

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

### **Decision notice**

**Date:** 11 December 2019

**Public Authority:** Information Commissioner's Office (ICO)

**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)**

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1. The complainant has requested information associated with the Commissioner's decision in case reference FS50624045. The ICO has confirmed that it does not hold some of the requested information. It released some of the information it does hold and its position is that the remaining information it holds is exempt information under section 40(2) of the FOIA (personal data) and section 42(1) (legal professional privilege), with the public interest favouring maintaining the latter exemption.

2. The Commissioner's decision is as follows:
  - The information that the ICO is withholding is exempt information under section 40(2) and 42(1) and the public interest favours maintaining the section 42(1) exemption.
  - On the balance of probabilities, the ICO complied with section 1(1)(a) of the FOIA with regard to the case file FS50624045. The ICO did not hold that case file at the time of the request, and so did not hold any further relevant information associated with that case file.
  - The ICO breached section 10(1) and section 17(1) as it did not comply with section 1(1), or issue a refusal notice in respect of aspects of the request, within 20 working days of receiving the complainant's request.
3. The Commissioner does not require the ICO to take any remedial steps.

## Request and response

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4. On 25 March 2019 the complainant wrote to the ICO and requested information in the following terms:

*"I am writing to make a FOI request for the following information in respect of Case Reference FS50624045. To be clear, this request includes information that relates to FTT appeal no. EA-2016-0250 or UT appeal no. GIA-1531-2017.*

*1. Any correspondence between the Commissioner (including her staff and legal representatives) and the Royal Borough of Kingston upon Thames (RBK).*

*2. Any recordings, transcripts or notes of telephone conversations between the Commissioner (including her staff and legal representatives) and RBK."*

5. The ICO responded on 30 April 2019. It advised that it had handled information that is the complainant's own personal data separately, under data protection legislation.
6. The ICO said it no longer holds a case file for FS50624045 as, in line with its retention policy, casework records are kept for a period of two years. With regard to the appeal number GIA-1531-2017, the ICO said that there is no information within the scope of the complainant's

request for correspondence between it and a particular public authority under this reference.

7. With regard to appeal number EA-2016-0250, the ICO withheld relevant information under section 42(1) of the FOIA and said it considered the public interest favoured maintaining the exemption. The ICO said it had not provided some relevant information to which section 42(1) did not apply as it did not consider that this information would be of interest to the complainant.
8. The complainant requested an internal review on 21 May 2019. He did not accept that the ICO did not hold the case file for FS50624045 and disputed that it could rely on section 42(1) with regard to the information it is withholding under this section. The complaint also expressed dissatisfaction with how the ICO had handled the element of the requested information that is his own personal data. Finally, he asked the ICO to provide the information to which section 42(1) did not apply.
9. On 24 May 2019, the ICO released the information it had referred to in its response. This comprised administrative correspondence from it to the public authority concerned and the ICO had redacted personal data from this information under section 40(2). On 4 June 2019 the complainant expressed dissatisfaction with the ICO's redaction of the public authority employees' personal data.
10. The ICO provided an internal review on 19 June 2019. It confirmed that it does not hold the case file for FS50624045 and explained why it does not. The ICO confirmed that the section 42(1) exemption had been correctly applied to all but one piece of information – further correspondence to the public authority - which it released. The ICO did not address the matter of the information being withheld under section 40(2); namely the public authority employees' personal data.
11. The ICO explained its approach to the information that it considered to be the complainant's own personal data, advising the complainant to submit a separate data protection complaint if he was dissatisfied with this aspect.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 27 June 2019 to complain about the way his request for information had been handled. With regard to information not held, the complainant's focus was on the case file FS50624045 and any relevant correspondence that file would have contained.

13. The Commissioner explained to the complainant that her investigation would consider only the ICO's handling of his request under the FOIA. As such, her investigation has first considered whether, on the balance of probabilities, the ICO held the FS50624045 case file at the time of the request, and the timeliness of its overall response.
14. The Commissioner has then considered whether the information the ICO has withheld is exempt from disclosure under sections 40(2) and 42(1), and the balance of the public interest where appropriate.

## Reasons for decision

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### **Section 1 - General right of access to information held by public authorities**

15. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
16. Section 10(1) of the FOIA obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
17. The complainant does not accept that the ICO does not hold the case file for FS50624045. In his complaint to the Commissioner the complainant says that in his request for a review he had noted that the ICO had stated that the case file for the FS50624045 investigation had been destroyed and so no correspondence or communications between the ICO and the public authority concerned during the course of that investigation could be provided.
18. The complainant notes that he had questioned whether the ICO would destroy documents which may be relevant to an active judicial appeal to the First-tier Tribunal (Information Rights)(FTT). The ICO's review response of 19 June 2019 had stated that only the "relevant" documents would have been copied from the original complaint file to the appeal file and that the original complaint file "is no longer held in our casework management system".
19. It appears to the complainant that this did not seem like a clear statement that the file has been destroyed. He considers it may still exist in an archive or off-line system, even if it has been removed from the casework management system. If that was the case, ie that the file

may be held in an archive or off-line system, the ICO should confirm this.

20. In a submission to the Commissioner, the ICO advised that any information held in connection with the request that was the subject of FS50624045 would have been held on the case file on its electronic case management system (CMEH) or on the Tribunal file for appeal reference EA-2016-0250 which would have been stored on Meridio, the ICO's document and records management system. The ICO confirmed that as of the date of the current request, case reference FS50624045 could not be found on CMEH and would therefore appear to have been deleted in line with its retention schedule. The only information held, therefore, was on the Tribunal file held on Meridio.
21. A public authority is entitled to destroy information in line with its retention schedule – that is good information management practice. If information was held only in paper form and an authority destroyed it in line with its retention schedule by shredding it and putting it in the bin, the authority would not be able then to retrieve that information at a later date. The authority would no longer hold that information. For this reason, information held in electronic form that has been deleted in line with the retention schedule of the authority's relevant business area, but which may be sitting within the authority's general IT system awaiting final elimination from that system, is not held information.
22. The ICO says that the (electronic) file for FS50624045 was destroyed in line with its formal retention schedule, once information it needed for the associated appeal was extracted from it, and so it no longer holds that file. From published information, the Commissioner notes that the FS50624045 decision is dated 21 September 2016; some two and a half years before the complainant submitted the current request. She notes that the ICO's retention policy for case file information is two years and therefore considers that it is entirely credible that the ICO would have no longer held the requested information at the time of the request.
23. Having considered all the circumstances, the Commissioner is satisfied on the balance of probabilities that the ICO did not hold the case file for FS50624045 at the time of the complainant's request and complied with section 1(1)(a) of the FOIA.
24. The complainant submitted his complaint on 25 March 2019. Taking account of the Bank Holidays in April 2019, the ICO's response of 30 April 2019 still exceeded the 20 working day requirement. The ICO then released relevant information on 24 May 2019 and 19 June 2019. The Commissioner has noted the apology for the delay that it had given to the complainant in its initial response but finds that the ICO breached section 10(1) on this occasion.

## **Section 40 – personal data**

25. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
26. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA').

*Is the information the personal data of a third person?*

27. Section 3(2) of the DPA defines personal data as: '*any information relating to an identified or identifiable living individual*'.
28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
30. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. The information being withheld under section 40(2) in this case, which the ICO has provided to the Commissioner, is the name and job title of one member of Council staff and the name and email address of another. The ICO sent the associated email correspondence to these individuals in 2016 and 2017. The correspondence is of a routine and administrative nature and concerns the FTT appeal referred to above.
32. The Commissioner is satisfied that this information is the Council staff members' personal data for the reasons given in the paragraphs above – the information relates to them and they could be identified from it.
33. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

*Is a condition under section 40(3A) satisfied?*

34. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The ICO considers that disclosure would contravene principle (a) under Article 5(1) of the GDPR.
35. Article 5(1)(a) of the GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
36. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
38. The lawful basis most applicable is GDPR basis 6(1)(f) which states:  
*"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*.
39. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:
  - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject (that is, the five staff members in this case).
40. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Is a legitimate interest being pursued?*

41. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

42. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
43. The information in this case has been summarised above. In his complaint to the Commissioner, the complainant has presented arguments as to why at least some of the individuals concerned would have the expectation that their personal data to be released. He has not, however, explained what his legitimate interest is in this information.
44. The Commissioner understands that the complainant has an interest in a previous decision the Commissioner has made, and associated appeal decisions and she considers that interest is legitimate. He has received the substance of particular correspondence associated with one of the appeals, which is information that falls within the scope of his request. It is therefore less clear what the complainant's legitimate interest is in the specific names, job titles and email addresses of Council staff to whom the ICO sent that correspondence, which is, in any case, entirely administrative.
45. In its submission to the Commissioner, the ICO has said there is no strong, legitimate interest in this information.
46. The complainant has not made a strong case for his legitimate interest in this specific information. There is a wider, societal legitimate interest in public authorities being open and transparent, however, and so the Commissioner has, for the sake of completeness, gone on to consider the second part of the test – the necessity test.

