

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 March 2022

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

#### **Note**

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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 Commissioner, as the public authority, dealing with the request, and the term 'Commissioner' denotes the Commissioner, as regulator, dealing with the complaint.

#### **Decision (including any steps ordered)**

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1. The complainant requested the ICO to disclose information relating to the register of fee payers and the processing and publication of personal data. This was a 15 part request and has been submitted three times to the ICO. The three requests are referred to as the Group 1, 2 and 3 requests. The ICO responded to the Group 1 requests on 25 October 2019, following an earlier decision notice issued by the Commissioner on 11 September 2019. It responded to all of the Group 2 requests on 9 January 2022 (it had responded only to parts 10 and 14 previously) and it responded to the Group 3 requests on 8 January 2022.
2. Following receipt of the responses to the Group 1, 2 and 3 requests, the complainant remained dissatisfied and asked the Commissioner

to consider whether the ICO had now met its obligations under FOIA, whether any further recorded information was held by the ICO at the time of the requests and to consider whether there had been any procedural breaches of the legislation.

3. The Commissioner's decision is that the ICO has now met its obligations under FOIA, although this is a result of a fresh search conducted in response to the Commissioner's section 50 investigation. The ICO located three further documents. In addition to this the complainant has identified further documents which the Commissioner considers falls within the scope of the request and should have been identified by the ICO's searches. On this basis, the Commissioner is satisfied that, on the balance of probabilities, no further recorded information is held (other than that which has now been newly identified by the ICO and the complainant). The new information identified is however exempt from disclosure under section 42 and 21 FOIA.
4. There has however been further procedural breaches of the legislation in addition to those recorded in the Commissioner's earlier notice of 11 September 2019. The ICO breached section 10 FOIA as it did not respond to the Group 2 and 3 requests within the statutory time for compliance. Furthermore as the ICO did not identify all recorded information held falling within the scope of the Group 1, 2 and 3 requests within twenty working days it again failed to comply with section 10 FOIA. Finally it breached section 17(1) as it did not identify the exemptions being relied upon to withhold the newly identified information.
5. The Commissioner requires no further action to be taken.

## **Request and response**

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### **Group 1 Requests**

6. The Commissioner issued a [decision notice](#) on 11 September 2019, which ordered the ICO to respond to the information requests listed in an annex, attached to the end of the notice, in accordance with FOIA. It recorded a breach of sections 1 and 10 of FOIA for failing to confirm to the complainant what recorded information is held and for failing to issue its response to those requests within 20 working days of receipt.
7. In his submissions to the Commissioner the complainant confirmed that requests 1, 2, 3, and 4 were made on 25 June 2018, requests 5 and 6 on 29 July 2018, request 7 on 21 August 2018 and requests 8

through to 15 on 2 January 2019. The requests are set out in the Annex attached to this Notice.

8. The ICO complied with the notice and issued its response on 25 October 2019.
9. The complainant wrote to the ICO on 20 November 2019. He stated that he did not wish to request an internal review at this stage but requested clarification on some aspects of the ICO's response.
10. As the complainant received no response, he chased the ICO on 22 January 2020.
11. The ICO acknowledged receipt on 27 January 2020 and advised the complainant that it would respond shortly.
12. The ICO responded on 8 February 2020, addressing the specific points the complainant had raised.
13. The complainant replied on 23 February 2020. He felt some clarification had been provided but felt the ICO had failed to address some of the points he made in his correspondence of 20 November 2019.
14. The ICO issued a further response on 27 February 2020. It addressed the complainant's correspondence of 23 February 2020 and advised the complainant that he could request an internal review if he wished. It also offered to forgo an internal review in this case and allow the complainant to proceed to a section 50 complaint if this was preferable to him.
15. The complainant responded on 27 February 2020. He referred to his appeal to the First-tier Tribunal in relation to the Commissioner's decision notice of 11 September 2019 and how he felt a further section 50 application to the ICO has been superseded by this appeal. The complainant confirmed that if the tribunal disagrees with him on this point it may be necessary to then make a further section 50 application to the ICO. He advised that he intended waiting the outcome of the appeal before making any decisions around this.
16. No internal review has been conducted in relation to the Group 1 requests.

## **Group 2 Requests**

17. On 27 February 2020, the complainant submitted an information request to the ICO in the following terms:

"This is quite equivocal with "it seems likely". To be clear are you saying that the ICO now has all the information I seek. If so, why can't you just give it to me now? You can try to argue that it doesn't fall within the scope of my FOI requests because you didn't have this information at the point I submitted my FOI requests. But isn't it easier to just give me the information if you have it now? What is the problem with doing this, if you sincerely wish to draw these matters to a close? To be clear I am asking for this information again now, and so in effect I've made a new set of FOI requests by saying this. If you require me to spell out the wording of each individual FOI request again to record this as a new set of FOI requests then please let me know."

18. This request was a resubmission of the Group 1 requests and was made following a statement from the ICO which suggested to the complainant that information he had been seeking previously (via his earlier request) was generated after the dates of his earlier requests. The requests are contained in an Annex to this notice.
19. The ICO acknowledged the request on 5 March 2020 and outlined its understanding of the scope of the complainant's request ie limited to parts 10 and 14.
20. The ICO responded on 27 March 2020 based on its interpretation of the request, providing a response to requests 10 and 14 of the attached annex.
21. The complainant disagrees with the ICO's understanding of scope. In correspondence to the Commissioner dated 26 April 2021 it was explained that it is clear that his intended scope was all parts, 1 to 15, of the request whilst accepting that for some of these parts it would be likely to be clear that there is no additional information to that already provided.
22. The ICO replied on 26 May 2020 and rejected the complainant's interpretation over scope, standing by its initial handling of the request and it being limited to parts 10 and 14.
23. The complainant wrote to the ICO on 2 October 2020 to request an internal review.
24. The ICO replied on 16 October 2020. It refused to carry out an internal review due to the passage of time. (This refusal led to a fresh request being made and accepted by the ICO (referred to by the complainant in his section 50 application as Group 3).

25. The complainant responded on 18 October 2020 to further reinforce why the ICO should carry out an internal review in the circumstances however no internal review was carried out.
26. On 9 January 2022 the ICO issued a response to all parts of the Group 2 requests. This response was provided after the Group 1 and 3 request responses. On this basis the ICO either referred to its responses previously provided in relation to Group 1 or 3 or confirmed the information was not held. In relation to parts 9 and 15 the ICO was unclear if the complainant wished these to be answered within Group 2 however it confirmed that these were answered within its Group 1 requests response.

### **Group 3 Requests**

27. The FOI requests in Group 3 are a re-issuing of 13 of the Groups 1 and 2 requests, this being requests 1-8 and requests 10-14 and these requests were submitted on 2 October 2020. The context in which this Group 3 FOI requests were made was because the ICO refused to carry out an internal review of its response to the Group 2 requests. In particular, in the complainant's email of 2 October 2020 he asked:

"Given this I would suggest it is unwise to argue now that you have no obligation to carry out my internal review request. But if disappointingly this is your position then I ask that you simply consider my internal review request as a further new re-issuing of my FOI requests so that we start going around the tiresome loop a third time".
28. In an email on 16 October 2020 the ICO made it clear that they were refusing to carry out an internal review of the Group 2 requests and that as a consequence they acknowledged the Group 3 requests as new re-issued FOI requests.
29. Parts 9 and 15 were removed from the Group 3 requests as the complainant acknowledged that this information was now reasonably accessible to him.
30. The ICO responded on 8 January 2020, it either provided information, confirmed information had previously been disclosed or confirmed information was not held.
31. Detail of the requests originally made in the Group 1 requests and repeated either in full or in part in the Group 2 and 3 requests are set out in the Annex attached to this Notice.

## Scope of the case

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32. The complainant contacted the Commissioner 11 December 2020 to complain about the way his requests for information had been handled.
33. In his submissions to the Commissioner, the complainant confirmed that his complaint is limited to parts 2 to 15 in the attached Annex for the Group 1 and 2 requests and parts 2-8 and 10-14 for the Group 3 requests. He stated that he has no ongoing complaint about part 1 of the requests except the delay in issuing the response which he considers is in breach of section 10 of FOIA. He considers at the point he submitted his Group 3 requests parts 9 and 15 were reasonably accessible to him which is why they can be removed from the complaint about the Group 3 requests. The complainant also mentioned section 16 of FOIA and the Commissioner's duty to provide advice and assistance. He stated that during his First-tier Tribunal appeal the Commissioner agreed with him that the ICO had breached section 16 of FOIA on that occasion. The complainant alleges that the breaches of section 16 have continued with the ICO responses to these requests which are post the Commissioner's decision notice of 11 September 2019.
34. The Commissioner considers the scope of his investigation to be to establish whether the ICO has now complied with its obligations under FOIA in respect of parts 2-15 of the Group 1 and 2 requests and parts 2-8 and 10-14 of the Group 3 requests detailed in the attached Annex. In particular, to determine, on the balance of probabilities, whether all recorded information the ICO held at the time the requests were made has been disclosed. There are 15 requests listed and the ICO's response to each is also included in the Annex attached for ease of reference.
35. In this case further information has been identified by the ICO during a fresh search conducted during the Commissioner's section 50 investigation. However the ICO considers that this information is exempt under section 42 FOIA (two documents held for the Group 1, 2 and 3 requests and one document held for the Group 3 requests). The complainant has also identified information that was held falling within the scope of the requests however the ICO considers that this information would be exempt under section 21 FOIA. The Commissioner has therefore considered the application of these exemptions to the newly located information falling within the scope of the requests. Finally the Commissioner has considered whether there has been any procedural breaches of the FOIA post the serving of the Commissioner's decision notice of 11 September 2019 in

relation to the Group 1 requests and also in relation to the Groups 2 and 3 requests.

## **Reasons for decision**

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### **Section 1 – general right of access to information**

36. 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.

37. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

38. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

39. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

### **The ICO's original position**

40. The ICO confirmed that extensive internal consultations were conducted in respect of these requests. The Head of the Customer Contact Department and two other managers were contacted at the time who oversaw or managed Registrations. The ICO's Change Programme in preparation for GDPR was also contacted, which included a 'registrations' project. It confirmed that the Head of Public Advice and Business Projects Group Manager was also consulted.

Additionally, management within the ICO's Information Management and Compliance, the Head of Internal Advice and the Head of Risk and Governance at the time were consulted. The Operations Service Delivery Team was also consulted, asked to search and as a result provided the figures for the response to question 15.

41. The ICO explained further that the text of the request was forwarded on to these individuals and it asked that they provide any information in the scope of these requests or confirmation that information was not held. It went on to say that usually these searches would encompass searches of its records management systems, Sharepoint EDRM, and previously, Meridio as well as any case management systems that might be considered relevant. For example, from the consultation responses it is apparent that searches were conducted of the Change Programme 'registration project' held in Sharepoint. The results of the searches conducted formed the basis of its response to the complainant.
42. The ICO advised the Commissioner that, for the avoidance of doubt, no further information was located during the additional searches conducted in relation to the complainant's Group 2 or 3 requests than was located for the Group 1 requests. When dealing with the Group 2 and 3 requests, the ICO consulted an additional manager in Customer Contact and its Information Management team.
43. A fresh search has however been conducted by the ICO in response to the Commissioner's section 50 investigation and the results of this are explained below under the section 'The Complainant's position'. This has located some further information falling within scope and additionally the complainant has identified some further information falling within scope.

### **The Complainant's position**

44. In his submissions to the Commissioner the complainant confirmed that he remains dissatisfied with the ICO's substantive responses and in particular with the responses the ICO gave to the effect that it did not hold the requested information at the time of the requests. He referred specifically to requests 2 and 8, request 4 and request 10, part of request 11, request 6 and part of request 15. He also stated that he found the ICO's responses to be confusingly worded and contradictory and his attempts to seek clarity have had only limited success. Earlier on in the complainant's interactions with the ICO in relation to the Group 1 requests it was said that some of his requests were not valid requests for information under section 8 of FOIA. During his appeal to the First-tier Tribunal the Commissioner agreed that all of his requests were valid FOIA requests, he stated



that later responses from the ICO also seemed to suggest it agreed with this assessment too. However, the responses did not 'unequivocally' state this.

45. With regards to the Group 1 requests, part 4 the complainant has referred to an email from [name redacted] dated 19 March 2019, which was supplied in response to his first SAR (response received 23 October 2019) which documented the ICO's position on the lawful basis for publishing the register of fee payers. The complainant queried whether [name redacted] generated recorded information when she wrote this email by recording an opinion of the ICO's position for the first time or whether she was merely reporting recorded information that the ICO already had.
46. The ICO confirmed that [name redacted] has advised that they have searched for any recorded information held that may have informed their letter of 19 March 2019 about the lawful basis the ICO rely on for the publication of the register of fee payers but has been unable to locate any recorded information prior to this date.
47. This would be equally applicable to part 4 of the Group 2 and 3 requests.
48. The complainant has also presented the following reasons for believing further recorded information could have been held (not limited to item 4) at the time of this request:

"The second reason relates to how in practice it seems likely the transition from the register of notifications, which existed prior to 25th May 2018, to the register of fee payers, was carried out and the ICO's responsibilities during the transition between the two registers. The regulations for the register of fee payers are contained in The Data Protection (Charges and Information) Regulations 2018 and were made under section 108(1) of the Digital Economy Act 2017 (later replaced by section 137(1) of the Data Protection Act 2018 on 25th May 2018). But section 109(1) of the Digital Economy Act 2017 required the Secretary of State [for Digital, Culture, Media and Sport] to consult the Information Commissioner before making these regulations. So before these new regulations came in regarding the register of fee payers there was a process for deciding upon them which involved the Commissioner, and thus the ICO. It is entirely reasonable to assume that amongst those matters discussed between the Department for Digital, Culture, Media and Sport ("DCMS") and the ICO was how the register of fee payers was to differ from the register of notifications. Now the register for notifications contained a specific legislative provision in section 19(6)

of the Data Protection Act 1998 for publication of the register of notifications. It follows that there may well have been some sort of consultation between the ICO and the DCMS over this of which the outcome was that no legislative provision directly equivalent to section 19(6) of the Data Protection Act 1998 was inserted into the new regulations or associated legislation. It seems implausible that any such consultations and discussions and so on generated no recorded information.

Furthermore, once the regulations had been approved by Parliament it was the ICO's responsibility to implement them by 25th May 2018. This must have involved some sort of IT project to make the necessary modifications to the registration process for the register of notifications so that it could become the registration process for the register of fee payers. Such an IT project would plausibly have generated documentation including a specification of what the differences are between the two registers, in order to implement the changes.

The third reason concerns the existence of evidence that has come to light indicating that the ICO deleted some information related to the project to implement the register of fee payers. This is evidence obtained from my 1st SAR which was withheld until 28th February 2020 and in particular two internal ICO emails. The first was from [name redacted], sent on 1st May 2019 [B/286] and included:

If we hold any information in relation to the green text below, it will be in the project files originally managed by [named redacted]l. When the project wound down, everyone deleted everything they had in relation to that project so we held just one corporate record.

The second internal ICO email was sent from [named redacted] on 2nd May 2019 [B/285] and included:

I was on the project until March 2018. Earlier during the project there was a point where critical documents were saved and the rest were deleted. This would have been in early 2018. I have looked in meridio and there is nothing else in there other than what is in the PMO folders BD00I3c Registration project on Sharepoint. This was one of the only projects that fell under the Change Programme that did not have the files stored in the CPfile path as [named redacted] had already kicked the project off as an IT one it was left there."

49. The Commissioner asked the ICO to address these specific points and confirm whether any further recorded information is held as a result of the consultations and discussions with DCMS and when this was created to then work out whether it would have fallen into scope

of Group 1, 2 or 3 requests. The Commissioner also asked the ICO to confirm whether any information was deleted, if it was deleted, why, and whether the ICO considers this was in accordance with its records retention policy.

50. With regards to searches, the Commissioner explained that the complainant is concerned that members of the project team were not consulted and asked to search – namely [four redacted names]. The Commissioner therefore asked whether these individuals were consulted and asked to search? If not, the Commissioner asked whether they could be approached now to see if any further recorded information is held? If further recorded information is identified the ICO would need to then determine whether it was held at the time the Group 1 requests were made, or later on when the Group 2 requests were made or, subsequently the Group 3 requests.
51. The ICO contacted again all those involved in the initial consultations and the additional individuals the Commissioner had specified and asked them to conduct further searches in order to confirm whether anything further is held which falls in scope of the request. With regards to discussions with DCMS, the ICO informed the Commissioner that there is no information falling in scope of the request. [name redacted] has advised that whilst they did consult with DCMS about the new regulations, she cannot recall that the ICO ever consulted specifically on the issue of publication of the register and reasonable searches have located nothing in scope.
52. The ICO's Retention and Disposal Policy determines when information should be retained. Information of this type is retained where there is a business need to do so. In [named redacted] response to the initial Group 1 consultation she confirmed: "Earlier during the project there was a point when critical documents were saved and the rest were deleted." The Commissioner is therefore satisfied that any information that was deleted was done in line with the ICO's retention and disposal policy.
53. Following the further searches, whilst no further information was identified by the individuals consulted originally and the additional individuals identified by the complainant, a further staff member was contacted by the ICO. They have advised that they had been involved in the ICO's internal compliance project in the run up to the implementation of GDPR and were aware of some documents generated as part of this project that might fall in scope of the request. It does not appear that this individual was previously consulted and nor were they identified as someone who may have been aware of information held in scope of the request. As a result, they have now conducted additional searches of the information held

in connection with this project and have managed to locate two documents that would appear to fall in scope of the complainant's request, specifically requests 6 and 10. Whilst they only contain a limited amount of information, these should have been identified and considered for disclosure at the time of the Group 1 requests (and would therefore also have been held at the time the Group 2 and 3 requests were made). However, these documents contain legal advice and are being withheld under section 42 of the FOIA. The Commissioner considers the application of section 42 to the two newly located documents below.

54. With regards to item 6 of the Group 1 requests, the complainant has made the following comments:

"The FOI response of 25th October 2019 [B/208-220] by the ICO regarding Article 30 records, for request 12 was reasonably clear. The ICO supplied a CSV file in their response which they described as a "live document which is currently under review". The reproduction of this document in the bundle [B/257] is not very clear as the data is not reproduced in a tabulated fashion but instead with a lot of literal "," characters. But it is sufficiently clear to establish that the Article 30 records contain nothing about processing for the purposes of publishing the entries in the register of fee payers. Now the original version of my FOI request [request 6], from 29th July 2018 [B/85] asked more straightforwardly:

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

The ICO have in effect said that they have no further information about this beyond what the Article 30 records record. But what is contained in Article 30 records and what a data controller has as its purposes of processing are not automatically and necessarily the same thing. Deviations can happen in virtue of absent or incomplete Article 30 records, amounting of course to a breach of Article 30 obligations by the data controller.

The difficulty with this position of the ICO, from the FOI perspective, is that they have given justifications and explanations for the register of fee payers which include publication and which sound like purposes. It's just that they have a reluctance to use the word "purpose" when describing them. There is an element of having their cake and eating it again, playing off the FOI regime against the data protection regime. Whether these justifications and explanations are regarded as purposes or not the Commissioner as data protection regulator seemed satisfied by them [B/234-238].

These explanations and justifications centred around a claim of accessibility of data controllers by the public; that is that they have to be contactable in ways that seem to go beyond the requirements provided for by the position of Data Protection Officer in Article 37 and Article 38 of the GDPR. In particular the ICO wrote on 25th June 2018 [B/76]:

We are continuing to publish the register of controllers in reliance on the 'public task' legal basis which can be found at Article 6 (1) (e) of the GDPR. We recognise the public interest, in both senses of the phrase, of the register of controllers being transparent and accessible. As you will be aware, being a controller represents responsibilities, one of which is to be easily accessible to individuals.

and on 27th July 2018 [B/82]:

We have always published addresses of controllers (including sole traders) and think that it is fair to do so for the reasons we have set out before – that there is a need for transparency about which controllers (however small) are processing personal data, whether they are registered and how they can be contacted.

and in the same email [B/82]:

We know that there is a significant level of interest in this information and we believe that we should be transparent about the controllers who are registered with us – and also therefore, about those who are not.

These emails from the ICO were all sent before my FOI request [request 6] asking about purposes.”

55. The Commissioner put it to the ICO that the complainant considers that these emails are recorded information relevant to request 6 and should have been disclosed.
56. The ICO argued that if the complainant's position is that he maintains the further emails referred to at paragraph 54 above should have been identified and disclosed, the ICO disagrees. FOIA requires the ICO to perform reasonable searches to identify all the information held. It consulted with the individuals who may have held information falling in scope and performed searches of relevant areas of the ICO's records management system. The ICO considers that it performed appropriate and thorough searches of the areas of its record management system and contacted individuals it would reasonably expect to hold information in scope if it existed. It does not consider it would have been reasonable to search every piece of correspondence or enquiry the ICO received on the off chance any

information falling in scope of the complainant's requests existed, especially given he is already in receipt of the emails he has referred to as they are addressed to him. In any event to search all correspondence and enquiries received would undoubtedly take the request over the cost limit under section 12. However the ICO said that should the Commissioner consider these documents should have been identified through reasonable searches and that the ICO should have disclosed these emails, then this would engage section 12 of the FOIA as any attempt to locate information of this nature would undoubtedly exceed the cost limits. Alternatively, the specific emails referred to by the complainant would be exempt under section 21 of the FOIA as they are already reasonably accessible to him.

57. With regards to the Group 3 requests, the complainant asked whether any legal advice is held relevant to part 4. The Commissioner put this query to the ICO.
58. The ICO responded that, having performed a number of additional searches it does hold a document containing legal advice that would fall in scope of part 4 and 10 of the Group 3 requests. It considers this information to be exempt under section 42 of the FOIA. The Commissioner will consider the application of section 42 to this newly located document below.

### **The Commissioner's position**

59. The Commissioner is satisfied that, on the balance of probabilities, all recorded information which was held at the time of the Group 1, 2 and 3 requests has now been identified by the ICO. The ICO has explained exactly what searches it undertook and how these were of all relevant staff and business areas.
60. This is because the Commissioner asked the ICO to carry out fresh searches during his section 50 investigation to ensure that it had identified all recorded information held and therefore complied with its obligations under section 1 of FOIA.
61. As a result of the fresh searches conducted, two further documents have been identified as falling within the scope of the Group 1 requests (and would therefore also fall within scope of the Group 2 and 3 requests). This information is however being withheld under section 42 FOIA. One further document was located relevant to the Group 3 requests which has also been withheld under section 42 FOIA (this was not however held at the time of the Group 1 and 2 requests).

62. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) held that in determining a dispute as to whether information is 'held' at [13]:

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

63. In this case the Commissioner does not consider it reasonable for the ICO to search all correspondence and enquiries given it is a large public authority and records will be spread across various departments and locations. Fresh searches ensured all original consultees were consulted again and the four individuals whom the complainant was concerned had not been approached were also consulted. In addition a further member of staff was consulted which located the three further documents being withheld under section 42.
64. However in terms of the emails referred to by the complainant as falling within the scope of the request and not located by the ICO identified at paragraph 54, the Commissioner considers it may have been reasonable to search for this information. The ICO would not have to search all correspondence and enquiries, only correspondence and enquiries from one particular individual (the complainant given the ICO's interaction with him on this subject matter). On this basis the Commissioner considers it unlikely section

12 FOIA would apply to search for correspondence with one individual however he would accept that this information would be reasonably accessible to the complainant and therefore exempt under section 21 FOIA. This exemption is therefore considered below.

65. As stated above, on the balance of probabilities, the Commissioner is satisfied that no further recorded information is held in relation to the Group 1, 2 and 3 requests other than the three newly located documents being withheld under section 42 FOIA (which will be addressed below) and the emails referred to by the complainant at paragraph 54 addressed to him which the Commissioner considers to be exempt under section 21 FOIA (which will also be addressed below). He is therefore satisfied that the ICO has now met its obligations under FOIA in respect of the Group 1, 2 and 3 requests and requires no further action to be taken.

## **Section 42**

66. Section 42 provides an exemption under FOIA for information which is subject to legal professional privilege (LPP). The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client.
67. There are two types of privilege covered by the exemption at section 42, litigation privilege and advice privilege.
68. In this case the ICO confirmed that these communications were for the dominant purpose of obtaining/communicating advice from professional legal advisers acting in their professional capacity. These communications reflect advice requested and received on specific issues in connection with the ICO's lawful basis for publishing the register of data controllers and are therefore subject to advice privilege.
69. The Commissioner has viewed the information withheld under section 42 FOIA and considers that the exemption is engaged.
70. Section 42 is not an absolute exemption and it is also necessary to consider whether the public interest favours withholding or disclosing the information.



**The following public interest arguments in favour of disclosing the information were taken into account:**

71. The general public interest inherent in FOI, i.e. the assumption of disclosure that is associated with the 'right to know' contained in section 1 of the FOIA.
72. The need for the ICO to be open and transparent in the work that the ICO does, and how it complies with the laws it regulates.

