

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 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, a firm of solicitors acting on behalf of two clients, has requested information associated with the ICO's decision to publish particular information in its report: '*Investigation into the use of data analytics in political campaigns*'.
2. The ICO released some information having redacted some of it under sections 31(1)(g)(law enforcement) and 40(2)(personal data) of the FOIA. It withheld other information under 42(1)(legal professional privilege). The ICO redacted other information which it considers falls

out of scope of the request. The complainant is dissatisfied with the ICO's reliance on the section 31 and 42 exemptions.

3. The Commissioner's decision is as follows:
 - The ICO is entitled to rely on section 31(1)(g) of the FOIA by virtue of subsections 31(2)(a) and 31(2)(c) to redact the information to which it has applied this exemption. The public interest favours maintaining the exemption.
 - The ICO is entitled to rely on section 42(1) of the FOIA to withhold the information to which it has applied this exemption. Again, the public interest favours maintaining the exemption.
4. The Commissioner does not require the ICO to take any remedial steps.

Request and response

5. In correspondence to the Commissioner the complainant has explained that, on behalf of its clients, it has been engaged in extensive correspondence with the ICO in relation to a range of issues connected to the ICO's report '*Investigation into the use of data analytics in political campaigns*' which was published in November 2018.
6. On 22 January 2019, the complainant wrote to the ICO and requested information in the following terms:

"In light of the above, and so that our clients can actually understand the decision making process in a significant matter relating to them, please now:

 - 1) Confirm the date(s) on which Mr Dipple-Johnstone and the Commissioner discussed this matter prior to 6 November 2018;*
 - 2) Confirm the actual date(s) on which the Commissioner made the two decisions; and*
 - 3) Provide any contemporary record of such discussions and decisions and any other documents relating to the discussions or decisions."*
7. The complainant confirmed that the request refers, first, to a decision to refer to enforcement action being taken against its clients in the above report and second, a decision to publish in the appendix to the report Notices of Intent (NOIs) addressed to its clients.
8. On 19 February 2019 the ICO contacted the complainant. It advised that it considered section 31 and section 42 applied to some of the

information requested and that, in line with section 10(3) of the FOIA, it would need longer than 20 working days to consider the public interest arguments associated with those exemptions.

9. The ICO provided a response on 15 March 2019. It released some information within the scope of the request; namely email correspondence from which it had redacted some information under sections 40(2) and section 31(1)(g). Other information in the email correspondence which the ICO said did not fall within the scope of the request was also redacted.
10. The ICO withheld other email correspondence in its entirety under section 42(1) of the FOIA; namely correspondence in which its senior personnel sought advice from its legal counsel. The ICO said that the public interest favoured maintaining the section 31 and 42 exemptions.
11. The complainant requested an internal review on 28 March 2019 with regard to the ICO's application of section 31 and 42, providing arguments for the information's release. The complainant also requested that the ICO re-consider the information it had redacted as being information 'out of scope' of the request.
12. The ICO provided an internal review on 6 April 2019. It maintained its original position, including with regard to the information it considered falls outside the scope of the request.

Scope of the case

13. The complainant contacted the Commissioner on 16 April 2019 to complain about the way the request for information had been handled. They confirmed that their concern is focussed on the ICO's application of the exemptions under section 31 and 42 of the FOIA, and the balance of the public interest.
14. The Commissioner's investigation has focussed on the ICO's application of sections 31(1)(g) and 42(1) of the FOIA to information falling within the scope of the complainant's request and which the ICO has redacted or withheld in its entirety. She has also considered the public interest test associated with each of these exemptions.

Reasons for decision

Section 31 – law enforcement

15. The ICO redacted a small amount of information from the email correspondence it released, under section 31(1)(g). It has provided this information to the Commissioner and she has noted that it concerns an NOI which, at the time of the request, was due to be issued to a separate organisation ie an organisation that did not appear to be a focus of the complainant's request.
16. The ICO has advised the Commissioner that it nonetheless considered this information falls within the scope of the request. The ICO explained that when it initially considered this request it interpreted the scope quite widely. Rather than focussing only on the NOIs pertaining to the two organisations which were the complainant's concern, it considered discussions and comments regarding the publication of any NOI relating to a particular operation to fall in scope of the request. As the NOI relating to the third organisation was yet to be published at the time of its response, the ICO says it applied section 31 to this particular information.
17. The ICO noted that it had received a previous request from the same requester for a particular decision note. It had released this under FOI but did so applying section 31 to any reference to the NOI in question. The ICO says that in the interests of continuity it applied the same approach to this very similar request. The Commissioner has taken account of the ICO's reasoning.
18. 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).
19. In its refusal notice the ICO 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.
20. The ICO said that information it has withheld is of relevance to, and is currently being considered in connection with, its ongoing investigation into the use of data analytics for political purposes. It considered that disclosing the withheld information, particularly while this investigation and related proceedings are ongoing, would create a real risk of distracting from and causing interference with the investigative process, resulting in prejudice to its functions at that stage.

21. The ICO also considered that it needed a 'safe space' in which to fulfil its regulatory function and to determine any regulatory action it may choose to take, without undue external influence. It said this was especially relevant given the ongoing nature of the matters in question. Disclosure at that time would be likely to prejudice the ICO's ability to effectively carry out its regulatory function.
22. In its submission, the ICO has confirmed that it considers disclosing the information 'would be likely to' prejudice the above purposes.
23. The ICO has explained that it 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.
24. In this case the information being withheld under section 31 again relates to the Commissioner's ongoing ICO investigation into the use of data analytics for political purposes. As has been noted, the information concerns an NOI which, at the time of the request, was due to be issued to a separate organisation. The ICO says that at the time of its response to the complainant it had not issued a Monetary Penalty Notice to that organisation and had also not published the associated NOI, and still has not.
25. The ICO considered that disclosing this information, particularly while the investigation was ongoing, would create a real risk of distracting from and causing interference with the investigative process, resulting in prejudice to the functions of the ICO both in relation to the current investigation and any future investigations. The information withheld here may reveal information about its general decision making regarding NOIs and its approach when deciding whether to publish these. For this reason, the ICO considered that disclosing the withheld information at the point of the request would be likely to prejudice its regulatory functions.
26. In their request for an internal review the complainant challenged the ICO's "safe space" argument. In their view it was not clear what causal link exists between disclosing the information and prejudicing the ICO's functions ie there was no apparent basis for the ICO's assertion that disclosure would lead to "*undue external influence*".

Conclusion

27. The Commissioner is satisfied that 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.
28. The information withheld under section 31(1)(g) concerns a NOI due to be issued to a particular organisation as part of the Commissioner's investigation into the use of data analytics in political campaigns. The Commissioner is satisfied that disclosing the withheld information while that investigation was still ongoing would be likely to prejudice the exercise of its functions, for the reasons the ICO has given. It would have made public an aspect of an investigation while that investigation was live. In addition, it would have made public details of the ICO's general approach to, and decision-making about, such investigations.
29. The Commissioner has noted the complainant's point but, given the high profile nature of the political campaign investigation, the Commissioner has decided that at the time of the request, disclosure would have been likely to interfere with, and distract, that investigation – ie although not certain to occur, there was a real and significant risk of it occurring. Such interference and distraction would have been likely to prejudice the exercise of the ICO's regulatory functions.
30. The Commissioner has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

31. ICO has given the following arguments for disclosure:
 - Increased transparency in the way in which the ICO carries out its investigations and makes decisions in respect of enforcement action it undertakes.
 - The public interest in the reasons why it took the unusual step of publicising a NOI.
 - The progress the ICO has made in this particular investigation; what it has found and who it has been in contact with.
 - 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.

Public interest in maintaining the exemption

32. The ICO's arguments are as follows:

- 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 and to make decisions 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. The ICO is conducting this investigation exactly because it recognises the need to probe into these activities and it wants to be able to 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 the ICO 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 considers that the public interest in disclosure is fulfilled by the information it has already disclosed in response to this request.

Balance of the public interest

33. The Commissioner notes that the ICO has released the majority of the information that the complainant has requested through this request. That request concerned two particular organisations; the withheld information concerns a third, about which the complainant had not requested information. However all three organisations were being considered as part of the Commissioner's investigation into data analytics and political campaigning, which is why the ICO considered the information fell within scope of the request.
34. However, on balance the Commissioner considers 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 31(2)(a) and 31(2)(c). Such wider public interest as there is in the Commissioner's data analytics investigation, and the

specific information that has been redacted, has been satisfied through the information that has been released and the information that the ICO proactively publishes. In this case there is a stronger public interest in the ICO being an effective regulator making fair and robust decisions and with which organisations under investigation are prepared to engage.