*Is disclosure necessary to meet the legitimate interests?*

47. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
48. In its submission, the ICO has confirmed that it does not consider that disclosure is necessary in this case. To a large degree the Commissioner agrees that any legitimate interest in this information (the personal data) – and her previous decision and associated appeals - has been satisfied through the material that the ICO has disclosed to the complainant.



49. But again, for the sake of completeness, the Commissioner has gone on to consider the final part of the test – the balancing test.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

50. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause
- whether the information is already in the public domain
- whether the information is already known to some individuals
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

51. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that his information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

52. In its submission to the Commissioner the ICO has said that it consulted with the Council and that no consent to disclose the personal data was provided.

53. The ICO says it relies on the ability to liaise with public authorities in relation to its regulation of the FOIA. Disclosing, without consent, the names of members of staff that had communicated with it would, the ICO says, likely prejudice this function. This is because individuals at such authorities may feel that they could not correspond with the ICO in a way that respected their privacy.

54. The ICO says it considered the reasonable expectations of the Council employees and whether details had been placed into the public domain. With this in mind, it says it disclosed the name of the Council's Chief Executive but considered that disclosure under FOIA would not be in the expectations of the remaining Council staff whose personal details were caught in the information in scope.

55. In his complaint to the Commissioner, the complainant has argued that there is no justification for redacting the name of one of the members of Council staff that the ICO emailed. He says it is obvious who this email was sent to because the documents the ICO filed for the appeal in question show that this is who the ICO was in contact with at the Council regarding the appeal. He also says that Council staff would also not have the legitimate expectation that their professional email

addresses would be “kept secret”. He says this is especially the case because the Council has provided him with copies of email chains with all the email addresses shown, other than those for non-staff members or residents. These individuals would have the reasonable expectation that the Council would keep their addresses private.

56. The Council may well have disclosed other staff email addresses to the complainant in correspondence it has had with him. However, the focus here is on the ICO, and not the Council, and whether the ICO can withhold certain personal data under the section 40(2). To address the complainant’s second point, disclosure under the FOIA is disclosure into the wider world; this differentiates it from information that may have been shared with the complainant during the course of an appeal he brought to the FTT or Upper Tribunal.
57. The Commissioner has considered all the circumstances and is satisfied that the individuals concerned would have the reasonable expectation that their personal data would not be placed into the public domain as the result of a request for information under the FOIA. As such, she considers that disclosure would be likely to cause those individuals a degree of distress.
58. Finally, the wider public interest in the ICO being open and transparent about its operations has been met, in the Commissioner’s view, through the ICO’s disclosure of the substance of the email correspondence in question.
59. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects’ fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
60. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
61. The Commissioner has therefore decided that the ICO was entitled to withhold the information in question under section 40(2) of the FOIA by way of section 40(3A)(a). This being the case it has not been necessary to consider the remaining condition under section 40(3A), 40(3B) or 40(4A).

## **Section 42 – legal professional privilege (LPP)**

62. 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."*

63. This exemption is subject to the public interest test.

64. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor 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.

65. The ICO has provided the Commissioner with a copy of the information it is withholding under section 42(1). It comprises phone notes recording telephone conversations between a member of the ICO's legal team and a member of Council staff, and email correspondence between those two individuals. The material dates from early 2017.

66. In its submission, the ICO has noted that litigation privilege applies to confidential communications which are made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Litigation privilege can cover communications between a lawyer and a third party so long as they are made for the dominant purposes of litigation.

67. The ICO has explained that the litigation in this case was the continuation of an appeal against a decision notice issued by the ICO in relation to a freedom of information request to the Council.

68. It says that at the time it received the complainant's request "in April 2019" (the Commissioner notes that the request was submitted on 25 March 2019) the Upper Tribunal proceedings were subject to their procedural directions, with the Cabinet Office's response to the appeal lodged on 5 April 2019. The ICO confirmed that the proceedings remain ongoing and it anticipates a hearing in the New Year.

69. The ICO says that it explained to the complainant that the withheld information is confidential communications, in the form of both correspondence and notes of telephone calls, between an ICO solicitor and staff at the Council. The communications were exchanged for the purpose of its preparation for the appeal as heard by the FTT and so as to provide legal advice to the ICO, as the Respondent in this litigation.

70. In his request for an internal review, the complainant put forward arguments as to why this particular information does not attract LPP.
71. He did not accept that privilege applies to communications between the ICO's solicitor and a public authority where that authority's response to an FOIA request is being challenged at the FTT. The complainant acknowledged that, while there was litigation and the authority in question was a third party to it, it was the third party that had been invited to join the litigation. The authority had chosen not to accept the invitation and so the ICO was not in the position of an adversarial litigant in the ordinary sense. The complainant considered the ICO was in the position of an independent regulator and decision-maker. As such it was supposed to adopt a neutral position between information-holder and information-requester and was required to act with candour in order to help the FTT achieve the correct outcome. The complainant argued that adopting any other stance fundamentally undermined the ICO's role, and public confidence in the ICO. He said that while the ICO may have in effect 'advised' the authority how to respond to the appeal, it should not have done so and correspondence between the ICO and authority is not privileged.
72. The complainant also noted that some of the correspondence which the ICO claimed was privileged was sent to the FTT and one of the parties involved on the morning of the hearing, which suggested to the complainant that the ICO did not consider the correspondence to be privileged.
73. As the ICO has noted, litigation privilege applies to confidential communications which are made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Litigation privilege can cover communications between a lawyer and a third party so long as they are made for the dominant purposes of litigation.
74. In this case, the information being withheld comprises communications between the ICO's legal team and the authority concerned (ie a third party) about the FTT appeal in question ie they were made for the purpose of litigation. Furthermore, and as the ICO noted in its review decision, the matter that is the focus of the complainant's request, ie the appeal, was still 'live' at the time of the request.
75. To address the complainant's point at paragraph 72, again, disclosure under the FOIA is disclosure into the wider world; this differentiates it from information that may have been shared during the course of an appeal brought to the FTT or Upper Tribunal, which is a relatively restricted arena.

76. The Commissioner has noted the complainant's points but, having considered all the circumstances, she is entirely satisfied that the information to which the ICO has applied section 42(2) attracted legal professional privilege and that the information was exempt from disclosure.

### **Public interest test**

#### Public interest in disclosing the information

77. In this request for an internal review, the complainant provided the following public interest arguments.
78. He considered that there is a greater public interest in disclosing the information because of the need for the ICO to be open and transparent in the work that it does. The ICO must demonstrate that it is able to fulfil its role as an independent regulator and to be independent and impartial when determining a person's rights to access information.
79. The complainant went on to argue that the section 42 exemption only permits information to be withheld, it does not require it, "even if the public interest weighs in favour of withholding". In the complainant's view this therefore does not prevent the ICO from disclosing the information. And it does not prevent the ICO from disclosing in order to comply with any other statutory duties it might have, including those under the Human Rights Act. The complainant considers that the ICO's communications with the public authority concerned breached, or caused an interference with, his right to a fair hearing and his right to access information.
80. For its part, the ICO says it recognises that there is a general public interest inherent in the FOIA, ie the assumption of disclosure that is associated with the 'right to know' contained in section 1 of the FOIA, combined with its commitment to be a transparent public authority. It says there is a need for the ICO, as the regulator of the FOIA, to be open and transparent in the work that it does and in the communication we have with public authorities. This is in order to support its vision of increasing the confidence in organisations responsible for making public information available.

#### Public interest in maintaining the exemption

81. The ICO notes the general public interest which underpins the principle of legal privilege, which is that communications between a lawyer and a client or third party, for the purposes of litigation, are protected.

82. It says there is a need to safeguard openness in all communications between the ICO and any external representatives it considers it necessary to contact as part of the appeals process.
83. Finally, the ICO says that the fact that the appeal process had not been concluded and remains a live issue adds further weight to the public interest favouring the maintaining of the exemption.

#### Balance of the public interest

84. As has been discussed above, the Commissioner is satisfied that the matter covered by the complainant's request was 'live' at the time of the request in the sense that an appeal to the FTT is ongoing. The ICO has noted that an associated Upper Tribunal appeal was in train at April 2019 – the matter concerned therefore continued to remain a live issue.
85. The Commissioner considers that any wider public interest that there may be in the subject that is the focus of the complainant's request is substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. The public interest in the ICO being open and transparent has largely been met through its release of some of the information the complainant has requested, where this is held. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption in this case.

#### **Section 17 – refusing a request**

86. Under section 17(1) of the FOIA a public authority that is relying on a claim that the requested information is exempt information must issue an appropriate refusal notice to the applicant within the time for complying with section 1(1) ie 20 working days.
87. In this case the complainant submitted his request on 25 March 2019 and did not receive a refusal notice with regard to the ICO's reliance on section 42(1) until 30 April 2019 and a refusal notice with regard to the ICO's reliance on section 40(2) until 24 May 2019. The ICO therefore breached section 17(1).

## Right of appeal

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88. 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)

89. 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.
90. 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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