

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 July 2019

Public Authority: Information Commissioner's Office

Address: Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Decision (including any steps ordered)

1. In this case the Information Commissioner is both the public authority which is the subject of the complaint and the regulator of the FOIA responsible for investigating the complaint. The notice will use the term Information Commissioner's Officer (ICO) when referring to the Information Commissioner as the public authority subject to the complaint and the term Commissioner will be used to refer to her as the regulator.
2. The complainant has requested correspondence between the ICO and various parties, which in broad terms relate to the ICO's investigations into the use of data analytics for political purposes. The ICO withheld the information under the exemption provided by section 31 – law enforcement.
3. The Commissioner's decision is that the ICO has correctly applied section 31 to withhold the requested information.
4. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

5. On 14 February 2019 the complainant requested information of the following description:

“I am requesting copies of all information, documentation or records, of whatever nature, that the ICO holds relating to:

 1. All communications between the ICO and [named individual A]/the Fair Vote Project and their representatives;
 2. All communications between [named individual B] and the "[named individual C]" referred to in the attached e-mail; and
 3. All communications between [named individual C] or any other person and the ICO, which relate to or mention the matters referenced in the attached letter; and
 4. All internal ICO documents, records or communications, of any nature, that relate to the decision of the ICO to issue the attached letter.”
6. On 14 March 2019 the ICO responded. It refused to provide the requested information. The ICO cited section 31(1)(g) by virtue of sections 31(2)(a) and (c) as its basis for doing so.
7. The complainant requested an internal review on 25 March 2019. The ICO sent him the outcome of the internal review on 6 April 2019. The ICO upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 27 April 2019 to complain about the way his request for information had been handled.
9. He argued that the investigation to which the request relates had now been closed and that the ICO had confirmed that it had found no grounds for supposing that there had been any failure to comply with the law or any justification for regulatory action. This led him to believe the ICO had used the exemption to provide blanket protection to the information. He further argued that there was an overwhelming public interest in disclosing the information because it relates to the ICO's involvement in private litigation before a foreign court. He considered that litigation to be politically motivated and suggested the ICO's involvement was at the behest or in co-ordination with a politician. The complainant therefore considered this undermined the ICO's position as an independent, apolitical, regulator.
10. The Commissioner considers the matter to be decided is whether the exemption provided by section 31 is engaged and, if so, whether the

public interest in maintaining the exemption outweighs the public interest in disclosure.

Reasons for decision

Section 31 – law enforcement

11. The ICO is relying on section 31(1)(g) by virtue of sections 31(2)(a) and (c) as its basis for withholding the requested information. So far as is relevant section 31(1) of the FOIA provides that,

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

Section 31(2) - the purposes referred to in subsection 1(g) are -

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

12. As set out above, section 31 cannot be applied to information which is exempt under section 30. In broad terms, section 30 provides an exemption for information which was held by a public authority at any time for the purpose of a criminal investigation. The information captured by the request relates to the ICO's investigation into data analytics for political purposes. The Commissioner contacted the ICO which confirmed that the information was obtained in respect of various elements of its investigation concerning potential breaches of the different legislation which the ICO is responsible for regulating, but it did not relate to the investigation of any criminal offences under those enactments. Therefore the Commissioner is satisfied that the information would not be exempt under section 30 and that the exemption provided by section 31 is available to the ICO.
13. The exemptions provided by section 31 can be applied on the basis that the public authority considers the alleged prejudice either 'would' occur, or that they would only be 'likely' to occur. The ICO advised the Commissioner that it is applying section 31 on the basis that the prejudice to its functions would be likely to occur. Although this is the

lower test, the term 'likely to prejudice' is taken to mean that there is a real and significant risk of the prejudice occurring.

14. The ICO provided the Commissioner with a copy of all the information captured by the request. It advised the Commissioner that the information captured by parts 1, 2 and 3 of the request was the same as that caught by an earlier request which had already been the subject of a complaint to the Commissioner. In the subsequent decision notice, FS50774650, the Commissioner found that this information could be withheld under the same exemptions as the ICO has applied in this case.
15. The ICO exercises a number of statutory functions for the purpose of ascertaining whether a data controller (a body responsible for the processing of personal data) or public authority has failed to comply with the law and for ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to that legislation. These regulatory functions are set out in statute within data protection legislation, namely the Data Protection Act 1998 (DPA98), the General Data Protection Regulations (GDPR) and the Data Protection Act 2018 (DP18). The ICO also has regulatory responsibilities in respect of the Privacy and Electronic Communications Regulations (PECR).
16. The ICO has explained that in this case the requested information relates to an ongoing investigation into the use of data and that the investigation was for the purpose of determining whether any data controller had breached the relevant legislation, or whether any regulatory action was warranted.
17. Having regard for the complainant's argument that the ICO had stated that the investigations in question had now been closed, the Commissioner pressed the ICO as to whether the investigation had in fact been completed. In response the ICO advised the Commissioner that there were elements of its investigation that were still ongoing and that the information was still pertinent to those aspects. It directed the Commissioner to a public statement from a blog on its website in which it refers to its report to Parliament of 6 November 2018. Although the reports sets out what the ICO had discovered about the use of data analytics for political purposes it goes on to say that,

"...Some of the issues uncovered in our investigation are still ongoing or will require further investigation or action."
18. The ICO has confirmed that this was still the position at the time of the request which was only three months later, i.e. 14 February 2019. The ICO considers that disclosing the information at that time would reveal potential lines of enquiry and would also be likely to inhibit effective and productive relationships with the various parties it communicates with.

