

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

### **Decision notice**

**Date:** 6 May 2014

**Public Authority:** Information Commissioner's Office

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

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

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1. The complainant has requested the ICO to disclose a copy of the briefing notes to Lord Turner, which were supplied to the ICO by the Financial Conduct Authority (FCA) in relation to an earlier complaint the complainant had made to the ICO under section 50 of the FOIA. The ICO responded refusing to disclose this information under section 44(1)(a) of the FOIA, by virtue of section 59(1) of the Data Protection Act 1998 (DPA).
2. The Commissioner's decision in this case is that the ICO has correctly applied section 44(1)(a) of the FOIA to the requested information.
3. The Commissioner therefore does not require any further action to be taken.

#### **Request and response**

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4. On 14 October 2013, the complainant wrote to the ICO and requested information in the following terms:  
  
"As part of its submissions to the Commissioner the FSA [now the FCA] provided arguments encompassing aspects of the more recent guidance. May I please have copies of those arguments."
5. On 28 October 2013, the complainant also requested:

"I request ALL information relied on by the ICO in arriving at the decision of 8<sup>th</sup> October 2013 in this case [FS50488531]."

6. The ICO responded on 25 November 2013. It released all information to the complainant except:
  - a) the personal data of third parties; and
  - b) a document supplied by the FCA to the ICO named 'the briefing notes to Lord Turner'.

Section 40 of the FOIA was applied to a) and section 31 of the DPA and section 44 of the FOIA was applied to b).

7. The complainant requested an internal review on 3 December 2013.
8. The ICO completed an internal review on 3 January 2014 upholding its earlier decision.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 14 October 2013 to complain about the way his request for information had been handled. Specifically, he raised concerns about the ICO's decision to withhold the briefing notes to Lord Turner from him and provided copies of various documents, the details of interested parties and references to a variety of material which he believes highlights the overwhelming public interest in the disclosure of these notes.
10. During the Commissioner's investigation it was agreed with the complainant that he had no complaint about the application of section 40 of the FOIA to the personal data of third parties and did not wish to pursue a complaint under the DPA relating to the application section 31 of the DPA to information contained in the briefing notes which could be construed to be his own personal data.
11. The complainant was clear that he only wished to pursue the matter under section 50 of the FOIA and dispute the application of section 44(1)(a) of the FOIA to the information contained in the briefing notes which could not be construed to be his personal data.
12. This notice will therefore address the ICO's application of section 44(1)(a) of the FOIA to the briefing notes.

## Reasons for decision

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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 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.
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. 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.
16. The ICO confirmed that section 59(1)(a) is satisfied because the briefing notes were provided to the ICO for the purposes of the information Acts

(these being the Data Protection Act 1998 and the Freedom of Information Act 2000). The ICO would not have received the briefing notes had it not been the regulator of the DPA and the FOIA and been considering the complainant's earlier complaint, FS50488531, under section 50 of the FOIA.

17. 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 these Acts and it concluded that the FCA (and the former FSA) is an identifiable business and therefore section 59(1)(b) is satisfied.
18. In relation to section 59(1)(c), the ICO was satisfied that the information had not been disclosed to the public or been available to the public from other sources and therefore this subsection did not provide a route to disclosure.
19. The ICO then went on to consider section 59(2)(a). The ICO contacted the FCA about the complainant's request and to seek its views on the disclosure of the information the complainant sought from the case file for FS50488531. The FCA consented to the disclosure of some information but specifically stated that it did not consent to the disclosure of the briefing notes to Lord Turner. It reiterated that the briefing notes were only supplied to the ICO for the purposes of considering the complainant's previous section 50 complaint under the FOIA and were therefore provided in confidence. It did not provide the briefing notes to the ICO for the purposes of making them public. As the FCA has not consented to its disclosure, section 59(2)(a) does not provide a route to disclosure.
20. Regarding section 59(2)(c), the ICO concluded that it is not required 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.
21. In relation to section 59(2)(d), the ICO confirmed that a disclosure would not be for the purposes of any proceedings. Proceedings in this context would be proceedings undertaken by the ICO itself or to which it was party to, not proceedings of a more personal nature ongoing or intended by the requester. Section 59(2)(d) therefore does not provide a route to disclosure whether the complainant is in current litigation or intending to commence litigation.
22. Addressing section 59(2)(e) the ICO 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). In the hearing of

*Lamb v Information Commissioner EA/2009/0108*, the Information Tribunal stated:

*"18. Although a determination under section 59(2)(e) is based on a public interest test it is very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."*

23. The complainant is clearly of the view that there is an overwhelming public interest in the disclosure of the briefing notes in question due to the underlying issues relating to this request, his view that there are and has been significant failings in the financial industry which need to be brought to light and the complainant's ongoing pursuit for personal justice. The complainant has submitted various articles and information to highlight this point and listed numerous other people he believes are interested in the requested information.

### **Conclusion**

24. 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 the FoI Act 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"*

25. 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, it is not for him to question whether that discretion was applied correctly or not.
26. 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.
27. 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.
28. However, for completeness the Commissioner has considered the challenge that the section 59(2)(e) is met, the basis of public interest.
29. The Commissioner has considered the withheld information in detail and whilst he may find the information supplied of interest, he does not consider it is compelling enough to demonstrate that there is a significant public interest in this case that would warrant overriding the confidentiality it owes to the FCA.
30. Section 59 of the DPA is an important protection for information provided to the ICO by third parties. As stated previously, a breach of section 59 is a criminal offence. Disclosing confidential information which has been provided to the ICO for the sole purpose of adjudicating on a section 50 FOIA complaint would have a significant and detrimental impact on the ICO's ability to investigate complaints and maintain the confidence of public authorities. There is a clear and significant public interest in not undermining the operation of the FOI regime.
31. It is the Commissioner's view that requests to the ICO itself for information it received in confidence for the purposes of carrying out its functions as regulator and for withheld information supplied by public authorities purely so it can make an assessment of the application of a particular exemption is an inappropriate use of the FOIA. It cannot have been the intention of the FOIA to provide another route to applicants for them to try and obtain the recorded information they require.
32. In conclusion, the Commissioner is satisfied that section 44(1)(a) of the FOIA was applied correctly in this case, as the information is exempt from disclosure under section 59 of the DPA and the ground for lawful authority are not established under section 59(2) of the DPA.



## Right of appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

34. 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.
35. 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**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**