**The factors in favour of withholding the information are:**

73. The general public interest which underpins the principle of legal privilege, which is that communications between a client and a legal adviser, for the purposes of seeking or giving legal advice are protected.
74. The need to safeguard openness in all communications between the Information Commissioner and their in-house legal advisers. This helps to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
75. Disclosing the requested information at this stage would lead to a reticence in seeking advice and the provision of that advice. This could lessen the effectiveness of the legal advice process and potentially undermine the client's ability to make fully informed legal decisions, particularly given the client's view that this information should remain privileged.
76. The ICO already set out its position with regards to the lawful basis and purpose of publication of the register at length to the complainant (and to the public), including by virtue of the disclosure under FOI of the related DPIA and Policy. The Commissioner considers this already satisfies the public interest in this matter. Disclosure of the small amount of legally privileged information would add nothing further of value to this discourse and would not be in the public interest.

**Balance of the public interest:**

77. The ICO considers that in this case given the strong inherent public interest in maintaining the principle of legal professional privilege and the fact it has already set out its position to the complainant in detail, the public interest favours maintaining the exemption and withholding this information.

78. The Commissioner considers that there is a strong public interest in protecting the doctrine of legal professional privilege. Whilst countervailing arguments need not be exceptional, they must be equally strong. In this case given the extent of information already provided to the complainant on this subject matter, this goes a significant way to meeting the public interest in the openness and transparency of how the ICO complies with the laws it regulates.
79. On balance the Commissioner considers that the public interest in disclosure is outweighed by the public interest in maintaining the exemption in this case.

## **Section 21**

80. Section 21 states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

81. The emails identified by the complainant as falling within the scope of the request identified at paragraph 54 above would be exempt from disclosure under FOIA as this information is clearly reasonably accessible to him.
82. Section 21 FOIA is an absolute exemption and is not therefore subject to a public interest test.

## **Procedural matters**

### **Section 10**

83. With regard to the Group 1 requests and the ICO's failure to respond to these requests within twenty working days in accordance with section 10 of FOIA, it is the Commissioner's view that a breach of section 10 was acknowledged and duly recorded for all requests that were outstanding at the time the Decision Notice of 11 September 2019 was served. The Commissioner does however consider it necessary to record a section 10 breach again in this notice as two further documents have now been located by the ICO and further specific emails have been identified by the complainant as falling within the scope of the Group 1 requests. Whilst this information is exempt from disclosure it was not identified as being held within twenty working days of the request. The ICO therefore breached section 10 FOIA in this regard.

84. The Group 2 requests were submitted on 27 February 2021 but not responded to in full until 9 January 2022 (previous responses were provided but only in relation to parts 10 and 14 of the Group 2 requests). Furthermore the newly identified information which is exempt in relation to the Group 1 requests would be equally relevant to the Group 2 requests. As the ICO did not respond to all parts of this request within twenty working days or identify all information held, it breached section 10 in its handling of this request.
85. In relation to the Group 3 requests, these were submitted on 2 October 2021 and the ICO did not provide a response until 8 January 2022. Furthermore as a result of the fresh searches conducted in response to the Commissioner's section 50 investigation the ICO subsequently located one further document falling within part 6 of the Group 3 requests. This is in addition to the two further documents identified by the ICO and the emails identified by the complainant which would fall within the scope of the Group 1 and 2 requests. The ICO therefore failed to respond within the statutory time for compliance and it failed to locate all information held within twenty working days. The ICO breached section 10 in its handling of the Group 3 requests.

## **Section 8**

86. With regard to section 8 of FOIA and whether the ICO accepted that all of the requests were valid requests for information, the Commissioner considers this issue was addressed during the First-tier Tribunal appeal. The tribunal recorded that the Commissioner acknowledge during the appeal that it should have accepted four disputed requests as valid information requests. The Commissioner believes this has been the approach taken by the ICO from that point onwards and therefore this element of the complainant's previous complaint/appeal was resolved. There is, therefore, no breach to record in terms of section 8 in this Decision Notice.

## **Section 16**

87. Turning now to the complainant's alleged continuation of a section 16 breach, the Commissioner notes that although the complainant has raised this as a concern, he has not provided any details or elaborated on why he feels this is case and why he considers the ICO continued to fail to provide him with appropriate advice and assistance post the Commissioner's decision notice of 11 September 2019.
88. The Commissioner has reviewed the correspondence which followed the notice of 11 September 2019 and he cannot find any obvious

breach of section 16 of FOIA. He notes that, in accordance with the standard FOIA process an internal review was offered. However, the complainant declined and felt it was more appropriate for him to seek the clarification he required in additional correspondence with the ICO outside of this process. The Commissioner acknowledges, as a matter of good practice, the ICO could have responded to the complainant's initial correspondence of 20 November 2019 sooner (not responding until 8 February 2020, following further correspondence from the complainant on 27 January 2020 chasing the matter up). But it is noted from then onwards there was no delay in responding to the complainant's further correspondence. The Commissioner considers that the ICO took reasonable steps to try and address the complainant's ongoing concerns and requests for clarification and again offered either an internal review or to even bypass this part of the process and allow a section 50 application. The complainant chose not to do so at this time, wishing to continue with his appeal and to submit the request again (Group 2 requests) to the ICO to be considered afresh.

