

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2014

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK0 5AF

Decision (including any steps ordered)

1. The complainant has requested correspondence which the Cabinet Office had sent to the Information Commissioner's Office (the "ICO") concerning her complaint case FS50435121.
2. The Commissioner's decision is that the ICO has correctly applied section 44(1)(a) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 28 March 2013, the complainant wrote to the ICO and requested information in the following terms:

"Would it be possible for you to send to me the letters that the Cabinet Office sent to you?"

5. The ICO responded on 29 April 2013. It refused the complainant's request and explained that this information is being withheld in its entirety on the basis of section 44 of the FOIA in conjunction with section 59 of the Data Protection Act 1998 (the "DPA").
6. On 1 May 2013 the complainant made a formal complaint about the handling of this case and expressed her dissatisfaction to the ICO about

withholding the information requested. This correspondence was treated by the ICO as a request for an internal review.

7. On 30 May 2013 the ICO responded and explained that it is upholding its original response under section 44 of the FOIA/59 DPA and it provided more reasoning to the complainant. The ICO also stated to the complainant that it had identified a small amount of her personal data within the correspondence and it would arrange for this to be sent to the complainant.
8. On 25 June 2013 the ICO submitted further information which was identified for disclosure to the complainant following its internal review response under case reference RCC0497307. The ICO had considered this information as being the complainant's personal data contained within the correspondence received by the ICO from the Cabinet Office on the complainant's case FS50435121.
9. On the same day the complainant asked the ICO for a review of its decision not to send the emails from the Cabinet Office in an un-redacted form. The complainant also asked the ICO to arrange the provision of the un-redacted documents.
10. On 10 July 2013 following from the ICO providing the complainant with further information on case reference RCC0497307 (the internal review of information request IRQ0494421) it advised the complainant of the right to appeal to the ICO under section 50 of the FOIA if she was dissatisfied with the internal review outcome.
11. On the same day the complainant contacted the Commissioner 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.

Scope of the case

12. The complainant contacted the Commissioner on 10 July 2013 to complain about the way her request for information had been handled.
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Reasons for decision

Section 44(1)(a)

13. 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.
14. In this case the ICO has explained that the enactment in question is section 59 of the DPA. Section 59(1) states the 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) related 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.
15. 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.
16. 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. During the investigation of this case the Commissioner requested further information from the ICO before he could make a decision.
18. 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.
19. 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 to include public authorities; and it concluded that the Cabinet Office is therefore an identifiable business and section 59(1)(b) is satisfied.
20. 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.
21. In relation to section 59(2) the ICO explained that it provides circumstances where lawful authority could be achieved. It stated that in relation to (a) it does not have consent from the Cabinet Office to disclose this information and in relation to (this is the most common exception to the prohibition it would seek to rely on and frequently obtain) (b) the information was not provided to the ICO for the purpose of being made public.
22. 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 received by the ICO in the course of carrying out its function under section 50 of FOIA.
23. In relation to section 59(2)(c) the ICO explained that it must consider whether this applies 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 stated that it finds that it is not required to disclose this information in order to discharge a function under the information Acts or a Community obligation.

24. 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.
25. 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) and it is not met in this circumstance.

Conclusion

26. Firstly, the Commissioner has followed the binding case law from the Upper Tribunal in the case of *Ofcom v Gerry Morrissey* and the Information Commissioner GIA/605/2010. The case considered the application of section 44 FOIA. The Upper Tribunal found (at §60) that when read together FOIA and the Communications Act did not extend the Commissioner's role to testing the reasonableness of Ofcom's decision not to publish the full statistics requested. At §63 the Upper Tribunal says;

"In short the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of the FoI. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act"

27. This establishes that whilst it may be appropriate for the Commissioner to take into account whether or not (as a matter of fact) a public authority exercised its discretion to disclose in any particular case related to a statutory bar, it is not for him to question whether that discretion was applied correctly or not.
28. In this case the Commissioner finds that the ICO had engaged the relevant provisions of section 59(1) and that the ICO had clearly decided that the lawful authority provisions in section 59(2) did not apply, the Commissioner is not required to question the reasoning.

29. The complainant's arguments about the public interest in disclosure essentially challenge the way ICO should have used its discretion to dis-apply section 59 but the Commissioner cannot question that discretion in this decision notice.
30. The Commissioner finds that section 44(1)(a) of the FOIA was applied correctly and the withheld information is exempt from disclosure by virtue of section 59 of the DPA.

Other matters

31. Whilst accepting all the withheld information was exempt under section 44, the Commissioner identified further information as the complainant's personal data. This has been communicated to the ICO so that they can consider the request under section 7 of the DPA.

Right of appeal

32. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Steve Wood
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