 working days, depending on how you define "10 working days".
- *You said that you "note the majority of your correspondence relates to concerns you have about our processing of your personal data and the register of data protection fee payers. We understand that you have raised a complaint with the Commissioner under data protection legislation in respect of these matters and this would appear to be the more appropriate avenue for you to satisfy your concerns in this regard." Again there is such an obvious conflict of interest regarding the data protection legislation matters that I had hoped that the ICO would be scrupulous in following the rules in how this is handled.*

² <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/>

22. On 2 January 2019 the complainant requested an internal review. He also stated that he recognised that earlier correspondence was not focussed on Freedom of Information and the wording may not have been ideal. Having read up on FOI law, the ICO's guidance and advice he re-submitted his outstanding requests in an attempt to clarify the information he was requesting. In addition, he made two new FOI requests, as detailed below:

Firstly regarding a Data Protection Impact Assessment:

- *Did the ICO carry out a Data Protection Impact Assessment (DPIA) which covered the processing of data gathered for the register of fee payers?*
- *If so when was the DPIA carried out?*
- *If a DPIA was carried out please send me a copy of any DPIA document.*
- *If the ICO did not carry out a DPIA did you document the reasons why not?*
- *If you did document the reasons why you did not carry out a DPIA then please send me a copy of this documentation.*
- *If you did not carry out a DPIA did you rely on a prior Privacy Impact Assessment (PIA) for the previous register of notifications, perhaps with the appropriate dates?*
- *If so then please send me a copy of any such PIA document and relevant updates.*

Concerning the current register of fee payers please provide the following numbers:

- *Total number of entries on the register of fee payers i.e. the total number of data controllers who are on the register of fee payers including those whose entry rolled over from the register of notifications.*
Then amongst this total number:
- *The number of entries on the register fee payers in tier 1 – micro organisations.*
- *The number of entries on the register of fee payers who specified an organisation type of "Individual/Sole trader".*
- *The number of entries on the register of fee payers who specified an organisation type of "Individual/Sole trader" and where the address given of the data controller is a domestic residential address. If such*

addresses are not flagged as such on the register then please provide a reasonable estimate of possible.

When providing these numbers please provide them for the most recent date where is practicable to provide them and tell me what that date is."

23. Due to the amount of correspondence between the parties, for brevity the Commissioner has not detailed the majority of it in this decision notice. However, the outstanding requests are detailed in an Annex at the end of this decision notice.

Reasons for decision

24. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

25. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

26. The Commissioner has referred to her own guidance³ and in particular section 8(1)(c) which states that a request can only be valid if it 'describes the information requested'.

27. It is important to recognise that most requesters are unlikely to know what exact information is held by the authority, or have an appreciation of how its records are stored. This means that they cannot always

³ <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

reasonably be expected to be specific about details such as the titles, contents and location of documents.

28. It also follows that they will not always provide enough detail to enable the authority to identify the information from the description provided. For these reasons, we are of the view that there has to be a low test for a description to meet the requirements of section 8(1)(c).
29. Authorities should therefore treat any description that allows the requested information to be distinguished from other information held by the authority as valid under section 8(1)(c).
30. It is clear from the correspondence that the complainant was initially seeking information relating to the processing of his personal data for the register of data controllers. However, given the further correspondence on 25 June 2018 it may have been appropriate to contact the complainant by telephone to fully discuss and clarify his concerns. Although this may not have reduced the amount of correspondence, it would likely have provided a better understanding for both parties.
31. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
32. With regard to the request of 25 June 2018, the ICO responded on 14 December 2018 stating that it did not hold a list of changes to the Privacy Notice.
33. Clearly this response was provided outside of the 20 working day timescale and is therefore a breach of section 10 of the FOIA.
34. The Commissioner asked the ICO for a timeline of its correspondence regarding this case, both with the complainant and the Commissioner, and what action had been taken.
35. The ICO stated that it received two emails from the Commissioner on 29 November and 3 December 2018 regarding the complainant's concern who considered that he had not been provided with responses to what he considered to be requests for information contained within his correspondence with the ICO's DPO of: 28 May 2018, 25 June 2018, 29 July 2018 and 21 August 2018.
36. It explained that it responded on 14 and 17 December 2018, providing the 'website update' form and its view that the remainder of the correspondence was questions, enquiries etc respectively. It additionally explained that it was unclear, what, if any, recorded information was being requested and therefore it was not considered to be valid requests

for information under section 8 of the Act. The ICO provided advice on how the requests could be clarified and worded in the future.

