

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2022

Public Authority: The Information Commissioner

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. He is therefore under a duty as regulator to make a formal determination of a complaint made against him 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 has requested from the Information Commissioner's Office (ICO) information specifically related to the [Data sharing code of practice draft code for consultation](#), and the final [Data Sharing Code of Practice](#). The ICO provided information via a series of links that was technically withheld because it was publicly accessible information (section 21) but withheld some information under section 42(1) legal professional privilege (LPP).

2. The Commissioner's decision is that the ICO has cited section 42(1) appropriately.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 4 May 2021 the complainant requested the following information from the ICO:

'Dr Ken MacDonald responded to the Education and Skills Committee Petition PE01692 with the following:

"Under s121 of the DPA18, the Information Commissioner is required to publish a Data Sharing Code of Practice which "provides practical guidance in relation to the sharing of personal data in accordance with the requirements of the data protection legislation"(sic).

A consultation on the draft Code was held in September 2019 and we anticipate launching the final version within the next few weeks. The Code will contain a chapter focussed on the sharing of children's data and we would expect all data controllers to follow the guidance contained therein.

Yours sincerely

Dr Kenneth Macdonald Head of ICO Regions"

https://archive2021.parliament.scot/S5_E...

In accordance with FOI Scotland Act 2002, please provide me with the following information held in your records in relation to the draft code consultation, with particular focus on GiRFEC [Getting it right for every child], wellbeing, and paragraph 18 of Part 2, Schedule 1 of the 2018 Data Protection Act, incl but not limited to minutes of the consultation, attendees, all communications recorded, emails, all telecommunications, and virtual meetings/discussions.

Please provide me with the draft code and the final version of the aforementioned Data Sharing Code of Practice. Please provide me with all discussions and communications surrounding compliance with human right Article 8, discussions relating to the Supreme Court's Named Person ruling that wellbeing is not one of the aims listed under Article 8(2) and discussions that wellbeing in the

absence of another aim listed under Article 8(2) without consent would breach human right legislation and convention.'

5. The Commissioner would like to clarify that, although the request refers to the Scottish legislation, the request was made to the ICO in Wilmslow and is a valid complaint under section 50 FOIA 2000.
6. The ICO responded on 28 May 2021. Some information was withheld regarding the ICO's consideration of the Human Rights Act 1998 (HRA) in its drafting of the code under section 42 – legal professional privilege (LPP). Some of the information was technically withheld under section 21 as being reasonably accessible, though links were provided. The ICO provided some information that it considered to be outside the scope of the request and it was suggested that the complainant could make a request for other information it held that might be of interest, though the complainant was warned that it might be exempt.
7. On the same day the complainant asked for new links as they didn't work. The ICO wrote back on 7 June 2021 to say that the links worked and providing some technical advice. On the same day the complainant replied saying that the links didn't work and asking for the URLs.
8. On 9 June 2021 the ICO provided the URLs.
9. The complainant requested a review on 10 June 2021 as she believed that the public interest favoured disclosure in respect of the information withheld under section 42. She explained that her view was that disclosure is in the substantial public interest due to the scale of processing and the population of those affected. In particular where children's information, including information attributed to children regardless of its accuracy, should be best protected in consideration of their human rights.
10. The review request was acknowledged on 16 June 2021.
11. The internal review on 6 July 2021 maintained the ICO's position.

Scope of the case

12. The complainant contacted the Commissioner on 6 July 2021 to complain about the way her request for information had been handled.
13. The Commissioner considers the scope of this case to be the ICO's citing of section 42(1)(legal professional privilege) to the withheld information.

Reasons for decision

Section 42 – Legal professional privilege (LPP)

14. Section 42(1) states that:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

15. The ICO has provided the information it had withheld under section 42 to the Commissioner.

16. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the FTT described LPP as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.” (paragraph 9)

17. LPP protects an individual’s ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.

18. Section 42 is a class based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise from disclosing the information. However, this exemption is subject to the public interest test.

19. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

The complainant's view

20. The complainant told the Commissioner that she was not content with the citing of section 42 because of the weight of public interest. Her arguments will be looked at later in this decision notice.

The ICO's view

21. Firstly, the ICO confirmed that the withheld information was subject to legal advice privilege. The emails from an individual in the ICO's Parliament and Government Affairs Department to the Policy Legal Department constitute a client seeking legal advice from two professional legal advisers on a policy matter. The replies from these legal advisors consists of legal advice communicated in their professional capacity as in-house legal professionals.
22. The ICO also confirmed that the emails had not previously been made available to the public or a third party without restriction. The ICO asked the client for their view and whether the advice could be disclosed under the FOIA or whether it should remain privileged. The client confirmed that they wished for the information to remain confidential and protected by legal professional privilege.