89. The Commissioner is unsure of what the ICO could or should have done further, and without any indication from the complainant as to what advice and assistance he felt was missing, the Commissioner has concluded that there is no breach of section 16 to record on this occasion. He notes that the complainant felt some of the ICO responses were confusingly worded and contradictory. The internal review process was still open at the time of this correspondence to the complainant and this would have been the appropriate route to challenge any outstanding issues.

## **Section 17**

90. Section 17 FOIA states that:

(1)A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a)states that fact,

(b)specifies the exemption in question, and

(c)states (if that would not otherwise be apparent) why the exemption applies.

91. In this case the ICO did not identify the two documents being withheld under section 42 in relation to the Group 1, 2 and 3 requests and it did not identify the additional document being withheld under section 42 in relation to the Group 3 requests (this further document was not held at the time the Group 1 and 2 requests were made). It therefore did not state this, specify it was relying upon this exemption and why. Furthermore it did not identify the emails sent to the complainant and identified at paragraph 54 above which would be exempt from disclosure under section 21 FOIA. The ICO did not therefore state this, specify it was relying upon this exemption and why. The ICO therefore breached section 17(1) FOIA in its handling of the requests.

## **Other Matters**

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92. Whilst section 40(1) FOIA (personal data of the applicant) has not been cited by the ICO in relation to the emails identified by the complainant as falling within the scope of the request at paragraph 54 above, it is likely that this exemption would additionally apply, at least in part, to this correspondence. This is because some of this information may amount to the complainant's own personal data. As the complainant clearly already has a copy of this information this has not however been considered any further.

## Right of appeal

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93. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

94. 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.
95. 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.....**

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

### Annex

No.	Date of initial Group 1 request	Request
1	25.6.18	"You say you have <b>updated your privacy notice</b> . 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.
2	25.6.18	"Is it your contention that the use of a PO Box or ' <b>alternative address</b> ' is compliant with The Data Protection (Charges and Information) Regulations 2018?"
3	25.6.18	"When did you <b>start publishing</b> the register again?"
4	25.6.18	Turning to the matter of your <b>lawful basis</b> for publishing my personal data. You are maintaining that it 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 specific reference to a statute 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 a parliament" but your "legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it". You have failed to do this. Moreover your own guidance notes at:

No.	Date of initial Group 1 request	Request
		<p><a href="https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/">https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/</a></p> <p>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 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.</p>
5	29.7.18	<p>"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 address 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?"</p>
6	29.7.18	<p>"What does the ICO think is the <b>purpose</b>, under the new legal framework, of the register of fee payers?"</p>
7	21.8.18	<p>"Your email solution makes no sense to me whatsoever. It just doesn't seem like it's been thought through properly. You talk 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 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.</p>



No.	Date of initial Group 1 request	Request
		<p>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 fee 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?"</p>
8.	2.1.19	<p>"The ICO collects for the register of fee payers the name and address of each registering data controller provided via paragraph 3(a) of Regulation 2 of The Data Protection (Charges and Information) Regulations 2018. Paragraph 5(b) of Regulation 2 says that for the purposes of paragraph 3(a), "the address of a person (other than a registered company) carrying on a business is that of the person's principal place of business in the UK."</p> <ul style="list-style-type: none"> <li>• Does the ICO have a policy, with regards to enforcement of these regulations, for what it regards as acceptable as a person's principal place of business in the UK?</li> <li>• If so please send me a copy of the ICO's policy.</li> <li>• Does the ICO have a procedure for verifying that the address a person has provided is their principal place of business in the UK?</li> <li>• If so please send me a description of the procedure.</li> </ul>
9.		<ul style="list-style-type: none"> <li>• "On which date did the ICO cease to publish on its website at <a href="https://ico.org.uk/">https://ico.org.uk/</a> data from the register of</li> </ul>

No.	Date of initial Group 1 request	Request
	2.1.19	<p>notifications (described at the time on the website as the "Register of data controllers") that pertained before the data protection law changes which commenced on 25th May 2018.</p> <ul style="list-style-type: none"> <li>• On which date, on or after 25th May 2018, did the ICO start to publish data from the register of fee payers, set up via the data protection law changes which commenced on 25th May 2018.</li> <li>• Please also specify any dates on which the register of fee payers was subsequently taken down from the website at <a href="https://ico.org.uk/">https://ico.org.uk/</a> and subsequently put back up on the website. I don't require any dates when the only reason that the register of fee payers was unavailable was general technical website operational problems at <a href="https://ico.org.uk/">https://ico.org.uk/</a> rather than deliberate purposeful actions in relation to the publication of the register of fee payers.</li> </ul> <p>Please answer the above requests in relation to the register of notifications and the register of fee payers in two ways:</p> <ul style="list-style-type: none"> <li>• In relation to a publicly searchable form, such as the current one at <a href="https://ico.org.uk/ESDWebPages/Search">https://ico.org.uk/ESDWebPages/Search</a> .</li> <li>• In relation to a downloadable file or set of files containing multiple entries from the register such as currently referred to at <a href="https://ico.org.uk/about-the-ico/what-we-do/register-of-fee-payers/download-the-register/">https://ico.org.uk/about-the-ico/what-we-do/register-of-fee-payers/download-the-register/</a> .</li> </ul> <p>Continuing:</p> <ul style="list-style-type: none"> <li>• Currently the page at <a href="https://ico.org.uk/about-the-ico/what-we-do/register-of-fee-payers/download-the-register/">https://ico.org.uk/about-the-ico/what-we-do/register-of-fee-payers/download-the-register/</a> says that the "register of fee payers is currently unavailable to download". Does the ICO have a policy or plan to make this downloadable version of the register of fee payers available again?</li> <li>• If so is there a target date for when this would happen and what is it?</li> </ul>

No.	Date of initial Group 1 request	Request
		<ul style="list-style-type: none"> <li>Were there any periods when the register of fee payers' data was unavailable on the ICO's website at <a href="https://ico.org.uk/">https://ico.org.uk/</a> , in either of the two ways referenced, when it was instead available at the UK government web archive of the ICO website at <a href="https://webarchive.nationalarchives.gov.uk/">https://webarchive.nationalarchives.gov.uk/</a> ? If you do not have this information about the UK government web archive I would be grateful if you could direct me to who does".</li> </ul>
<b>10</b>	2.1.19	<p>"The ICO have previously said that the publication on the ICO's website of the register of fee payers, including some personal data of individual data controllers, is done under the public task lawful basis. The ICO's published guidance on the public task lawful basis at <a href="https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/">https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/</a>says public authorities relying on the public task lawful basis should "Document your decision to rely on this basis to help you demonstrate compliance if required. You should be able to specify the relevant task, function or power, and identify its statutory or common law basis".</p> <ul style="list-style-type: none"> <li>Does the ICO have documentation regarding the decision to rely on the public task lawful basis and does any such documentation include a specification of the relevant task, function or power, and its statutory or common law basis?</li> <li>If the ICO does have such documentation then please send me a copy of it.</li> <li>If the ICO does not have any such documentation then please send me any records you have regarding why this documentation was regarded as unnecessary in spite of your own published guidance and obligations under Recital 41 of GDPR"</li> </ul>
<b>11.</b>	2.1.19	<ul style="list-style-type: none"> <li>"If an individual data controller complains about the publishing of their domestic residential address or email address in the published register of fee payers, does the</li> </ul>

No.	Date of initial Group 1 request	Request
		<p>ICO have a policy that covers whether or not this data will be listed as "withheld" on the published register of fee payers?</p> <ul style="list-style-type: none"> <li>• If so please send me a copy of this policy.</li> <li>• Are there any plans to ask individuals whether they consent to have this information published as part of the registration process or will it be left to individuals exercising their general right to object such as under Article 21 of GDPR?"</li> </ul>
12.	2.1.19	<p>"Article 30 of GDPR requires the ICO to document the purposes of any processing of the personal data gathered for the register of fee payers.</p> <ul style="list-style-type: none"> <li>• Does the ICO have such documentation and if so please send me a copy of it?</li> <li>• Do the purposes go further than those specified in the privacy notice at <a href="https://ico.org.uk/global/privacy-notice/pay-a-data-protection-fee/">https://ico.org.uk/global/privacy-notice/pay-a-data-protection-fee/</a>?</li> </ul>
13	2.1.19	<p>"In an email to me on 20th August 2018 you referred to an <b>email solution</b> to give individuals the option of providing an email address giving them the option to provide a way of being contacted without that identifying where they are based.</p> <ul style="list-style-type: none"> <li>• Does the ICO have any specification documents as to how this solution is intended to work and how it would change the process of registering by data controllers?</li> <li>• If so please send me a copy of any such specification documents.</li> <li>• Does the ICO still intend to proceed with this email policy?</li> <li>• If the ICO does still intend to proceed with this email policy then is there a target date for when the change would be rolled out and what is it?"</li> </ul>

No.	Date of initial Group 1 request	Request
14	2.1.19	<p>“Firstly regarding a <b>Data Protection Impact Assessment</b>:</p> <ul style="list-style-type: none"> <li>• Did the ICO carry out a Data Protection Impact Assessment (DPIA) which covered the processing of data gathered for the register of fee payers?</li> <li>• If so when was the DPIA carried out?</li> <li>• If a DPIA was carried out please send me a copy of any DPIA document.</li> <li>• If the ICO did not carry out a DPIA did you document the reasons why you did not?</li> <li>• If you did document the reasons why you did not carry out a DPIA then please send me a copy of this documentation.</li> <li>• 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 appropriate updates?</li> <li>• If so then please send me a copy of any such PIA document and relevant updates”.</li> </ul>
15	2.1.19	<p>“Concerning the current <b>register</b> of fee payers please provide the following <b>numbers</b>:</p> <ul style="list-style-type: none"> <li>• 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:</li> <li>• The number of entries on the register of fee payers in tier 1 - micro organisations.</li> <li>• The number of entries on the register of fee payers who specified an organisation type of "Individual / Sole trader".</li> <li>• 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</li> </ul>

<b>No.</b>	<b>Date of initial Group 1 request</b>	<b>Request</b>
		<p>flagged as such on the register then please provide a reasonable estimate if possible.</p> <p>When providing these numbers please provide them for the most recent date where it is practicable to provide them and tell me what that date is”.</p>