Section 42 – legal professional privilege (LPP)

35. Section 42(1) of the FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

36. This exemption is also subject to the public interest test.

37. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal adviser in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.

38. The information the ICO is withholding under section 42(1) is an email to senior ICO staff from a solicitor in the ICO's Enforcement team regarding a briefing draft document, which is attached to the email.

39. In its submission to the Commissioner, the ICO confirmed that it considers the withheld information is subject to legal advice privilege. It constitutes legal advice on the wording and approach of what it describes as a Decision Note due to be sent to the Commissioner for her consideration regarding the publishing of certain information in her report. The ICO confirmed that its Deputy Commissioner sought its legal team's advice, regarding the content of the Decision Note. Any changes or suggestions provided by the solicitor were given in the same legal capacity. The ICO confirmed that these communications were therefore for the sole purpose of obtaining/communicating advice from professional legal advisers acting in their professional capacity. It says it is satisfied these privileged communications remain confidential and the legal advice remains privileged.

40. The ICO notes that in December 2018 it had released the final version of the above Decision Note, under the FOIA, to the same requester. It says that whilst it has made this disclosure, it maintains that the 'track changed' draft version of the document, which is the subject of this request, is subject to legal advice privilege and this is not something

that it would wish to disclose at this time, as to do so would reveal the substance of the legal advice given.

Conclusion

41. The Commissioner is satisfied that the information withheld under section 42(1) – the covering email and the draft document - attracts LLP and that therefore, the section 42(1) exemption is engaged. The information constitutes legal advice to the ICO from its legal team on the matter of particular information being published.
42. The Commissioner has gone on to consider the public interest arguments.

Public interest test

Public interest in disclosing the information

43. In their request for a review, the complainant argued that included in the information that the ICO released was information in which members of the ICO's legal team gave advice to colleagues about the publication of the NOIs. They considered it unfair for the ICO to 'cherry pick' which bits of privileged information to provide and which to release.
44. Furthermore, from the released information it appeared to the complainant that the advice being given was that the NOIs should not be published. It also appeared that the Commissioner was not satisfied with being advised not to publish. The complainant has inferred that the withheld information is connected with the Commissioner's desire for different advice– to facilitate her wish to publish. The complainant argues that, in these circumstances, very considerable weight is to be attached to the public interest in providing information to enable public understanding of what the issues are and how they were considered. They consider that there is a very strong public interest in understanding whether different advice was given (and, if so, on what basis) or whether the advice remained the same and the decision was nevertheless made to publish the NOIs.
45. The ICO has given the following arguments for disclosure:
 - The general public interest in the ICO being open and transparent.
 - It would provide information to enable public understanding of what the issues are and how they are being considered.

Public interest in maintaining the exemption

46. The ICO has given the following arguments:

- The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege. Disclosing any legally privileged information threatens that principle.
- Safeguards openness in all communications between client and lawyer, to ensure access to full and frank legal advice.
- There is a strong inherent weight in preserving legal privilege. There is additional weight to this factor, as the advice was created as part of ongoing policy considerations, which were and are still live.

Balance of the public interest

47. The Commissioner considers that the public interest in the ICO being transparent is, in this case, weaker than the very strong public interest in lawyers being able to provide frank and open advice to a client. She considers that the public interest in decisions made regarding information published in her report has been met through the ICO's release of information relevant to the request. As the complainant notes, the ICO could have withheld some of this information under section 42(1) but it chose not to.
48. Legal advice given to a client by their lawyer is just that; advice. A client is not compelled to follow that advice. So while it may be of interest to the complainant, the Commissioner does not consider that the complainant has made a case that supports or explains his assertion that there is strong wider public interest in whether or not particular legal advice was followed, in this case.
49. The public interest in the ICO being open and transparent in its role as regulator is met, in the Commissioner's view through the ICO proactively publishing information about its work on its website, including its the '*Investigation into the use of data analytics in political campaigns*' report.
50. Furthermore, the report and associated investigations were still live matters at the time of the request, and currently. In addition, the possibility exists that the ICO may need to draw on the same or similar legal advice in the future.

51. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption.

Right of appeal

52. 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

53. 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.
54. 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

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