The Commissioner's view

23. The ICO has set out its view that the communications (the emails) were made between professional legal adviser/s and a client. In this case the client was the Head of Parliamentary and Government Affairs. The legal advisers were in-house ICO employees. The Commissioner accepts that in-house legal advisers are no different from external legal advisers in their advice being subject to LPP. He also accepts that the communications were made for the sole or dominant purpose of obtaining legal advice. Not all communications from a legal adviser attract advice privilege but, having seen the withheld information, it is clear to the Commissioner that these emails from the legal advisers were sent solely in a professional capacity to provide advice regarding the client's request for that advice. The ICO has also confirmed that these emails (the advice) have not been disclosed to the public at large and remain confidential. The exemption is therefore engaged.

Public interest test

24. Section 42 is subject to the public interest test and the Commissioner must next consider whether the public interest lies in withholding or disclosing the requested information.

Public interest arguments in favour of disclosing this information

25. The ICO has argued that the factors in favour of disclosing this information are:
- The public interest in the ICO being open and transparent;
 - The public interest in transparency about our consideration of the HRA when drafting statutory code.
26. However, the complainant has contended that additional weight should be given to disclosure because of the large number of people affected – namely every citizen in Scotland (“5,460,000 individuals”) whose human rights and data protection rights are at “high risk of being breached”. She states that she understands the section 42 exemption but that the substantial public interest due to the scale of the processing and the number of individuals affected, in particular children, regardless of its accuracy should be “best protected in consideration of their human rights”.
27. Additionally the complainant believes that,
- “... there may be a misrepresentation of the advice given taking into account the Supreme Court 2016 UKSC 51 ruling that wellbeing is not one of those aims listed under article 8(2), data processing wellbeing information without explicit and informed consent would contravene that law”.
28. For these reasons she states that additional weight must be considered in the balance of disclosure which outweigh the exemption for LPP.

Public interest arguments in favour of maintaining the exemption

29. The ICO has provided the following as its arguments in favour of non-disclosure:
- The disclosure of LPP threatens its importance as a principle.
 - Maintaining openness in communications between client and lawyer to ensure full and frank legal advice can take place in a safe space.
 - Discussions in safe places serve the wider administration of justice as disclosure is likely to curtail lawyers advising clients what should be sensibly done in a relevant legal context.
 - The disclosure of legal advice could have a chilling effect on both policy officers and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public.

- In general terms, unrestricted public disclosure of legally privileged information would result in the loss of confidentiality and therefore of legal privilege. This would include disclosure in response to a FOIA request.
- A great deal of information which falls under the scope of the original request is already in the public domain. This constitutes the vast majority of information held within the scope of the request.
- The publication of such a large amount of information goes towards satisfying the public interest in this matter as information has been proactively made available for public scrutiny.
- The ICO also stressed that the withheld information relates to a very narrow point of clarification. There is information already in the public domain and, it could be argued, that the withheld information does not fall within the scope of the original request which was interpreted widely for reasons of transparency.

The balance of the public interest

30. The Commissioner has not considered the ICO's point about whether the withheld information falls within scope. The ICO withheld it on the basis that it did and has not withdrawn its citing of section 42 and explained to the complainant or the Commissioner that there is no further information held, other than what was provided or technically withheld under section 21.
31. The ICO maintains that the importance of the principle of LPP and the views of the client add stronger weight to the public interest arguments in favour of maintaining the exemption.
32. Some of the ICO's argument is generic, though it would be unusual to present legal professional privilege arguments without the weight of what is considered to be a "fundamental requirement of the english legal system"¹ being mentioned. The FTT stated that, "At least equally strong counter-vailing considerations would need to be adduced to override

¹ [legal_professional_privilege_exemption_s42.pdf \(ico.org.uk\)](#)

that inbuilt public interest".² They do not have to be exceptional though. In *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted the following in emphasising that the exemption is not a blanket exemption:

"The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute."

33. The Commissioner acknowledges the difficulty a complainant has in formulating arguments when they are unaware of the actual content or extent of any advice. The complainant has argued that there are a large number of people affected which would clearly favour release. However, the Commissioner has had chance to consider the content of the LPP and he accepts the ICO's argument that this specific information is not of the significance that the complainant considers it to have. He has considered other factors such as lack of transparency in the ICO's actions or the misrepresentation of advice which he also does not believe apply here.
34. A legal opinion is exactly that, an opinion and not definitive. It could be argued that this is a reason to release it. However, he is not persuaded that there is clear, compelling and specific justification for disclosure of this information that weighs equally or more heavily when set against the principle of LPP. His view is also underpinned by the knowledge of what is in the public domain and has already been provided to the complainant.

² [Microsoft Word - Bellamy - Information Tribunal Judgment 04.04.06.doc \(tribunals.gov.uk\)](#)

Right of appeal

35. 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

36. 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.

37. 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

**Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**