19. Furthermore the ICO advised the Commissioner that although it had served an enforcement notice under the DPA98 in respect of breaches of PECR (the ICO's enforcement powers under the DPA98 extend to breaches of PECR), there was the potential for that notice to be appealed and that therefore the ICO considered this issue was still live at the time of the request.
20. The ICO has also argued that the application of section 31 is not only required to protect ongoing and live elements of its current investigation, but also future investigations. This is because it is essential that organisations continue to engage with it in a constructive and collaborative way, without fear that the information they provided will be made public prematurely, or at a later date, if it is inappropriate to do so. The ICO believes that disclosing the requested information at the time of the request would have eroded that confidence and made it more difficult for the ICO to gather evidence and intelligence in future investigations.
21. On the basis of the arguments presented by the ICO the Commissioner is satisfied that section 31(g) is engaged by virtue of both 31(2)(a), a likely prejudice to a function for the purpose of ascertaining whether any person has failed to comply with the law, and 31(2)(c) whether circumstances which would justify regulatory action exist or would arise.

Public interest test

22. Section 31 is subject to the public interest test as set out in section 2 of the FOIA. This means that although section 31 is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. Since the ICO considers the alleged prejudice is only likely to occur, less weight is given to the potential harm that disclosure may be caused than would have been the case had the ICO demonstrated the prejudice would occur. Even so, it should be remembered that by finding section 31 is engaged on the basis that the prejudice 'would be likely' to occur it still means that the Commissioner accepts there is a real and significant risk of harm to the ICO's functions.
23. The ICO has acknowledged that there are a number of ways in which the public interest would be served through disclosing the information. These include more general public interest arguments that disclosure would increase transparency in the way the ICO carries out its investigations, the value in revealing the progress made in the particular investigation to which the requested information relates and which parties have been involved in that investigation.

24. The ICO also recognises that there is a significant public interest in the public understanding how data analytics are being used and the impact that use has on individuals. Furthermore, there is a heightened public interest in this particular investigation given the number of people potentially affected and the high profile nature of the issues.
25. The Commissioner has also considered the complainant's argument that there is an overwhelming public interest in understanding the ICO's role in what he describes as politically motivated, private litigation in a foreign court. He also suggests the ICO's involvement was at the behest of a politician. If these concerns were substantiated, there would be a very strong public interest in disclosure. However having viewed the withheld information the Commissioner has found nothing which suggests any untoward, or political influence or motive behind the ICO's investigation.
26. The ICO has provided a number of public interest arguments in favour of maintaining the exemption. It reiterated its position that disclosure of the information would be likely to prejudice the discharge of its regulatory functions in vital areas, including its ability to influence the behaviour of data controllers and to take formal action. It argued there was a public interest in preventing this.
27. It also argued that there was a public interest in maintaining the ICO's ability to conduct investigations as it sees fit, without undue influence and to be able to make decisions without a high degree of scrutiny which could affect its decision making or divert resources. The Commissioner understands this to refer to the position while investigations are ongoing.
28. The ICO also reiterated the importance of maintaining effective relationships during investigations in order to ensure parties fully engaged with it.
29. The ICO emphasised the importance of the investigation to which the requested information relates, arguing that there was a very significant public interest in the ICO being given the space to probe issues raised by the use of data analytics for political purposes and having the opportunity to understand the full picture and reach the right conclusion in these very serious matters.
30. The ICO also argued that not only is there a public interest in protecting its current investigation, there is a risk that future investigations could also be prejudiced if organisations became more cautious of providing information to the ICO for fear it may be disclosed later. It contended that there was a public interest in the ICO being an effective and efficient regulator.

31. Finally the ICO argued that the public interest in better understanding how it had investigated concerns about the use of data analytics for political purposes had already been partially satisfied by the information published on its website.
32. In weighing the competing public interest arguments the Commissioner recognises that there is a strong public interest in transparency of the way in which the ICO conducts its investigations and decides how and when to take regulatory action. This would allow the public to better understand the issues under investigation, the competence of the ICO in tackling those issues and the impartiality with which it approaches such work. These arguments are particularly weighty in respect of a high profile investigation into the use of data analytics for political purposes which affected a large number of people.
33. However the significance of the ICO's investigation into those matters means there is a very real public interest in ensuring the investigation is not in any way undermined by the premature disclosure of information. Added to this is the public interest in preventing the harm that is likely to be caused to future investigations if the requested information was released.
34. On balance the Commissioner considers that the public interest arguments in favour of maintaining the exemptions outweigh the public interest in disclosure. The ICO is entitled to rely on section 31(1)(g) by virtue of 31(2)(a) and (c) to withhold the information.

Right of appeal

35. 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

36. 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.
37. 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

Rob Mechan
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