Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **1 September2022**

Public Authority: **The Information Commissioner**
Address: **Wycliffe House**
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant requested additional correspondence and material submitted by a public authority in response to a complaint they made. The Information Commissioner ("the ICO") withheld the requested information citing section 44 of FOIA as its basis for doing so.

2. The Commissioner's decision is that the ICO is entitled to rely on section 44 of FOIA to withhold the requested information.

3. The Commissioner does not require the ICO to take any steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority – a duty confirmed by the First Tier Tribunal ("FTT"). 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. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request and dealing with previous complaints brought under the FOIA. It uses the term "the Commissioner" when referring to the Information Commissioner dealing with this complaint.

Background

5. In 2020, the complainant brought a complaint to the ICO in which they challenged Liverpool City Council's ("the Council) reliance on section 14 of FOIA to withhold information he had requested. On 19 August 2020 the ICO issued a decision notice reference FS50909734, in which it did not uphold the complaint on the grounds that the request was vexatious, and the Council was entitled to apply section 14(1) of FOIA to refuse to comply with the request. The complainant lodged an appeal against this decision to the FTT, following which the ICO conceded the appeal against the Council's reliance on section 14 FOIA and upheld the complaint in full.

6. This complaint relates to paragraphs 54, 55 and 56 of the decision notice reference FS50909734, dated 19 August 2020. In this decision notice the ICO stated the following in the paragraphs below:

"54. The Commissioner has viewed the correspondence and notes the nature of other material generated as a result of the complainant's approach to the Council. It shows correspondence between the Council and the complainant during 2018 relating to his ethical concerns about stray dogs.

55. The Commissioner has viewed the range of examples provided by the Council, which it obtained from its contractor in relation to engagement with the complainant. These examples included screenshots of the complainant's social media posts which consisted of allegations about missing dogs, theories on what happens to them and information regarding stray dogs and of the third parties in question, which the council disputes. The inevitable result of such posts is that there has been an online backlash against the organisations concerned.

56. The Council reported that these activities on social media sites had resulted in staff being threatened. It said that there had been threats of arson attacks which had caused the kennels and the home of one of its staff being published on the social media site. The Council stated that 'an obsession with conspiracy theories and missing dogs is a regular theme in his [the complainant's] social post. These allegations have been investigated and unfounded but does stir emotional responses and behaviour from other individuals."

7. The above forms the basis for the complainant's request for information to the ICO.

Request and response

8. On 18 June 2021, the complainant wrote to the ICO and requested information in the following terms:

   "It is evident from the original Decision Notice in this case (see paras 54, 55 and 56) that the ICO received additional correspondence and material from Liverpool City Council prior to the issue of the decision notice. I was not aware of this when I submitted my request for a copy of the email from the Council.

   Can you provide me with this additional material, or would I need to submit a new FOIA request for this?"

9. The ICO responded on 15 July 2021. It refused to provide the requested information. It noted that it had dealt with the request both under FOIA and as a Subject Access Request (SAR) and where information is not the complainant's own personal data, the ICO considered it under FOIA. It stated that it was unable to provide the requested information under section 44 of FOIA by virtue of section 132 of the DPA 2018.

10. The complainant sought an internal review on 19 July 2021 disputing the Commissioner's regulatory functions and argued that the disclosure of the information would not prejudice the exercise of those functions. They also challenged the ICO's application of section 44 of FOIA and considered that one of the 'gateways' of the DPA 2018 may be engaged to allow the ICO lawful authority to disclose the information requested.

11. Following an internal review, the ICO wrote to the complainant on 9 August 2021 and upheld its original position that section 44 of FOIA would apply.

Scope of the case

12. The complainant contacted the Commissioner on 6 November 2021 to complain about the way their request for information had been handled.

13. The Commissioner considers the scope of his investigations to be to establish whether the ICO is entitled to withhold the requested information under section 44 of FOIA.

Reasons for decision

Section 44 – prohibitions on disclosure

14. Section 44 of the FOIA states that:

    "(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

    (a) is prohibited by or under any enactment,

    (b) is incompatible with any Community obligation, or

    (c) would constitute or be punishable as a contempt of court

    (2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

15. Section 44 of FOIA is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.

16. The relevant legislation in this case is the DPA 2018. In this particular case, the ICO is relying on section 132 of DPA 2018 as the statutory bar preventing disclosure.

17. Section 132(1) of that Act states that:

    "A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

    (a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

    (b) relates to an identified or identifiable individual or business, and

    (c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources unless the disclosure is made with lawful authority."

18. Section 132(3) of the DPA 2018 makes it a criminal offence for any person to disclose information in contravention of section 132(1).

19. The withheld information was provided to the ICO for the purpose of discharging one of the ICO's functions, namely, to investigate complaints arising under section 50 of FOIA and to issue a decision. Therefore DPA 2018 would prevent this information from being disclosed unless a lawful gateway to disclosure applied.

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20. Section 132(2) of the DPA 2018 originally set out six possible gateways through which disclosure could take place with lawful authority:

    "For the purposes of subsection (1), a disclosure is made with lawful authority only if and to the extent that—

    (a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,

    (b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),

    (c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions,

    (d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation,

    (e) the disclosure was made for the purposes of criminal or civil proceedings, however arising, or

    (f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

21. Gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union and would not therefore have been available to the ICO at the point it responded to the request (although the Commissioner considers it unlikely to have applied in this case).

22. In their internal review request, the complainant has argued that gateways (a), (c) and (f) would allow for disclosure of this information. The Commissioner will consider each one in turn.

23. In respect of (a), the ICO have stated that they do not have consent from the Council to disclose the information. Therefore, it does not consider it has lawful authority to disclose the information. While he notes that at the point ICO dealt with the request, it did not have the Council's explicit consent to disclose any of the withheld information, the Commissioner is satisfied that the ICO could not have relied on gateway (a) to disclose the information.

24. In relation to gateway (c), the complainant argued that:

    "The ICO frequently does quote directly from correspondence with complainants and local authorities in its decision notices. Presumably, this is in accordance with the s132(2)(c) gateway, namely that such disclosure was made for the purposes of, and was necessary for, the discharge of one or more of the Commissioner's functions.

In the decision notice FS50909734 which was issued in this case, the ICO directly quoted extensively from correspondence received from Liverpool City Council at paragraphs 37, 41, 45, 49 and 56 and paraphrased the Council's submissions throughout the decision notice.

The ICO directly quoted from correspondence from myself at paragraph 16 and paraphrased my submissions elsewhere in the decision notice. If the ICO is willing to risk criminal liability by disclosing selected correspondence in its decision notices, then it is not clear why it would adopt a different approach to subsequent FOIA requests for disclosure".

25. The Commissioner notes that the decision notice in question only summarised or paraphrased the Council's arguments, but he accepts that many ICO decision notices (including this one) do contain quotes taken directly from the submissions provided by the parties to the complaint. However, the Commissioner makes clear in his correspondence with public authorities that it should highlight any information that it does not want reproduced in a decision notice.

26. The Commissioner considers that to satisfy gateway (c), it is not sufficient for a disclosure to be made as part of the discharge of one of the ICO's functions, it must also be necessary for the discharge of that function.

27. When the ICO receives a valid complaint under section 50 of the FOIA, it must, in most circumstances, issue a decision as to whether the public authority has complied with the FOIA in responding to the request in question. Whilst the ICO is not required to provide reasons for its decision, as a matter of fairness, it does. This enables both the public authority and the person who brought the complaint to understand why the ICO has reached the decision that it has. That is the function being discharged here.

28. In order for gateway (c) to be satisfied, disclosure to the world at large (which is what is required under the FOIA) must be necessary to the discharge of that function. The use of the word "necessary" implies that the discharge of the function could not otherwise take place – or would be severely impaired.

29. It is not necessary to disclose the entirety of a public authority's submission in order for the ICO to discharge its function of reaching decisions on section 50 complaints. Whilst the ICO may, on occasion, quote or summarise a submission, it does not follow that it cannot discharge its function without disclosing the entire submission. The Commissioner is therefore satisfied that such a disclosure is not "necessary" and hence gateway (c) is not satisfied.

30. Finally, the Commissioner must consider the last of the lawful gateways: that disclosure is necessary in the public interest.

The complainant's position

31. In their request for internal review, the complainant referred to paragraph 25 of decision notice reference IC-40162-K2S5 that confirms the approach which the Commissioner agreed should be adopted when considering the public interest test when applying this gateway. Paragraph 25 states:

    "Considering the close connection between section 40 of the FOIA and the DPA 2018, the Commissioner therefore considers it both helpful and appropriate to adopt a very similar three-step framework for considering the matters at hand. First, he must identify any public interests in disclosure of the requested information; second, he must determine whether disclosure to the world at large is necessary to meet the public interest(s); finally, he must balance the public interest against the rights, freedoms and legitimate interests of the RDSPs. Only if all three tests are satisfied will the lawful authority gateway be opened."

    The complainant further challenged on the grounds that the ICO:

    (a) had not explained whether or not it had taken the above approach.

    (b) had not explained whether it had identified any public interest in disclosure, having regard to the legitimate interest in the case and to the general public interest in accurate decision making by the ICO,

    (c) whether disclosure was necessary or whether the legitimate interest could be met by less intrusive means and

    (d) whether any public interest in disclosure outweighed the rights, freedoms and legitimate interests of the Council in withholding the correspondence".

32. The complainant referred to the Council as having provided "misleading and inaccurate" information to the ICO in respect of a previous complaint they had submitted. They considered that this information had resulted in a "seriously flawed decision notice in the local authority's favour" which they successfully appealed.

33. The complainant argued if the ICO had provided them with a copy of the Council's submission, they would have been able to draw attention to the fact that the evidence the Council previously relied on, was not admissible, as none of it existed at the time of the request for information.

34. The complainant also argued that disclosure was necessary to meet the public interest because the ICO quoted extensively from correspondence with the Council in its decision notice. They explained that if it was considered necessary to do so for the purposes of the decision notice,

then it must be necessary to meet the public interest in the disclosure of the information.

35. The complainant did not consider that the Council was likely to have any reasonable legitimate interests to object to disclosure of the information because it had not objected to the inclusion of parts of their correspondence within the decision notice.

36. Finally the complainant argued that the withheld information should be disclosed as the Tribunal routinely discloses correspondence within the "open bundle", should a decision be appealed. They argued that disclosure would not deter public authorities from providing submissions in future. The complainant noted that, public authorities must be aware that their submissions to the ICO might subsequently be disclosed in Tribunal or court proceedings.

The ICO's position

37. The ICO did not accept that disclosure was necessary in the public interest. It pointed to its guidance[1] to public authorities about how it handles complaints. It stated that the guidance explains:

"In many cases we will need to see the disputed information. Our case officers will not pass this on to the requester (even if we find in their favour) and will not reveal the contents of the disputed information in any decision notice. Staff with higher levels of security clearance will be able to handle very sensitive information."

And

"If we receive any information requests about the case, we have a duty under FOIA and the EIR to respond. It is in the public interest that we are open, transparent, and accountable for the work that we do. It is also important that we do not undermine the trust and confidence of those who write to us.

If you do have reasons why we should not share information you've [sic] sent to us with anyone else, you should explain this to the case officer as part of your submission. We will usually consult with you if we receive an information request about a complaint."

38. The ICO added that emails sent to public authorities in the course of complaint handling often include the following footer:

[1] What happens when someone complains? | ICO and How we deal with complaints | ICO

"We are often asked for copies of the correspondence we exchange with third parties. We are subject to all of the laws we deal with, including the Data Protection Act 2018 and the Freedom of Information Act 2000. You can read about these on our website (www.ico.org.uk). Please say whether you consider any of the information you send us is confidential. You should also say why. We will only withhold information where there is good reason to do so."

39. The ICO recognised that there is a general public interest in transparency, but it noted that:

"In relation to section 50 complaints, it is not necessary to disclose the entirety of the 'complained about' public authority's correspondence supplied to the Commissioner. Pertinent details of the Commissioner's findings in relation to section 50 complaints are published on the ICO's website and will contain the general arguments put forward by the public authority. This is adequate enough to satisfy the public interest in transparency in such a complaint. Furthermore, the complainant also has recourse to First Tier Tribunal. As such, through the provisions of the appeals process they may be entitled to LCC's submissions, including those withheld in this instance. This would be outside of the FOIA and would therefore not need to be a publication to the world at large."

40. Whilst the wording of DPA2018 refers to "public interest", the Commissioner does not consider that this is equivalent to the sort of public interest test he is required to assess when considering a qualified exemption under FOIA.

41. The Commissioner is guided in this approach by the ruling of the First Tier Tribunal in Lamb v Information Commissioner EA/2010/0108. The Tribunal was asked to consider the ICO's reliance on the equivalent gateway in the Data Protection Act 1998[2] as preventing disclosure. The Tribunal commented that:

"Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by

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[2] Section 59 of the Data Protection Act 1998 was the equivalent provision of section 132 of the DPA 2018 and section 59(2)(e) of the 1998 Act, the equivalent of section 132(2)(f) of the 2018 Act. For completeness, the precise wording of the 1998 Act is below. The Commissioner does not consider there is any meaningful difference in how this provision of the two Acts should be interpreted:

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest

the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure, and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."

42. In respect of a deterrent effect, the ICO noted that:

"We are satisfied in this instance that the information withheld pursuant to section 44 by virtue of section 132 of the DPA 2018, was provided by the public authority that was the subject of a complaint raised by the complainant only for the purpose of carrying out our investigation into that complaint. It is our view that providing this information to the world at large would likely prejudice our function as regulator. This is because a disclosure of such information could very likely damage our relationship with the public authority, and as a result, would make it less likely they would co-operate with us fully and openly in the future. If we are not able to receive such information in confidence, this would most certainly undermine our ability to regulate the FOIA effectively. This is overwhelmingly contrary to the public interest. Most poignantly, there is a clear and significant public interest in not undermining the operation of the FOIA regime to also protect public authorities from such inappropriate use of the legislation."

43. The ICO also referred to the withheld information and argued the impact of the disclosure of the information on the Council. Adding that it would be highly likely that publication would harm the commercial interests of the Council. The ICO stated:

"In our view it would be unreasonable and illogical if the FOIA were to allow requests to the ICO to become another route for applicants to obtain the information they want. We consider requests of this kind are an inappropriate use of FOIA. In our view any potential public interest in disclosure to the world at large is very heavily outweighed by the public interest in protecting the ability of the ICO to receive information in confidence from public authorities and controllers. As described above, should the requester be dissatisfied with the outcome of the DN [sic] and wishes to challenge the PA's [sic] submissions, the appropriate route to do so is via the FTT."

The Commissioner's view

44. The Commissioner does not consider that disclosure of this information is necessary in the public interest.

45. As noted in relation to gateway (c), the Commissioner considers that the inclusion of the word "necessary" implies that any legitimate or public interest could not be satisfied if the information were not disclosed. If there are other means of satisfying the interest, disclosure to the world at large would not be necessary.

46. Whilst the Commissioner notes the complainant's arguments raised in the internal review request, he does not consider that that threshold is met here. It is not necessary or justifiable to disclose the information as there is no compelling public interest to do so.

47. The Commissioner considers that such an approach is in accordance with the decision of the Tribunal in Lamb that, whilst the gateway mentions "public interest," the test is not the same as that which he would apply when considering a qualified exemption under FOIA. There is an assumption in favour of non-disclosure, and it follows that the bar should be set high.

48. The argument by the complainant that further details of a public authority's submissions should routinely be made available are not without merit. However, such matters fall outside the scope of what the Commissioner is required to do here – which is to make a decision as to whether the ICO is entitled to rely on section 44 of the FOIA or not.

49. As the ICO has correctly pointed out, when it issues a decision under section 50 of the FOIA, the decision is published in full along with the reasoning for that decision. That fulfils any public interest in transparency and provides the opportunity for either party to challenge the decision if they consider it to be incorrect in law.

50. The main thrust of the complainant's argument is that the public interest favours ensuring that the ICO makes better decisions, and that disclosure would serve that public interest. The Commissioner does not consider that this is a compelling argument – either on the facts of the case or in principle.

51. The complainant's request relates to a complaint that the ICO upheld. Whether the arguments provided by the Council in its submission were the same or different to those presented in its refusal notice and review is irrelevant because the ICO found that the Council was not entitled to rely on the exemption. The complainant's input was unnecessary as the Council failed to discharge its burden of proof in demonstrating that the exemption was engaged.

52. Therefore, it is not clear why the ICO would have issued a different decision in this case if the Council's submission had been published prior

to the decision being made. Whilst the Commissioner appreciates that the complainant was making this argument on a more general level, the particular facts of this case demonstrate that the ICO does not need to publish a submission to find that a public authority had not complied with the FOIA.

53. The Commissioner also does not consider that the "necessity" has been demonstrated in principle. As the facts of this case have demonstrated, not publishing submissions does not mean that the ICO is bound to uphold the public authority's position. Routine publication may cause some decisions to be different but seeking additional submissions from complainants in every case will cause all complaints to take longer to resolve – meaning that a balance must be struck between the two. In the Commissioner's view, that balance lies in allowing either party to appeal a decision notice to the FTT if they feel that it is incorrect in law.

54. Having considered the available evidence, the Commissioner is not persuaded that there is a sufficiently compelling public interest which would necessitate the disclosure of the information being withheld in this case. The ICO has pointed to the detrimental effects of disclosure, but the Commissioner need not consider those effects because he is not satisfied that there is a necessity for disclosure. He is therefore satisfied that the lawful gateway to disclosure is not met and has thus not gone on to consider any balancing exercise.

55. As none of the lawful gateways to disclosure is met in this case, section 132(2) of the DPA 2018 would prohibit the ICO from disclosing this information and therefore section 44 of the FOIA is engaged.

56. The Commissioner therefore finds that the ICO is entitled to rely on section 44 of FOIA to withhold the information.

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Right of appeal

57. 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: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.

59. 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 ………………………………………………

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF