

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

### **Decision notice**

**Date:** 8 October 2013

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

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

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

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1. The complainant has requested information from the ICO which relates to the workers and companies with connections to the North-east of Scotland who were involved in the blacklisting scheme ran by The Consulting Association. The request sought information about the individuals and companies involved and details of what information was recorded on the blacklist. The ICO provided some information it held in response to the request and refused to disclose other requested information relying upon section 44(1) (a) of the FOIA, by virtue of section 59(1) of the Data Protection Act 1998.
2. The Information Commissioner's (The "Commissioner") decision is that the ICO has correctly applied section 44(1) (a) FOIA in this case.
3. The Commissioner requires no further steps to be taken.

## Request and response

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4. On 6 December 2012 the complainant requested information relating to the following:

*"Please can you provide all data, redacted if necessary, relating to workers and companies involved in blacklisting in North-east Scotland/ Grampian (Aberdeen, Aberdeenshire and Moray).*

*I want to get an idea of:*

- *how many workers with links to the NE have been blacklisted*
  - *Any details that can be provided of what information was held about these individuals and how many pages long their file was*
  - *how many companies based in the NE used the database (at least one, Turriff Construction, is listed on your website)*
  - *how many national companies used the database for NE projects – e.g. road building, schools etc – and details of the work."*
5. On 17 December the ICO wrote to the complainant asking for further clarification in respect of the request. On the same date the complainant provided clarification to the ICO.
6. On 18 December 2012 the ICO advised that a full response would be sent by 18 January 2013.
7. On 17 January 2013 the ICO responded to the request for information. It provided some information as requested; advised why some details were not held; that other information was already available on the ICO website and claimed an exemption under section 40(2) of the FOIA in respect of information that it held that it considered personal data.
8. On 18 January 2013 the complainant advised that she was not satisfied with the response. This was treated as a request for an internal review.
9. On 14 February 2013 the ICO provided the complainant with a response. It corrected previously given information in relation to the number of employees from the North-east of Scotland who were on the blacklist. It also stated it would not be providing any further information in respect of the request. It confirmed that it relied on section 40(2) of the FOIA in respect of personal data by virtue of section 40(3)(a)(i).

## Scope of the case

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10. The complainant contacted the Commissioner on 19 February 2013 to complain about the way her request for information had been handled

stating that she was not satisfied with the response received to the request.

11. Following clarification the complainant confirmed that she required information in the following terms:

*"Basically, if I can get any details from these 63 records that will be great. It will enable me to write an article saying, for example, a North-east worker had details about the newspaper he was reading / his wife's affair/ a safety complaint made... kept on file.*

*The examples I give above were all mentioned at a blacklisting press conference by MP Ian Davidson, who was able to view the files at the ICO himself. I'm only after the same details he has been allowed to see but with my focus being solely those with links to North-east Scotland."*

12. During the course of the investigation the ICO substituted the exemption it relied upon as a basis for refusing to provide the remainder of the information it had identified as falling within the scope of the request dated 6 December 2012. It advised that it wished to rely upon section 44(1)(a) of the FOIA, by virtue of section 59(1) of the Data Protection Act 1998 (the "DPA").
13. The Commissioner has therefore considered whether the ICO was correct to withhold the requested information under section 44(1)(a) of the FOIA in relation to the requested information.

## **Reasons for decision**

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14. Section 44(1)(a) of FOIA states that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited by or under any enactment.
15. In this case the ICO has explained that the enactment in question is section 59 of the DPA. Section 59(1) 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.

16. 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.
17. 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 (these consist of the Data Protection Act 1998 and the Freedom of Information Act 2000). The ICO would not have received the 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. In this case the DPA.
18. It went on to explain that as section 59(1)(b) applies to the 'information Acts' the meaning of the word 'business' must be assessed in the context of those Acts and it had concluded that The Consulting Association is an identifiable "business" and section 59(1)(b) is satisfied.
19. 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.
20. The Commissioner is aware that the complainant has raised the issue that some of the information she sought, as to matters that were recorded by The Consulting Association, has now become available as a result of an interim report produced by the Scottish Affairs Select Committee. However, the Commissioner considers that the relevant

point in time as far as disclosure is concerned is following the date of the original request, in this case 6 December 2012. Given that the interim report of the select committee was not published until April 2013 the details contained therein would not have been in the public domain at the time of the request and therefore section 59(1)(c) applies.

21. In relation to section 59(2)(a), the ICO has confirmed that it does not have consent to disclose this information and in relation to section 59(2) (b) it maintains that the information was not provided to the ICO for the purpose of being made public. This information was seized by the ICO under a search warrant in the course of carrying out its function as regulator of the DPA.
22. In relation to section 59(2)(c) the ICO concluded that it is not required, in this instance, to disclose this information in order to discharge a function under the information Acts or a Community obligation and therefore this information could be considered "exempt information" in respect of this request. In relation to information provided to the Scottish Affairs Select Committee at a later date it contends that there is a clear public interest in doing so to assist it with its enquiries.
23. In relation to section 59(2)(d), the ICO confirmed that a disclosure, in respect of this request, would not be for the purposes of any proceedings.
24. In relation to section 59(2)(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 ICO may constitute a criminal offence (under section 59(3) of the DPA). It confirmed that it considered that disclosure was not necessary in the public interest on the facts of this particular case.
25. The Commissioner is mindful that there has been a legitimate public interest in this matter given the extent of the information held by The Consulting Association and the consequent effect upon individuals because of its use of personal information and he affords some weight to this.
26. However the Commissioner is of the view that there is an even greater public interest in information being provided in confidence to the ICO, to enable it to carry out its statutory duty with information being provided remaining confidential and not being disclosed without lawful authority. This is of particular concern when litigation is being contemplated and investigations are still being carried out. Premature release of any details could jeopardise on-going investigations and potentially identify individuals who may have been on the blacklist.

27. In support of its position the ICO submitted that it considered that releasing the requested information in this case would undermine its regulatory functions and powers.
28. The Commissioner has had the opportunity of considering the arguments and submissions presented by the ICO and the complainant. The Commissioner is of the view that section 44(1)(a) of the FOIA was applied correctly in this case as the information requested is exempt from disclosure under section 59 of the DPA and the grounds for lawful authority have not been established under section 59(2) of the DPA.

## Right of appeal

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29. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

30. 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.
31. 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  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**