

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2023

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

Decision (including any steps ordered)

1. The complainant has requested correspondence and related records submitted by the DfE in response to a complaint they made. The Information Commissioner's Office (ICO) disclosed some information but withheld the remainder citing section 44 of the FOIA as its basis for doing so.
2. The Commissioner's decision is that the ICO is entitled to rely on section 44 of the FOIA to withhold the requested information.
3. The Commissioner does not require the ICO to take any steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information 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 in his capacity as a public authority – a duty confirmed by the First Tier Tribunal ("FTT"). 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. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request and dealing with previous complaints brought under the FOIA. It uses the term "the

Commissioner” when referring to the Information Commissioner dealing with this complaint.

Background

5. In 2021, the complainant brought a complaint to the ICO in which he challenged the Department for Education’s (DfE) reliance on section 35(1)(a) and 35(1)(b) of the FOIA (Formulation of government policy and Ministerial communications) to withhold information he had requested relating to the Autumn 2021 exam policy. On 10 October 2022 the ICO issued a decision notice, reference: IC-134878-Q7J6, in which it did not uphold the complaint, and the DfE was entitled to rely on section 35(1)(b) of FOIA to withhold the information.
6. The withheld information in this case, contains the same information (relating to the exam policy) that was withheld in the original complaint (IC-134878-Q7J6).

Request and response

7. On 10 October 2022, the complainant wrote to ICO and requested information in the following terms:

“I am interested in the records associated with the case reference IC-134878- Q7J6 created since 7 September 2022. Could you please disclose those records in full?

I would like the disclosure to include both the full correspondence between the ICO and the Department for Education and any additional records related to the case that are held by the ICO.”

8. On 9 November 2022, the ICO responded. It stated that it handled the request in part as a subject access request (SAR) under the DPA, and in part as a freedom of information request (FOIA) where necessary. It released some information in response to the SAR.
9. In relation to the portion of the request handled under the FOIA, it said that some information that is his personal data has been withheld under schedule 2, Part 2, paragraph 11 of the Data Protection Act 2018 (DPA). This is because it does not have lawful authority under section 132 of the DPA to disclose the information. It said that the DPA lists the Commissioner as a body that carries out regulatory functions and can refuse an individual access in the event that disclosure would be likely to prejudice those functions. That disclosure of the information would

prejudice this function because it would create a risk of undermining the trust in the ICO.

10. The ICO said that it also withheld some information that is not the complainant's personal data under section 44 of the FOIA, which, places prohibitions on disclosure by virtue of section 132 of the DPA. It also withheld an internal email address under section 31(1)(g) of the FOIA (prejudice to the exercise of a public authorities functions).
11. The complainant replied to the ICO on the same day and asked it to carry out a review of the request. In regard to the information that is his personal data, he asked it to reconsider its application of section 132 of the DPA. In regard to its application of section 44 of the FOIA, he said that because the information is not personal data, the exemption cannot be engaged by virtue of section 132 of the DPA.
12. On 5 December 2022, the ICO completed the review and wrote to the complainant upholding its original decision. It said that although some of the withheld information contains his personal data it was disclosed by the DfE to the ICO in order for his complaint about the DfE to be investigated. It did not agree that the information can be disclosed to him because he had consented to disclosure. It said that he is not in a position to do this, because he is unaware of the contents. It said that section 132 of the DPA allows a public authority to disclose information to the ICO in order for the ICO to discharge one (or more) of its functions. However, this doesn't extend to disclosure under FOIA.

Scope of the case

13. On 7 December 2022, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
14. During the course of the Commissioner's investigation the ICO has confirmed that both the complainant's personal data (e.g., his name and the request) contained within the DfE's submission, and the DfE's submission itself and the related annexes, have all been withheld under section 44(1)(a) of the FOIA by virtue of section 132 of the DPA. It also confirmed that it applied 40(2) of the FOIA to withhold DfE staff details contained within the correspondence.
15. In his most recent communication to the Commissioner, the complainant outlined the scope of his complaint, which, is "only about what is in my view a misapplication of section 132 DPA (and the associated misapplication of Section 44 FOIA)." His specific complaints are, that he does not believe that the statutory bar at section 132(1)(b) of the DPA has been met because the withheld information does not relate to an

individual or business. Also, because he has provided consent, disclosure of the withheld information can be permitted via gateway (a) under section 132(2) of the DPA. Therefore, he believes the ICO has incorrectly applied section 44 of the FOIA by virtue of section 132 of the DPA to withhold the requested information.

16. The Commissioner has therefore considered whether the ICO is entitled to rely on section 44 of the FOIA by virtue of section 132 of the DPA to withhold the requested information, that is, the DfE's submission (containing the complainant's personal data) and annexes.

Reasons for decision

Section 44 of the FOIA – prohibitions on disclosure

17. Section 44 of the FOIA states that:

18. "(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court

19. Section 44 of FOIA is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.

20. The relevant legislation in this case is the DPA 2018. In this particular case, the ICO is relying on section 132 of DPA 2018 as the statutory bar preventing disclosure.

Section 132(1) of that Act states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

- (a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,
- (b) relates to an identified or identifiable individual or business, and
- (c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources unless the disclosure is made with lawful authority."

21. Section 132(3) of the DPA 2018 makes it a criminal offence for any person to disclose information in contravention of section 132(1).
22. The withheld information was provided to the ICO for the purpose of discharging one of the ICO's functions, namely, to investigate complaints arising under section 50 of FOIA and to issue a decision. Therefore the DPA 2018 would prevent this information from being disclosed unless a lawful gateway to disclosure applied.
23. Section 132(2) of the DPA 2018 originally set out six possible gateways through which disclosure could take place with lawful authority:

"For the purposes of subsection (1), a disclosure is made with lawful authority only if and to the extent that—

(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),

(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions,

(d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation,

(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising, or

(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

24. Gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union and would not therefore have been available to the ICO at the point it responded to the request (although the Commissioner considers it unlikely to have applied in this case).

The complainant's position

25. In his complaint, the complainant has argued that the statutory bar at section 132(1)(b) of the DPA has not been met because the withheld information does not relate to an individual or business. He also argued that because he has provided consent for disclosure of the withheld information, disclosure is therefore permitted via gateway (a) under section 132(2) of the DPA. The Commissioner will consider each one in turn.

26. In regard to the statutory bar at section 132(1)(b), the complainant argued that although he accepts that the DfE is "identified or identifiable" he does not accept that it is an "individual or business" as required by section 132(1)(b) of the DPA, and therefore the DfE's submission and annexes cannot be withheld on reliance of section 44 of the FOIA by virtue of section 132 of the DPA.
27. The complainant said that, the DPA does not define "business", though it is clear from other sections of the Act (e.g. 21(3)(a)(ii)) that the word is intended to relate to a commercial organisation. He said, the wording in section 132(1)(b) is taken directly from section 59(1)(b) of DPA 1998, and the DPA 1998 does define "business" in Section 70(1). That definition says that "*business*" includes any trade or profession". Since the DfE is not a "trade or profession", this requirement of section 132 of the DPA has not been met, and therefore the application of section 44 of the FOIA by virtue of section 132 of the DPA is incorrect.
28. In regard to the gateway for disclosure under section 132(2)(a), the complainant argued that because he has provided consent for disclosure of the withheld information (including his personal data within the DfE's submission), section 132 of the DPA cannot be used to justify this information being withheld.

The ICO's position

29. The ICO said that the DfE's submission and annexes were provided for the purpose of the ICO's investigation: IC-134878-Q7J6. The information relates to individuals that are members of staff at the DfE, e.g., the author of the submission, the annexes sent to Ministers seeking the qualified person's opinion ect.
30. The DfE has expressly refused to consent to release of the information in its entirety ("*We would also not wish to have our response documents released, i.e. our letter to the ICO 22 September 2022, the withheld information and the s36 submission and annexes sent to ministers when seeking the opinion of the Qualified Person*").
31. The ICO has confirmed that the information that is the complainant's personal data within the DfE's submission is the complainant's name and the wording of his request. It argued that, section 132(3) of the DPA 2018 makes it a criminal offence for ICO staff to disclose information in contravention of section 132(1) of the DPA. In this instance the complainant's personal data was provided within the DfE's submission to the ICO for the purpose of it discharging one of its functions – namely investigating a complaint under Section 50 of FOIA. This is the only reason the ICO now holds the information.

32. The ICO argued that, disclosure of information within the submission and annexes would prejudice the ICO's function because, it would create a risk of undermining trust in the ICO. This could negatively affect how DfE and other public authorities engage with the ICO during its investigations. Ultimately, this will conflict with the public interest in having an effective, trusted regulator. Organisations and members of the public need a secure channel to communicate with the ICO and express their concerns. It argued that, to be an effective regulator, the ICO needs to provide assurance that information will be handled appropriately. This assurance allows the ICO to receive important, detailed information which it can use for targeted responses and actions on information rights issues.
33. The ICO has noted that the complainant has consented to disclosure of his personal data (within the DfE's submission) to the world at large. However, it said that this "isn't his decision to make or consent to", because it was provided by another individual or business (the DfE), for the purposes of the ICO carrying out its regulatory functions. That the DfE has expressly refused to consent to disclosure of the information in its entirety. It argued that there is no lawful gateway through which this information could be disclosed.
34. The ICO also argued that, although the complainant's name and the wording of the request has been withheld from within the DfE's response, the same information was disclosed to him within other information under the SAR portion of its response.

The Commissioner's view

35. The Commissioner notes that the basis of the complainant's opinion that the statutory bar at section 132(1)(b) has not been met is because he does not believe the DfE is an individual or business.
36. Section 132(1)(b) of the DPA states that the Commissioner or a member of the ICO's staff must not disclose information which relates to an identified or identifiable individual or business. The Commissioner notes the word 'or', meaning one or the other (e.g., an identifiable individual or business).
37. The Commissioner has viewed the withheld information in this case, and notes that all the information relates to identifiable individuals, specifically named members of staff at the DfE e.g., the author of the submission, the individuals the annexes relate to. He is therefore satisfied that the statutory bar at section 132(1)(b) of the DPA is met in this case.

38. In regard to gateway 132(2)(a), the Commissioner notes that, section 132(3) and 132(1) of the DPA makes disclosure of information provided to the Commissioner a criminal offence unless disclosure is permitted through one of the gateways under section 132(2) of the DPA. In this case, the complainant has argued that disclosure is possible through the gateway at 132(2)(a) because, he has provided consent for the information to be disclosed.
39. The Commissioner notes that, the ICO does not have consent from the DfE to disclose any information from within the submission (which includes the complainant's personal data) or annexes. Also, while the Commissioner notes that at the point ICO dealt with the request, it did not have the DfE's explicit consent to disclose any of the withheld information, it has since expressly refused consent to the release of this information in its entirety.
40. The fact that the complainant has agreed to disclosure of this information (including the information that is his personal data) after the information was provided to the ICO is not relevant in consideration of gateway 132(2)(a), this is because he did not provide this information to the ICO, the information was provided by the DfE. The Commissioner has also reviewed the information that was disclosed to the complainant and withheld in this case. He notes that the ICO provided the complainant with his name and the wording of his request under the SAR portion of its response to his request.
41. For the reasons given above, the Commissioner is satisfied that the ICO cannot rely on section 132(2)(a) as a lawful gateway to disclosure because it does not have lawful authority to disclose the withheld information. As none of the lawful gateways to disclosure are met in this case, section 132(2) of the DPA 2018 would prohibit the ICO from disclosing the withheld information and therefore section 44 of the FOIA is engaged.
42. The Commissioner therefore finds that the ICO is entitled to rely on section 44 of FOIA to withhold the information.

Right of appeal

43. 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

44. 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.
45. 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

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