

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2019

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested information about companies that instigated marketing email messages. The ICO has withheld the information under section 31(1)(g) with subsections (2)(a) and (c) of the FOIA (law enforcement).
2. The Commissioner's decision is that the ICO can rely on section 31(1)(g) with subsections (2)(a) and (c) to withhold the requested information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 5 September 2018, the complainant wrote to the ICO and requested information in the following terms:

"In relation to this fine, <https://ico.org.uk/media/action-weve-taken/mpns/2259719/everything-dm-ltd-mpn-20180903.pdf> it appears that EDML were sending Electronic marketing on behalf of several other organisations. The CMP refers to these organisations as the 'instigator' (para 19) of the messages.

I'd like to request information held about the companies who instigated the messages. This should include the names of the organisations, the numbers of emails sent on their behalf and any information held around the ICO's consideration of their own compliance requirements in this context."

5. The ICO responded on 3 October 2018. It released some information - the number of emails EDML sent, in relation to the Civil Monetary Penalty (CMP) referred to in the request. It said that the specific information the complainant has requested - the names of companies who instigated the email messages - is exempt information under section 31(1)(g) of the FOIA, by virtue of sections 31(2)(a) and (c). The ICO considered the public interest favoured maintaining this exemption.
6. The complainant requested an internal review on 3 October 2018. He argued that the companies in question had instigated marketing that was unlawful, and so the information he has requested should be released. The ICO provided an internal review on 2 November 2018. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 6 December 2018 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on the ICO's reliance on section 31(1)(g) of the FOIA to withhold the information the complainant has requested, and the balance of the public interest.

Reasons for decision

Section 31 – law enforcement

9. Under subsection 31(1)(g) of the FOIA information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2).
10. In its correspondence with the complainant the ICO has cited subsection 31(2)(a), which is the purpose of ascertaining whether any person has failed to comply with the law and subsection 31(2)(c), which is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
11. The requested information is the names of companies that instigated email messages sent by EDML and *"...any information held around the ICO's consideration of their own compliance requirements in this context."*
12. In response to questioning by the Commissioner the ICO has explained that its understanding of the final part of the request is that it is for information that the ICO holds in respect of its consideration of its 'compliance requirements' of the companies that were the 'instigators' of the email messages. The ICO has confirmed that it considers that such information that it holds is also exempt under section 31(1)(g) by virtue of section 31(2)(a) and 31(2)(c).
13. With regard to section 31(1)(g) the ICO exercises a number of statutory functions for the purpose of ascertaining whether a data controller or public authority has failed to comply with the law and/or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation. The relevant regulatory functions in this case are set out in statute within the Data Protection Act (DPA) 2018, formerly the DPA 1998.
14. In its internal review, the ICO re-stated to the complainant that it has applied section 31(1)(g). It said it considers it to be essential that organisations continue to engage with it in a constructive and collaborative way without fear that the information they provide to it will be made public prematurely, or at a later date, if it is inappropriate to do so.
15. In correspondence to the Commissioner the complainant has argued that the ICO has released the names of 'instigators' in other CMPs where it fined the instigator (and gave a specific example) and disputed that the ICO could not release the names in question in this case.

16. The requested information in this case concerns the issuing of a CMP following a breach of the Privacy and Electronic Communications Regulations (PECR). The ICO has told the Commissioner that regulation 22(2) of PECR states that a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of email.
17. As a result, the ICO considered the 'instigators' of the emails in this case to have potentially breached PECR. At the time of receiving the complainant's request it says it was at that stage not ruling out further investigations of the companies suspected of this involvement.
18. The ICO says it considers that disclosing the names of the instigator companies would have alerted those companies to the fact that they had been identified as the likely instigators in this case. Disclosing the companies' names would have therefore undermined the ICO's ability to conduct the relevant investigations before the investigations had even begun, giving those companies the ability to anticipate its investigation and act accordingly. This would potentially undermine the ICO's regulatory function.
19. The ICO also noted that it had determined that it was likely not to have the names of all the instigator companies. It says that disclosing the names of the companies it *does* hold would have likely prejudiced its ability to investigate any remaining companies that had instigated the transmission of illegal communications in the case in question, exposing the gaps in the ICO's knowledge before any further investigation.
20. Addressing the complainant's reference to it publicly naming other organisations subject to its investigations, the ICO has explained that this is done in line with its *Communicating Regulatory and Enforcement Activity Policy*. It has advised this is normally following the conclusion of an investigation and where it considers that naming the organisation subject to its enforcement powers is a proportionate use of the information.
21. The ICO has noted that the specific example the complainant cited appears to be a closed case where a monetary penalty had been issued.
22. The ICO has also explained that it publishes datasets regarding the casework complaints that it receives, which include the 'submitted about party', but only after cases have been completed and with the case closure state included. This closure state makes clear if an organisation has been found to be in breach of a law the ICO regulates, but also makes clear where it has investigated against an organisation and found it not to be in breach.