37. On 2 January 2019 the Commissioner asked the ICO to carry out an internal review. The complainant also made a request for review on the same day. In addition this email contained new requests for information and clarification of his previously posed questions, explaining what recorded information he required.
38. On 24 January 2019 the ICO carried out a review of its response of 14 December 2018, that is, in relation to the 'website update' form.
39. The ICO acknowledged that a number of responses remain outstanding, and particularly to the request of 2 January 2019. It explained that whilst this request is both complex and requires consideration of a voluminous amount of information and the fact it has experienced an unprecedented demand on its services recently, (receiving 2,326 information requests in 2018/19 – a 54% rise on the number handled in 2017/18), it accepts that the substantial delay in its response to this request is regrettable and for this it offers its sincere apologies.
40. It anticipated being in a position to respond to this request in the near future. However at the time of writing this decision notice, a response has yet to be provided to the complainant. Again this is a clear breach of section 10 of the FOIA.

Other matters

41. The Commissioner is disappointed to see how these requests were dealt with. It appears to her that requests for information were not recognised as such and therefore not dealt with correctly. This in turn led to breaches of section 10 compounding the complainant's frustration, and leading to further requests, complaints and correspondence.
42. The Commissioner is also concerned that the ICO may not have an appropriate process in place to recognise and forward requests to the Information Access team in a timely manner. In this case, the initial correspondence of 28 May 2018 was addressed to the Data Protection Officer (DPO) and responded to on 25 June 2018.
43. Further correspondence from the complainant on 25 June 2018 was acknowledged on 27 June, and an email sent on 29 June saying the ICO would respond 'next week'. It appears that there was a delay here in responding and that this was the foundation for the following correspondence.

44. Although some of the questions were not deemed to be valid FOI requests under section 8 of the Act, the Commissioner considers that it is reasonable to respond to them and advise that no information is held that could answer the question.
45. For example, the complainant has queried how the email address solution would work in practice, this appears to have been disregarded and no response has been forthcoming. If no information is held relating to that process, the ICO should advise this is the case under section 1 of the FOIA.
46. A further example is where the complainant asked:
"What does the ICO think is the purpose, under the new legal framework, of the register of fee payers?"
47. A more appropriate response may have been *"we do not hold any information that could answer that question because this is a request for a view or opinion rather than recorded information. However, the legal purpose for which the register is required is....."*
48. The Commissioner further acknowledges that the FOI complaints initially raised with her were not handled as expected in that a decision notice was not issued with regard to the ICO's breach of section 10.
49. With regard to the calculation of 10 working days, the Commissioner confirms that this is any business day excluding bank holidays and weekends, including bank holidays in Scotland and Northern Ireland.

<https://ico.org.uk/media/for-organisations/documents/1621/the-right-to-recorded-information-and-requests-for-documents.pdf>

<https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

<https://ico.org.uk/media/for-organisations/documents/1624140/duty-to-provide-advice-and-assistance-foia-section-16.pdf>

<https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

50. 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

51. 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.
52. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Outstanding requests

"Turning to the matter of your lawful basis for publishing my personal data. You are maintaining that this is under the lawful basis of 'Public task'. But you have failed to adequately address my points in my original email regarding this. In particular you have not given any reference to a statute in law which gives you this publishing right, in your email reply you simply refer to Article 6(1)(e) of the GDPR but as you know this merely introduces the Public task lawful basis. It is not the specific law needed for this particular case. Recital 41 of the GDPR does say that you do "not necessarily require a legislative act adopted by parliament but your legal basis or legislative measure must be clear and precise in its application should be foreseeable to persons subject to it. You have failed to do this. Moreover your own guidance notes state "For accountability purposes, you should be able to specify the relevant task, function or power, and identify its basis in common law or statute. You should also ensure that you can demonstrate that there is no other reasonable and less intrusive means to achieve your purpose

"When did you start publishing the register again?"

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When providing these numbers please provide them for the most recent date where is practicable to provide them and tell me what that date is."