

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

### **Decision notice**

**Date:** 20 September 2017

**Public Authority:** Information Commissioner's Office  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

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

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1. The complainant has requested information relating to the ICO's intention to amend her guidance on the application of section 36 of the FOIA. The ICO disclosed some information but withheld other information, citing section 42 of the FOIA.
2. The Commissioner's decision is that section 42 of the FOIA is engaged and that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case. She therefore does not require any further action to be taken.

### **Request and response**

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3. On 12 January 2017, the complainant wrote to ICO and requested information in the following terms:
4. "All information brought into existence since 19 March 2015 and held in respect of the consideration and/or implementation and/or communication of possible or intended revisions to paragraph 13 of the above mentioned Guide; to include those data more specifically enumerated below."

"I seek confirmation or denial that there has been (a) consideration by the ICO of any such revision in the period in question or (b) any decision amounting to a settled intention to make any such revision or (c) the communication of any such decision."

5. "This present Request includes recorded information held by the ICO which does any of the following:
  - 1 evidences the making of that decision
  - 2 includes the wording or draft wording of any possible or intended revision
  - 3 evidences the conveying of that decision either internally within the ICO or from the ICO to Counsel who drafted the statement made on 9 December 2015
  - 4 evidences discussion or consultation undertaken either within the ICO or with others (including the Ministry of Justice and any NHS trust) concerning the scope or the wording of the intended revision or any possible alternative forms of any such revision."
6. The ICO responded on 10 February 2017. It confirmed what recorded information is held and disclosed some of this to the complainant. In relation to the information it was unwilling to disclose, it cited section 42 of the FOIA.
7. The complainant requested an internal review on 23 February 2017.
8. The ICO carried out an internal review and notified the complainant of its findings on 24 March 2017. It confirmed that it remained of the opinion that section 42 of the FOIA applied to the withheld information.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 11 April 2017 to complain about the way his request for information had been handled. Specifically, the complainant disagrees with the application of section 42 of the FOIA.
10. The Commissioner considers the scope of this investigation is to determine whether, as a public authority bound by the requirements of the FOIA, she was entitled to rely on section 42 of the FOIA in this case.

### **Background**

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11. This request relates to the complainant's former appeal to the Information Tribunal in which the ICO's submission of 9 December 2015 confirmed that in relation to paragraph 13 of the ICO Guide to Freedom of Information concerning the delegation of the role of qualified person

under section, "*the Commissioner intends to revise this paragraph.*" The said guidance can be accessed via the following link:

[https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

## Reasons for decision

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12. Section 42 of the FOIA states that a public authority may refuse to disclose information if it is subject to legal professional privilege.
13. This exemption is not absolute, so it is subject to the public interest test. Therefore, in addition to demonstrating that the withheld information is subject to legal professional privilege, a public authority must consider the arguments for and against disclosure and demonstrate, in a given case, that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
14. Legal professional privilege covers communications between lawyers and clients for the purpose of obtaining legal advice and communication and/or documents created by or for lawyers for the dominant purpose of litigation. The ICO confirmed that the withheld information relates to the complainant's earlier appeal to the Information Tribunal, which was dealt with by one of the ICO's Solicitors. During the course of the appeal the Solicitor communicated and exchanged information with her internal client and with Counsel, who had been asked to represent the ICO for the purposes of the Information Tribunal hearings. It stated that where these communications contain information that falls within the scope of this request, that information is subject to legal professional privilege and as such is exempt by virtue of section 42 of the FOIA.
15. The Commissioner has reviewed the withheld information and considered the ICO's arguments. She is satisfied that the withheld information is subject to legal professional privilege and so this exemption is engaged. It is clear that the withheld information constitutes communications and information exchanged with her internal client and Counsel and so attracts legal professional privilege.
16. The Commissioner will now go on to consider the public interest test.
17. The ICO advised that it had considered the public interest factors for and against disclosure but had reached the view that in this case the public interest rested in maintaining this exemption. It stated that the withheld information discusses the pros and cons of an approach at the Tribunal and therefore the relative strengths and weakness of the current

published guidance. At the time of the request this work was ongoing and the ICO had not yet amended or published the revised guidance.

18. It advised the complainant that the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege – that being safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. The ICO argued that the withheld information is legally privileged and there is weight in that principle in itself, that of solicitor/client confidentiality. It explained further that there is additional weight to this factor here, as the advice sought and received is still “live”, in that the guidance amendment work has not been completed, and “recent”, in that the decision of the Upper Tribunal was made on 1 December 2016; just over a month prior to the complainant’s request.
19. The ICO said that it recognised that there is a public interest argument that making this debate available to the world at large would help the understanding of those issues around delegated authority relating to section 36 of FOIA. However, it believed there is a stronger public interest in favour of withholding the information, as sharing this advice would undermine the confidence in the ICO and its own published guidance and create unintended confusion for those that are working with the section 36 exemption.
20. The Commissioner has considered the arguments for and against disclosure in this particular case. She recognises the public interest in openness and transparency and as regulator of the FOIA that she promotes such openness and transparency in other public authorities. She understands the value in providing access to information to enable the public to understand more fully why decisions are made and to encourage public debate and scrutiny.
21. In this case, the withheld information relates to the ICO’s intention to amend her section 36 guidance as a result of issues that arose during the complainant’s earlier Information Tribunal hearing. Disclosure would assist the public in understanding more closely what those issues were, how they are being considered and what changes to the existing guidance may occur. It would also further the public’s understanding of the ICO’s approach to guidance in this area.
22. However, in this case, the Commissioner considers there are stronger public interest arguments in maintaining the exemption. The withheld information was live and recent at the time of the request and remains so at the time of writing this decision notice. It relates to ongoing work within the ICO relating to the section 36 exemption and the ICO’s guidance on its application. It discusses the pros and cons of an

approach at the tribunal and therefore the relative strengths and weaknesses of the current published guidance. Disclosure would undermine the confidence in the ICO on its guidance and create unintended confusion for those that currently work with and apply this exemption to requests they handle day to day and this would not be in the public interest.

23. Once the ICO's work on the current guidance is completed, any amendments will be duly published in an updated version. The Commissioner considers the public interest is best served by allowing the ICO the time and space to do this without premature public disclosure and potential scrutiny.
24. As the ICO informed the complainant earlier, the Commissioner considers there is a strong public interest in maintaining the concept of legal professional privilege. It enables the ICO to seek and obtain candid and frank legal advice on a whole range of issues to enable the ICO to make appropriate and well informed decisions about the legislation it regulates. Therefore, full and frank legal advice is fundamental to the administration of justice. If disclosure were ordered in this case, it would undermine the principle of legal professional privilege and the ability in future for the ICO to obtain necessarily free, frank and candid legal advice, which in turn would hinder the ICO's ability to carry out its statutory functions and regulate the legislation it is responsible for. The Commissioner does not consider such consequences are in the interests of the wider public.

## Right of appeal

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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: 0870 739 5836

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)

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 .....**

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**