

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2022

Public Authority: Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant requested information pertaining to the purchase of chocolates. The Information Commissioner ("the ICO") originally relied upon section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs) to withhold all the information, but subsequently disclosed some of it.
2. The Commissioner's decision is that the ICO, was entitled to rely on section 36(2)(c) of FOIA to withhold the information it held in relation to four of the eight parts of the request and disclosed the information it held in respect of another part.
3. As the complainant already possesses the information that was incorrectly withheld, no steps are required.

Jurisdiction and nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority – a duty confirmed by the First Tier Tribunal. It should be noted however that the complainant has a right of appeal against the decision, details of which are given at the end of this notice.

5. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

Request and response

6. On 9 July 2021, the complainant wrote to the ICO and, referring to a previous announcement by the ICO of an investigation, requested information in the following terms:

"1) Is the investigation complete?

2) If not, what is the expected completion date for the investigation?

3) What is the name and job title of the person who carried out the investigation?

4) What is the name and job title of the person who bought the chocolate?

5) Was the purchase authorised by someone more senior than the person who made the purchase? If so, what is the name and job title of that person?

For the above three questions, please consider the name / job title as separate elements and consider disclosing the job title even if you believe that the name should be exempt.

6) What was the purpose for buying the chocolate? If you refuse to provide a summary answer, please provide all recorded information held by the ICO that sets out the purpose for buying the chocolate.

7) Has any disciplinary action been taken against anyone involved in the purchase? If so, what action was taken and who was the subject of the action?

8) What changes - if any - have been made to ICO procedures on purchasing as a result of the investigation?"

7. The ICO responded on 10 August 2021. It relied on section 36(2)(c) of FOIA to withhold all the information it held.
8. Following an internal review the ICO wrote to the complainant on 27 September 2021. It stated that the investigation had now been concluded and that, whilst it considered that it had been entitled to rely on section 36(2)(c) of FOIA at the time of refusal, it was now able to

provide all the information except that within the scope of elements 4), 5) and 7) – where it now relied on section 40(2) of FOIA (third party personal data) to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 9 November 2021 to complain about the way his request for information had been handled. His grounds of complaint focussed on the original application of section 36(2)(c) of FOIA.
10. The Commissioner responded to the complainant on 13 November 2021 and asked him to clarify the scope of his complaint. He (the Commissioner) noted that the complainant had not disputed the application of section 40(2) to withhold the information and that it was not his usual practice to investigate exemptions that were no longer being relied upon. Pursuing an investigation into the use of section 36 could not place the complainant in a more advantageous position than he was already in because that information had already been provided to him.
11. The complainant maintained that he was entitled to a decision on the original application of section 36. He criticised the Commissioner's unwillingness to accept what he (the complainant) considered to be a "a reasonable level of scrutiny" and described it as a "secretive and self-serving decision."
12. The Commissioner notes that the complainant has not challenged the ICO's reliance on section 40(2) of FOIA to withhold information. The Commissioner has, in any case, already found that the ICO was entitled to withhold the same information when another person requested it.¹ The complainant has also not referred to the balance of the public interest in his grounds of complaint.
13. The Commissioner has therefore decided that he will restrict the scope of his investigation to the narrow issue that the complainant has raised – namely whether the ICO correctly applied section 36(2)(c) of FOIA. As the complainant now has most of this information anyway, the Commissioner considers that widening the scope would be an

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019357/rcrc-2021-m7z0.pdf>

inappropriate use of his finite resources – which are, of course, funded by the taxpayer.

Reasons for decision

14. Section 36(2)(c) of FOIA will apply in situations where, in the reasonable opinion of a Qualified Person, disclosure of the requested information would “otherwise prejudice the effective conduct of public affairs.”
15. Conscious, once again, of the need to spend resources wisely, the Commissioner did not seek a formal submission from the ICO, but did seek a copy of the opinion, from the Qualified Person, on which it had relied.
16. The ICO provided the Commissioner with a document, signed by Elizabeth Denham and dated 3 March 2021. The Commissioner accepts that Ms Denham held the role of Information Commissioner at the time of the refusal notice and was therefore the ICO’s Qualified Person for the purposes of section 36 of FOIA.
17. The complainant advanced two main arguments as to why he did not believe the Qualified Person’s argument to be reasonable. Firstly, he considered that the opinion was prevented from being reasonable because it had not been sought specifically for his request. Secondly, he considered that the opinion was too broad, had been applied in blanket fashion and failed to consider the specific information that he had requested.
18. The complainant’s first argument can be dismissed out of hand. The Upper Tribunal in *Information Commissioner v Malnick & ACOBA* [2018] UKUT 72 (AAC) made clear that the Qualified Person’s opinion must only be reasonable on its face. Whilst following a reasonable and thorough process is more likely to lead to the forming of a reasonable opinion, if the Qualified Person has followed an unreasonable process, but still arrived at a reasonable opinion, that opinion remains reasonable. Equally, an unreasonable opinion is still unreasonable, regardless of the process that preceded it. Therefore the fact that the Qualified Person’s opinion was not sought specifically for the request does not prohibit it from being reasonable – providing that it is otherwise reasonable in substance.
19. The Commissioner accepts that the qualified person in any public authority will be one of the most senior people within that organisation. Whilst section 36 places a certain legal duty upon that person, the law does not require that duty to take precedence over the qualified person’s other roles and duties.

20. There will be occasions where a public authority is likely to receive a number of requests, for the same or very similar information, over a short period of time. In those circumstances, the Commissioner does not consider that it would be necessary (or even desirable) to seek the Qualified Person's opinion on each and every request in order to engage section 36.
21. However, when a public authority does decide to "re-use" an old qualified person's opinion, it must make sure that the previous opinion covers the same or very similar information to that now being requested. Secondly, the public authority must consider whether there has been any significant change in circumstances that would render the previous opinion out of date or otherwise irrelevant.
22. The Qualified Person identified four categories of information whose disclosure, during an ongoing investigation, would, in her opinion, prejudice the ability of the ICO to carry out a fair and thorough investigation. These categories were:
 - Name and job title of the relevant controlling person who made the purchase.
 - Name and job title of the employee who approved payment of the expenses claim
 - All data relating to recovery of the sum and disciplinary action.
 - Whether the transaction was fraudulent and what steps the ICO intends to take regards with the employee(s) concerned.
23. The Qualified Person was concerned that disclosure of such information, whilst the investigation was ongoing, would pre-empt the outcome of that investigation, potentially subjecting an innocent employee to the court of public opinion. It also risked prejudicing the willingness of other staff members to take part in this or future investigations and their willingness to be candid if they did so.
24. In respect of element 1) of the request, the Commissioner considers that, whilst the ICO could have been more explicit, its reasoning for applying the exemption (and the Qualified Person's opinion itself) effectively confirmed that the investigation was ongoing – something the complainant acknowledged himself when seeking an internal review. The Commissioner's view is that the ICO had disclosed the information it held within the scope of this element.
25. In respect of element 2), it is not clear whether the ICO did hold this information at the time of the request – given that it was an independent investigation, it is not clear what information was shared

between the investigator and the ICO. The Commissioner considers that it would be wholly disproportionate to investigate the extent to which this information was held and has therefore taken the view that, on the balance of probabilities, at least some relevant information would have been held – even if it was held by the investigator on behalf of the ICO.

26. Having considered the Qualified Person's opinion, the Commissioner considers that this information would fall within the scope of the opinion (specifically "**all data** relating to recovery of the sum and disciplinary action" [emphasis added]), however the opinion does not really explain why disclosure of a date would prejudice the conduct of the investigation.
27. That does not mean that disclosure could not have caused prejudice – only that the Qualified Person's opinion does not explain why it might.
28. The Commissioner therefore considers that, in this respect, the Qualified Person's opinion was not reasonable and the exception did not apply. However, as the complainant had been aware, six weeks prior to making his complaint, that the investigation had concluded, the Commissioner sees no purpose whatsoever in dealing with this element further.
29. Turning to element 3), the Commissioner is satisfied that the ICO would have held this information at the time of the request. As with element 2), the Commissioner considers that this would fall within the scope of the Qualified Person's opinion, but the opinion does not give sufficient reasoning for explaining why prejudice would occur.
30. The Commissioner therefore finds that this element of the Qualified Person's opinion was not reasonable and therefore the exemption was not properly engaged. Once again, the Commissioner notes that the complainant had already been provided with the information, six weeks prior to making his complaint.
31. In respect of elements 4), 5), 6), and 7), the Commissioner considers that all of these elements were covered by one or more the categories identified above. He also considers that disclosing such information, whilst an investigation was still live, would risk pre-empting the outcome of that investigation. He is therefore satisfied that the Qualified Person's opinion was reasonable in respect of these four elements and thus the exemption was engaged. He further notes that elements 4), 5) and 7) would, at the time of the request, have been the personal data of the relevant ICO employee(s) and therefore exempt under section 40(2) of FOIA – the exemption on which the ICO has since relied.
32. Finally, in respect of element 8), the Commissioner does not consider that the information in question falls within the scope of the Qualified

Person's opinion. Whilst the latter two categories are quite broad in scope, they relate to actions taken in respect of the particular employee(s) involved – not to wider process alterations that the ICO considered were necessary.

33. The Commissioner notes that disclosing details of procedural alterations, prior to the outcome of the investigation, would have risked pre-empting the outcome of that investigation. Had the Qualified Person applied her opinion to this category of information (or had the ICO sought a fresh opinion from its Qualified Person covering this information), it is likely that the Commissioner would have concluded that the opinion was reasonable at the time of the request. However, as the opinion did not cover this information, it follows that it cannot be reasonable and thus the exemption is not engaged.
34. As previously, the Commissioner notes that the complainant was provided with the information within the scope of element 8) six weeks prior to complaining to the Commissioner and has since been provided with a redacted copy of the investigation report.
35. The Commissioner further notes that the complainant was in reality only inconvenienced by 33 working days in accessing the information he (the Commissioner) has now found was incorrectly withheld in the original refusal. All of these matters were in any case, resolved six weeks prior to the complaint having been made.
36. That having been said, the Commissioner notes that a breach of FOIA has occurred. As the complainant already has the information to which he was entitled, the Commissioner considers that it would be both inappropriate and wholly disproportionate to require any remedial steps to be taken.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF