

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2014

Public Authority: Information Commissioner's Office

Address: Wycliffe House

Water Lane

Wilmslow

SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested a copy of information held by the Information Commissioner's Office (ICO) in which was the subject of an earlier decision notice. The complainant also requested any information which provided an explanation for a statement within this earlier decision notice. The ICO confirmed that only information within the first part of the request was held. This was considered to be exempt from disclosure on the basis of section 44(1)(a) of the FOIA.
2. The Commissioner's decision is that the ICO has correctly applied section 44 by virtue of section 59 of the Data Protection Act 1998, as amended by the FOIA, to withhold this information.

Request and response

3. On 1 November 2013, the complainant wrote to the ICO and requested information in the following terms:

"This is an FOI request for the information which was the subject of the ICO's decision notice below.

http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50483307.ashx

Given the passage of time – it is now more than two years since the advice was provided to the DfE by the Cabinet Office, the fact that the

DfE withdrew an appeal which was being contemplated at the time of the request in January 2011, that the ICO has issued guidance on the matter, and that the Cabinet Office has now issued its own guidance, most of the public interest arguments advanced by the DfE and supported by the ICO fall away. There can now be little, if any, public interest in maintaining the exemption.

I would be grateful for a copy of the advice in full, including the names of the senior civil servants by whom and to whom it was sent.

I would also be grateful for any information held by the Commissioner which sheds light on the following statement in his decision.

22. The Commissioner has considered this point but would also say that having reviewed the withheld information there is nothing extraordinary or concerning in the content that would heighten the public interest in disclosure."

4. The ICO responded on 28 November 2013. It stated that it did not hold information which would shed light on the statement in the decision notice but did hold information in relation to the first part of the request. The ICO explained it considered this information to be exempt on the basis of section 44 of the FOIA by virtue of section 59 of the Data Protection Act 1998 ("DPA"). The ICO explained it did not have lawful authority to disclose information provided to it in confidence as part of an investigation.
5. Following an internal review the ICO wrote to the complainant on 3 January 2014. It stated that it upheld the initial response and still considered section 44 provided an exemption from disclosure.

Scope of the case

6. The complainant contacted the Commissioner on 26 February 2014 to complain about the way his request for information had been handled. In particular the complainant considered the main point of the withheld information had been disclosed so it no longer held the necessary quality of confidence. The complainant also stated his belief that the ICO's earlier response that the withheld information had not been summarised raised suspicions of wrongdoing.
7. The Commissioner considers the scope of his investigation to be to determine if the ICO has correctly withheld the information on the basis of section 44 of the FOIA.

Reasons for decision

8. Section 44(1)(a) of the FOIA states:

"(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."

9. In this case the ICO has explained that the enactment in question is the DPA and specifically section 59 which 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 this Act,

(b) relates to an identified or identifiable individual or business, and

(c) is not 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."

10. The ICO has explained that the withheld information was obtained in confidence for the purposes of the Information Acts – the DPA and, by amendment, the FOIA. The ICO would not have received this information had it not been the regulator of the DPA and FOIA and had been provided this information as part of the consideration of an alleged breach of that legislation.

11. Section 59(1)(b) requires the information to relate to an identifiable business. The Information Tribunal¹ considered that the term business should be interpreted widely and could cover public authorities and other organisations. In this case the business is a public authority, the Department for Education (DfE).

12. Section 59(1)(c) requires that the information has not been disclosed to the public. The complainant has argued that the main point of the withheld information has already been disclosed or summarised in

¹ EA/2006/0039

statements made by the DfE. The ICO has argued that the statements issued by the DfEs press office cannot be reasonably characterised as disclosing or summarising the withheld information. The Commissioner has viewed the withheld information and agrees with the ICO that the information cannot be said to already have been disclosed or summarised.

13. As the Commissioner accepts that the subsections of 59(1) have been shown to be met he has next gone on to consider the provisions of section 59(2) which states that there are five circumstances in which the ICO could have lawful authority to disclose this type of information. This is an exhaustive list and 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 interest of any person, the disclosure is necessary in the public interest."

14. In relation to (a) the ICO did not have consent to disclose the information and in regard 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) of the FOIA sets out 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. 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), a disclosure would not be for the purposes of proceedings.

16. In relation to (e) the ICO stated it did not consider there to be a strong public interest in disclosure of the withheld information but did consider there to be a strong public interest in information provided in confidence to the ICO remaining confidential, to enable it to carry out its statutory duties, and that this information should not be disclosed without lawful authority.
17. The ICO has stated that a breach of section 59 is a criminal offence. Disclosing confidential information which has been provided for the sole purpose of adjudicating on a complaint would have a significant and detrimental impact on the ICO's ability to investigate complaints and maintain the confidence of public authorities. The ICO considers there to be a clear public interest in not undermining the operation of the FOIA by ruling in a decision notice that information should be withheld only to then release it shortly afterwards.
18. The complainant has raised the passage of time as a factor in diminishing the public interest in withholding the information. The ICO has acknowledged these arguments and accepts that the impact on the specific issue may have reduced by the time the request was made but still considers the general harm from disclosure by the ICO would be strong.
19. In addition to this the ICO has stated that the information dates back to 2011 and by the time of the request in 2013 matters had progressed and guidance on the use of private email accounts had been issued by the ICO and the Cabinet Office. As such the ICO argues that the public interest in disclosing advice from 2011 cannot be compelling when further advice has since been issued.
20. The Commissioner has viewed the withheld information and is satisfied that it was provided to him solely for the performance of his statutory function of investigating a complaint made under section 50 of the FOIA. It was provided by the DfE in confidence for the purpose of enabling the ICO to conduct its investigation of a specific case (FS50483307), in accordance with the provisions of the FOIA.
21. The Commissioner is satisfied that the information has not otherwise been made publicly available and that there are strong public interest arguments in withholding this, particularly with regard to the need for public authorities to maintain confidence in the ICO to allow it to continue to perform its regulatory functions.
22. Whilst the Commissioner accepts there is a public interest in the issue of private email accounts and in understanding the 2011 advice, he does accept the argument from the complainant that the situation has moved

on and changed greatly since the advice was given and the public interest in the advice will have lessened.

23. The Commissioner therefore finds that the ICO correctly applied section 44(1)(a) to the withheld information.

Other Matters

24. Making a request to the ICO specifically for information which it holds only as withheld information which is the subject of a complaint the ICO is or has been required to investigate is not, in the Commissioner's view, an appropriate use of the right under section 1 of the FOIA. Where someone wants to make a request for such information, the more appropriate course is to make the request to the public authority which originally held the information for its own business purposes. The Commissioner is always going to treat a statutory bar which imposes criminal liability as a very strong basis for non-disclosure

Right of appeal

25. 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

26. 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.
27. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF