

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2024

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the ICO and personal data breaches.
2. The Commissioner's decision is that the ICO has complied with its section 1 (general right of access to information) obligations under FOIA.
3. The Commissioner does not require further steps.

Language

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, as the regulator, to make a formal determination of a complaint made against him in his capacity as a public authority. The complainant has the same right of appeal against the Commissioner's decision as they would any other public authority, details of which are at the end of this notice.

5. This notice uses the term “the ICO” to refer to the Information Commissioner dealing with the request. It uses the term “the Commissioner” when referring to the Information Commissioner dealing with this complaint.

Request and response

6. On 7 June 2023 the complainant requested:

“Question 1

Question 1.a relates to whether, having been made aware that a personal data breach had occurred, the ICO investigated whether other data subjects were at risk of a similar PDB. The other questions fall out of this question. In other words, if no investigation was conducted, there is no reason to consider any of the other questions. Therefore, I would be grateful if you could confirm whether;

In the relation to the above please confirm:

1. The ICO investigated whether other data subjects were at similar risk of a PDB,
2. Whether any risk assessments were carried out in relation to this and if so, provide copies of these,
3. Whether any DS notifications were made as a result of this, and
4. Whether the ICO self-notified of a PDB?

Question 2

Please confirm the identity and role of any persons who have replaced Stephen Eckersley, the ICO’s Director of Investigations, whether in a temporary capacity or permanent position.

Question 3

Since 25 May 2018, please confirm:

- a. How many times the ICO, as a regulator, has determined that the ICO has, as an organisation, infringed the GDPR/UK GDPR/Data Protection Act (2018),
- b. What sections/articles the ICO has deemed to have infringed and the number of times each section/article has been infringed,
- c. Whether the ICO has made any Article 34 notifications and if so, how many times it has done this,
- d. Whether the ICO has self-notified of any personal data breaches and when.”

7. The ICO responded on 21 September 2023 and its responses were:
 - Question 1 – The ICO wasn't aware of any personal data breach ('PDB') that matched the complainant's description.
 - Question 2 – It confirmed who the interim Director of Investigations was.
 - Question 3 – It disclosed a dataset of all data protection concerns received by the Commissioner, about the ICO. It confirmed it had made no Article 34 notifications. It also explained the ICO self-reported one PDB during this period which was closed with no further action.
8. On 3 November 2023 the complainant requested an internal review. During their communication with the ICO, the complainant queried the absence of specific cases from the disclosed dataset.
9. The ICO provided its internal review outcome on 30 November 2023. It upheld its previous positions but acknowledged that the dataset didn't include the restricted cases the complainant had identified.
10. The ICO explained that, when it handles a restricted case, it also creates a "shell case" on its case management system, ICE. This shell case is anonymised and contains very basic details of the restricted case on ICE, for reporting purposes.
11. The ICO explained that, due to an administrative error, shell cases were not set up when specific restricted cases were handled. Once this error was identified by the complainant, the ICO rectified it. Since these shell cases were not disclosed as part of the aforementioned dataset, and would fall within the scope of the request, the ICO disclosed them to the complainant.

Scope of the case

12. The complainant contacted the Commissioner on 8 December 2023 to complain about the way that their request for information had been handled.
13. The complainant raised several concerns about the ICO. Not all of these concerns fall within the Commissioner's obligations under section 50 (Application for decision by Commissioner) but he will address the ones that do.

Reasons for decision

Section 1 – general right of access to information

14. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority has provided all information relevant to the complainant's request.
15. In order to make his determination, the Commissioner has considered both the public authority's response to the complainant and the complainant's concerns.
16. The complainant is concerned that:

“The ICO has provided details of regulatory outcomes rather than, in respect to questions 3 (a) & (b), a complete breakdown of the individual articles/sections of data protection legislation it has deemed itself to have contravened. For example, one regulatory outcome could contain multiple infringements of legislation. This does not reconcile to the information I requested.”
17. First of all, the Commissioner notes that questions 3a and 3b ask how many times the ICO has, as an organisation, infringed the Data Protection Act 2018 ('DPA18') and what sections of the DPA18 were relevant. Questions 3a and 3b of the request don't ask for a 'complete breakdown' of these concerns.
18. The ICO has provided a list of each time a data protection concern was raised about the ICO, what part of the legislation the complaint relates to, and what the outcome was. This is what the complainant requested.
19. In its internal review outcome, the ICO explained:

“The ICO's usual procedure when handling request for basic case data is to run a report from ICE, which we did.”
20. These reports take information from each case on ICE, involving 'connections' (party complained about, relevant legislation etc), the decision report and complaint activity.
21. The complainant is correct; one regulatory outcome could contain multiple complaints or infringements of legislation. However, a 'complete breakdown' of every case would only come from a complete review of

each individual case, as opposed to the information the ICO regularly reports on.

22. The Commissioner has considered what the complainant has actually requested, and the information the ICO has provided. Having done so, the Commissioner is satisfied that the ICO has fully complied with its obligations under section 1 of FOIA.

Procedural matters

Section 10 – timescale for compliance

23. Section 10 of FOIA states that a public authority must comply with a request as soon as possible and no later than twenty working days of receipt of the request. The ICO breached section 10 in its handling of this request.

Other matters

24. The complainant is concerned that the ICO's processes in relation to restricted cases fails to comply with the Section 46 Code of Practice on records management which states:

"Authorities should have appropriate tools to identify, locate and retrieve information when required. An effective search capability should be maintained alongside controls to protect information."

25. The complainant is concerned:

"The ICO has stated, in the event a restricted case is required to be set up by the ICO, a "shell case" is set up on the case management system containing "no identifying information whereby a requestor's identity could be revealed...therefore safeguarding the identity of the requestor." In other words, this system was set up to conceal any information relating to the relevant case by default, including but not restricted to personal data."

26. The Commissioner disagrees. A shell case on ICE will record the complaint, the relevant legislation, and the outcome – all of which will be captured by a report ran from ICE and which answer parts 3a and 3b of the request. The only reason these shell cases weren't captured by the dataset originally is because the shell cases weren't set up. However, the ICO has confirmed that this was an isolated administrative error.

27. The Commissioner acknowledges this error was only corrected after the complainant brought it to the ICO's attention. However, the Commissioner doesn't consider this a systemic failing in the ICO's processes. Unfortunately, on this occasion the ICO's restricted process wasn't followed but this was rectified as soon as it was brought to the ICO's attention.
28. To address the complainant's concerns about shell cases deliberately concealing information, when the restricted case process is followed correctly, it's easy for the ICO to cross reference a shell case with a restricted case to ascertain the full details of the complaint.
29. Any personal data that is captured by an FOI request must be considered in line with section 40(2) (personal information) of FOIA. If the ICO considers a case sensitive enough for the case to be restricted, its unlikely this personal data would warrant disclosure under FOIA.
30. The complainant is also concerned, for the same reasons outlined in paragraph 25, that a section 77 (offence of altering etc. records with intent to prevent disclosure) offence has occurred, because "the system by which the ICO processed restricted cases was designed by default to prevent the disclosure of information."
31. Again, the Commissioner disagrees. A shell case can easily be cross referenced with the restricted case it represents and will be represented on a report ran from ICE in the same way that any other case would. The Commissioner sees no evidence that a section 77 offence, rather than an administrative error, has occurred in this instance.

Right of appeal

32. 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

33. 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.
34. 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

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