

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2013

Public Authority: The Information Commissioner's Office (ICO)

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information which was withheld following a previous complaint he made to the ICO relating to Kent Police. The ICO refused to disclose the requested information under section 44(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the ICO has correctly applied section 44(1)(a) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 26 July 2012, the complainant requested a copy of the withheld information which fell within the scope of his original request to Kent Police and which was the subject of an earlier complaint to the ICO. On 24 August 2012 the ICO refused to provide the complainant with the information he requested under section 44(1)(a) FOIA.
5. The complainant requested an internal review on 28 August 2012. The ICO sent the outcome of its internal review on 11 September 2012. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner 20 October 2012 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the ICO was to correct to withhold the requested information under section 44(1)(a) FOIA.

Reasons for decision

8. Section 44(1)(a) of FOIA states that, "Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it- is prohibited by or under any enactment".
9. In this case the ICO has explained that the enactment in question is the Data Protection Act 1998 (DPA) and specifically Section 59 of the DPA. Section 59 states that neither the Commissioner nor his staff shall disclose;

"any information which :

- a. has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts.
- b. relates to an identified or identifiable individual business, and
- c. is not at the time of disclosure, and has not been available to the public from other sources,

unless the disclosure is made with lawful authority."

10. The ICO went on to explain that Section 59(2) states that there are five circumstances when the ICO could have lawful authority to disclose this type of information. It explained that this is an exhaustive list. The circumstances are:

- "(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
- (c) the disclosure is made for the purposes of, and is necessary for, the discharge of –
- (i) any functions under this Act, or
 - (ii) any Community obligation,
- (d) the disclosure is made for the purposes of any proceedings, whether

criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.”

11. The ICO confirmed that section 59(1) (a) is satisfied because the information was provided to the ICO for the purposes of the information Acts. The Information Acts consist of the Data Protection Act 1998 and by amendment the Freedom of Information Act 2000. The ICO would not have received this information had it not been the regulator of the DPA and FOIA and been provided this information as part of the consideration of an alleged breach of that legislation.
12. It went on to explain that as section 59(1)(b) applies to the 'information Acts' and therefore the meaning of the word 'business' must be assessed in the context of those Acts to include public authorities. It therefore concluded that Kent Police is an identifiable business and section 59 (1) (b) is satisfied.
13. It said that in relation to section 59 (1) (c), the information has not been disclosed to the public and therefore this does not provide a route to disclosure.
14. In relation to section 59 (2) (b), the ICO confirmed that this provides circumstances where lawful authority could be achieved. It said that in relation to (a) it did not have consent from the Kent Police to disclose this information and in relation to (b) the information was not provided to the ICO for the purpose of being made public.
15. In relation to (c) it considered whether this applied in any way without reference to the ICO having received an information request because section 44 (1) FOIA sets out that 'Information is exempt information if its disclosure (otherwise than under this Act)'. It concluded that it is not required to disclose this information in order to discharge a function under the information Acts or a Community obligation. Furthermore, in relation to (d), it confirmed that a disclosure would not be for the purposes of proceedings.
16. Finally, in relation to (e), it stated that the public interest threshold in relation to this request is very high, not least because disclosure in contravention of section 59 by the Information Commissioner or his staff may constitute a criminal offence (s.59 (3)). It confirmed that it considers that there is a strong public interest in information being provided in confidence to the Information Commissioner, to enable him to carry out his statutory duty, remaining confidential and that this information will not be disclosed without lawful authority. It considers

that to do so would undermine the regulatory function and powers of the ICO.

17. The Commissioner considers, in light of the arguments and submissions presented by the ICO, that section 44(1)(a) was applied correctly in this case as the information requested is exempt from disclosure under section 59 of the DPA.

Right of appeal

18. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

19. 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.
20. 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

Gerrard Tracey
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