23. The ICO went on to explain that in the vast majority of these instances the information is only disclosed on the conclusion of an investigation. There are rare instances where the ICO publishes the name of organisation it is investigating, and when this is done it is because the ICO believes it would improve overall compliance with information rights, in line with the policy referred to above.
24. With regard to the instigator companies in this case, the ICO says they were, and to best of its knowledge remain, unaware that they had been named by EDML. On the basis that the ICO had not corresponded with those companies specifically on this matter and that they have had no opportunity to respond to the allegations, and on the basis that disclosing their names into the public domain as the alleged 'instigators' would have almost certainly had a detrimental effect on their reputations, the ICO also confirmed that it considers that disclosure in response to the complainant's request would not have been fair or proportionate.
25. The ICO considers that the effect of disclosure would have therefore been the strong likelihood of a reluctance on the part of those companies to provide information to it in any investigation, and a likelihood too that other organisations that were potential suspects in breaching the laws that it regulates would be equally reluctant, having seen that the ICO may disclose their name in relation to potential law breaking before having a chance to answer any allegations put to them.
26. The Commissioner has considered all the circumstances of this case and has decided that section 31(1)(g), with subsections 2(a) and (c), is engaged in respect of the names of instigator companies and to associated information. The ICO is formally tasked with regulatory functions to ascertain whether any person has failed to comply with the law or whether circumstances would justify regulatory action. The request in this case was submitted to the ICO on 5 September 2018. The CMP to which the withheld information relates had been issued on 3 September 2018, two days previously and, as discussed by the ICO, further related investigation was a possibility. The Commissioner therefore considers that although not certain to occur, the likelihood of prejudice occurring; that is, by affecting the ICO's ability to discharge its regulatory functions, was real and significant at the time of the request.
27. The Commissioner has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

28. In its response to the complainant the ICO gave the following public interest arguments for disclosure:

- Openness and transparency regarding the way in which contraventions of legislation are dealt with by the ICO.
- The understandable interest of the public in knowing about the investigation into EDML.

29. The complainant's public interest arguments for disclosure – that the ICO has disclosed the names of other instigator companies and that the instigator companies in this case have broken the law and so should be named – have been addressed above.

Public interest in maintaining the exemption

30. The ICO gave the following public interest arguments against disclosure:

- To reveal information about the ICO's investigatory techniques could be prejudicial to current and future investigations
- To release the names of the companies would reveal commercially sensitive information relating to EDML and their contractual relationships with other companies
- There is a public interest in the ICO being able to maintain effective and productive relationships with the various parties it communicates with. It is essential that organisations continue to engage with the ICO in a constructive and collaborative way without fear that the information they provide to it will be made public prematurely, or at a later date, if it is inappropriate to do so.
- There is a further public interest in the ICO providing a cost effective, timely and efficient regulatory function that it feels is best achieved by this informal, open, voluntary and uninhibited exchange of information with those that it regulates. It thinks that such co-operation may be adversely affected if information of this nature were routinely made public, which would in turn prejudice its ability to deliver the levels of service required of the ICO.
- It has explained in broad terms the background and reasons for its decision in this investigation in its published monetary penalty notice, which the complainant has referenced in his request. The ICO believes this goes some way to address the public interest in transparency about its work.

Balance of the public interest

31. There is clearly a strong public interest in the ICO being effective in its role as a regulator and in carrying out its statutory functions. As such the Commissioner is satisfied that there is also a strong public interest in not disclosing information which would be likely to impede the ICO's ability to carry out those functions – including future investigations - effectively. She has not been presented with evidence to suggest that any public interest in the 'instigator' companies in this case is sufficiently strong to outweigh that interest.
32. The Commissioner considers that such public interest as there may be in the requested information, and the broader circumstances behind the request, is met through the published CMP. On balance therefore, she is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsections (2)(a) and (c).

Right of appeal

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: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF