

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2024

Public Authority: Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He's therefore under a duty as regulator to make a formal determination of a complaint made against him 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.
2. The complainant has requested information about ICO case logs and meetings minutes related to the Facewatch decision making process as well as copies of ICO policy and performance management documents. The Information Commissioner's Office ('the ICO') relied on section 21 of FOIA (information accessible by other means) for the part of the request concerning ICO policy and performance management documents and section 42 of FOIA (legal professional privilege) to withhold the remainder of the requested information.
3. The Commissioner's decision is that the ICO is entitled to rely on sections 21 and 42 of FOIA to withhold the requested information.
4. The Commissioner does not require further steps.

Request and response

5. On 4 October 2023, the complainant wrote to the ICO and requested information in the following terms:

“3. Any and all ICO case logs, meeting minutes relevant and part of the Facewatch decision making process that concluded in March 2023. Specifically who Stephen Bonner, Emily Kearney and John Edwards sought advice from when Policing Minister Chris Philip MP wrote to the ICO in February 2023. 5. Documents showing how ICO key performance indicators and service management targets are measured and recorded internally at the ICO. 6. Internally issued ICO policy and policy guidelines regarding complaint handling against the ICO and its staff itself. 7. Internally issued ICO policy and policy guidelines regarding data protection and information rights complaints received by the public. (Parts 1, 2, 4 and 8 are part of a current SAR)”

6. The ICO responded on 25 October 2023. It provided links to some of the requested information via disclosure log entries and ICO website resources and advised that the information was therefore exempt from disclosure under section 21 of FOIA. It advised that the exemptions cited in previous disclosure log entries still applied, namely sections 31, 40(2), 42, and 44 of FOIA.
7. Following an internal review, the ICO wrote to the complainant on 7 November 2023. It provided further guidance on how to access the links in its previous response and stated that it was upholding its application of sections 21 and 42 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 10 November 2023 to complain about the way their request for information had been handled. The complainant expressed dissatisfaction with the application of section 21 of FOIA cited in its response of 25 October 2023 and its continued application of section 42 of FOIA in a previous disclosure.
9. The Commissioner considers that the scope of his investigation is to determine whether the ICO is entitled to rely on sections 21 and 42 of FOIA to withhold the requested information. The complainant has not raised issue with ICO’s response that other FOIA exemptions still applied to the previous disclosures. Accordingly, the Commissioner has not investigated that aspect of the response.

Reasons for decision

Section 21 – information accessible by other means

10. Information is exempt from disclosure under FOIA if it's accessible to the requestor by other means.
11. Section 21 is an absolute exemption. This means if section 21 applies there is no requirement to carry out a public interest test.
12. Unlike most exemptions, the circumstances of the requestor can be considered, as the information must be reasonably accessible to the particular requestor.
13. The Commissioner considers that it's reasonable for a public authority to assume that information is reasonably accessible to the requestor until it becomes aware of any evidence to the contrary.
14. The complainant has communicated with the ICO via email. Therefore, it's a reasonable assumption that the complainant has access to the internet and can access the requested information via the links to its website that the ICO has provided.
15. In their internal review request, the complainant stated that the links provided did not work and therefore the information was not accessible. In its internal review response, the ICO confirmed that it had checked the links provided and confirmed that they were functional. The ICO provided longer versions of the links that would enable the complainant to paste them into an internet browser and also signposted the complainant to the relevant pages on the ICO's website where the information could also be found.
16. The Commissioner has looked at what's being requested and the links that the ICO provided. He's satisfied that the information the ICO has provided, via its website, fulfils the part of the request concerned with ICO policy and performance management documents. The Commissioner is satisfied that the ICO was entitled to apply section 21 to refuse this part of the request.

Section 42 – legal professional privilege

17. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP).
18. There are two types of LPP – litigation privilege and advice privilege. The ICO has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client (the ICO)

and a legal adviser, made for the dominant purpose of seeking and giving legal advice.

19. The Commissioner has reviewed the withheld information and he is satisfied that it comprises communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld information.
20. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

Public interest test

Considerations favouring disclosure

21. The ICO has recognised that it is in the public interest to promote accountability and transparency. It has stated that there is also public interest in transparency about its investigations.
22. The complainant has stated that there is significant public interest in ICO demonstrating consideration of the rights of the UK public at large and the parties that are potentially affected by the outcome of ICO's investigation into Facewatch.
23. The complainant also explained that given the concerns about the ICO's role in live facial recognition technology, the already large media interest in the case of Facewatch and the ICO's subsequent role in the application made by Facewatch it is important to consider what role the ICO plays.

Considerations favouring withholding the information

24. The ICO has explained that the disclosure of legally privileged information threatens the important principle of legal professional privilege. It explained that disclosure of legal advice could have a chilling effect on both policy officers and legal advisers by dissuading them from discussing such matters in the future in the knowledge that it could potentially be made public.
25. The ICO added that the Facewatch investigation had only recently been closed at the time of the response, and the ICO had decided it was appropriate to conduct further enquiries into the use of facial recognition across the sector. It considers that the issues considered in the advice can therefore be said to have remained 'live' at the time of the response.

Balancing the Public Interest Test

26. The Commissioner recognises the public interest in promoting accountability and transparency, particularly around the use and impact of live facial recognition technology. He also recognises the importance of maintaining openness in communications between client and lawyer to ensure full and frank legal advice.
27. The Commissioner notes that the complainant has disputed the ICO's reference to a chilling effect and has stated that instead the ICO has used the chilling effect argument as a "deterrent effect" on freedom of expression.
28. The general public interest inherent in section 42 will generally be strong owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
29. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
30. Although the Commissioner accepts that disclosure may provide some insight into how the ICO reached the decision it did, he also notes that some or all of the advice could be relevant when corresponding on the same issue in the future.
31. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However, he does not consider that they are strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case.
32. Having considered the relevant factors the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to the ICO's ability to obtain legal advice.
33. The Commissioner's decision, therefore, is that the ICO is entitled to withhold the remainder of the requested information under section 42 of FOIA.

Right of appeal

34. 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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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