

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 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 associated with Eunoia Technologies; a company referred to in a monetary penalty notice the ICO issued to Facebook. The ICO has withheld the information under section 31(1)(g) of the FOIA (law enforcement).
2. The Commissioner's decision is that the ICO can rely on section 31(1)(g) to withhold the requested information and 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 29 October 2018, the complainant wrote to the ICO and requested information in the following terms:

"I refer to your recent Penalty Notice you issued to Facebook Ireland Limited. In paragraph 38 of that Penalty Notice, you state that Dr Kogan and/or GSR shared such personal data and/or data derived from such data, with Eunoia Technologies Inc; this is a marketing company based in Delaware, and may have been associated with SCL Elections Limited and Cambridge Analytica

I am therefore requesting all documents, information, notes, correspondence and/or any other records of any kind that you hold, in any format, that refer to Eunoia Technologies Inc, any of its subsidiaries (including Eunoia Technologies Limited) and any of its officers and/or employees, agents or representatives, as well as any that relate to the ownership and/or control of Eunoia Technologies Inc.

Various press reports, including statements made the Canadian Liberal Party, suggest that in fact this company and its subsidiaries was controlled by Chris Wylie and was set up and run independently by him (to, amongst other things provide political consultancy services), after he left Cambridge Analytica, rather being associated with SCL or Cambridge Analytica.

Obviously, given the high profile of the action taken by the ICO against Facebook, this is a matter of great public interest."

5. The ICO responded on 9 October 2018. It said the information the complainant has requested is exempt information under section 31(1)(g) by virtue of the purposes referred to in subsection 31(2)(a) and (c). The ICO's response indicated that disclosure *would* prejudice its regulatory functions. It considered that the public interest favoured maintaining this exemption.
6. The complainant requested an internal review on 9 November 2018. He noted that the request relates primarily to Eunoia Technologies which is not listed in the ICO's report as being a party that it is investigating or had investigated. The complainant also noted that the ICO has obviously taken and concluded action against Facebook. He argued that, given that Eunoia Technologies is referred to in the penalty notice issued against Facebook, which is of high public interest, it therefore follows that information relating to parties also referred to in that notice are of comparable public interest.

7. The ICO provided an internal review on 10 December 2018. It maintained its reliance on section 31(1)(g) and provided further explanation of its position. At this point the ICO advised that disclosure *would be likely to* prejudice its regulatory functions.

Scope of the case

8. The complainant contacted the Commissioner on 17 December 2018 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on the ICO's reliance on section 3(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

10. 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).
11. 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.
12. The complainant had submitted a complaint to the Commissioner about a previous request he had submitted to the ICO which also concerned the ICO's ongoing investigation into the use of data analytics for political purposes. That case was considered under FS50798225¹ (April 2019). The Commissioner found the ICO could rely on section 31(1)(g) to withhold the requested information. A separate case - reference

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614752/fs50798225.pdf>

FS50774650² (December 2018) - also concerned information relating to data analytics and section 31(1)(g) with, again, the Commissioner finding in the ICO's favour.

13. The Commissioner considers that the explanations the ICO provided in the earlier case are pertinent to this case and has noted the explanation it provided in its internal review decision.
14. In FS50798225 the ICO had explained to the Commissioner that 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. These regulatory functions are set out in statute within the data protection legislation – namely the Data Protection Act 1998, the General Data Protection Regulations and the Data Protection Act 2018.
15. In its review decision in this case the ICO had explained that the requested information forms part of an ongoing ICO investigation. It said it therefore follows that the purposes referred to in subsection (a) and (c) above apply in relation to this information. Disclosure of this information in relation to the ICO's regulatory work would be likely to prejudice the ICO's regulatory functions both in relation to the current investigation and future investigations.
16. The ICO's position is that disclosing the information, particularly while the main investigation is ongoing, would create a real risk of distracting from, and causing interference to, the investigative process. By way of examples in the complainant's earlier case, the ICO said that disclosing the information may reveal information about potential lines of enquiry and would also be likely to inhibit effective and productive relationships with the various parties with which it communicates. The ICO considered that it is 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.
17. The ICO had confirmed that disclosure at that juncture would be likely to prejudice its regulatory functions, regardless of whether any formal regulatory action is ultimately taken. The situation remains the same in

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614084/fs50774650.pdf>

this case, in that the ICO's overarching investigation – of which the Facebook monetary penalty notice formed part – is ongoing.

18. To address the points the complainant raised in his request for an internal review; first it is true that at the time of his request the ICO had issued a monetary penalty notice to Facebook and that element of its investigation had concluded. However, that particular action was only one part of the ICO's wider investigation into the use of data analytics for political purposes. As has been stated, that wider investigation is still ongoing.
19. Eunoia Technologies is referred to in the monetary penalty notice against Facebook as a company with which personal data was shared. While it is true that the ICO may not have been investigating Eunoia Technologies at that time, and may not investigate it in the future, it is still a company with which the ICO may want to engage as part of its wider investigation. The Commissioner therefore agrees with the ICO that releasing the information the complainant has requested would be likely to prejudice the ICO's regulatory functions as it may prohibit Eunoia Technologies from engaging with the ICO's investigation in the future.
20. As in both of the earlier cases, the Commissioner has decided that section 31(1)(g), with subsection 2(a) and (c), is again engaged. 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 29 October 2018. The investigation to which the withheld information broadly relates was still live at the time of the request, and is still live currently. 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, is real and significant.
21. The Commissioner has gone on to consider the public interest arguments.

Public interest test

Public interest in disclosing the information

22. In its response to the complainant the ICO gave the following public interest arguments for disclosure:
 - Increased transparency in the way in which the ICO carries out its investigations.

- The progress the ICO has made in this particular investigation, what it has found and who it has been in contact with.
 - The significant public interest in understanding how data analytics are being used and the impact on individuals.
 - The heightened public interest in the outcome of this investigation, particularly given the number of people it potentially affects and the high profile nature of the issues.
23. The complainant has argued that because the ICO's monetary penalty notice against Facebook – and the issues behind that notice - are of significant public interest, there is a public interest in disclosing the information he has requested about Eunoia Technologies, which is referred to in the notice.

Public interest in maintaining the exemption

24. In its response to the complainant the ICO gave the following public interest arguments against disclosure:
- The ICO considers that disclosing this information would be likely to compromise its ability to investigate and therefore affect the discharge of its regulatory function in vital areas, including its ability to influence the behaviour of data controllers and to take formal action.
 - There is a public interest in maintaining the ICO's ability to conduct investigations as it sees fit without undue external influence which might affect its decision making or divert its resources.
 - The very significant public interest in this particular investigation gathering the information it needs to and reaching the right outcome. It is conducting this investigation exactly because it recognises the need to probe into these activities and it wants to be able understand the full picture and reach the right conclusion.
 - Routine disclosure during this and/or other investigations would be likely to result in caution from involved organisations it requires to further any investigation and consequently prejudice its ability to deliver its regulatory objectives. There is a strong public interest in the ICO being an effective and efficient regulator.
 - The ICO has explained in broad terms the work that it is doing in this area and the fact that it is conducting this investigation. It is likely to make further public statements during the life of the

investigation and this goes some way to address the public interest in transparency about its work.

Balance of the public interest

25. The Commissioner again considers that there is a strong public interest in the ICO being effective in its role as a regulator and carrying out its statutory functions, particularly in relation to such high profile issues as the use of data analytics in politics.
26. 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 its functions effectively. She does not consider that any public interest in Eunoia Technologies – in relation to the data analytics investigation – is sufficiently strong to outweigh that interest.
27. She considers that the public interest in the investigation in question, and in the ICO being open and transparent in its role as regulator, is met through the related information that the ICO has published on its website.
28. On balance, the Commissioner considers that the public interest in favour of disclosure is again outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsection (2)(a) and (c).

Right of appeal

29. 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

30. 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.
31. 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
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