

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2012

Public Authority: The Information Commissioner's Office
(‘The ICO’)

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the “Act”), he is under a duty to make a formal determination of a complaint made against himself. 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 (although this right may be restricted by the appellant body in certain circumstances). For the sake of clarity, 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)

1. The complainant requested the names of the journalists that were identified by the ICO in Operation Motorman, whose generic details were provided in its *What Price Privacy?* report. The ICO confirmed that it held this information, but argued that it was exempt by virtue of section 40(2) [the ‘third party personal data’ exemption].
2. The Commissioner finds that the ICO correctly withheld the information by virtue of section 40(2). He has also found that the information could also be correctly withheld by virtue of section 44(1). He requires no remedial steps to be taken.

Request and response

3. The complainant made two requests to the ICO on 25 July 2011. He referred one of those requests to the Commissioner and it was worded as follows [this referred to 305 journalists referenced in the *What Price Privacy Report?*]¹:

'A further supplementary key identifying each of the 305 journalists identified by first, middle and last name where known.'

4. On 22 August 2011 the ICO issued its response. It confirmed that it held this information, but considered that it was not appropriate to release the information to the public. It believed that section 40(2) [‘the third party personal data exemption’] could be appropriately applied to the information. It explained that disclosure would contravene the first data protection principle and provided its view about why that was so.
5. The complainant requested an internal review on 4 September 2011. He explained why he considered that the exemption was not applied correctly. He received a response to that request on 26 September 2011. The ICO upheld its original position and explained why.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled by the ICO. On 31 October 2011 he explained why he considered that section 40(2) was not applied appropriately in considerable detail.
7. The Commissioner has considered all of the information before him, but for conciseness he has focussed on the arguments that relate to the operation of the exemptions themselves.
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¹ The ‘What Price Privacy?’ Report was a report that the Information Commissioner made to the UK Parliament on 6 April 2006 in pursuant to section 52(2) of the Data Protection Act 1998 (DPA). It explained that there were 305 individuals and is found at the following link: http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/what_price_privacy.pdf

It was followed by ‘What Price Privacy Now?’ which was published on 13 December 2006 and contained a table of publications that were found in Mr Steven Whittamore’s book and the number of times they were placed at page 9. This can be found here: http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/ico-wppnow-0602.pdf

Reasons for decision

Section 40(2)

8. Section 40(2) [‘the third party personal data exemption’] of the FOIA states that:

‘Any information to which a request for information relates is also exempt information if –

(a) It constitutes personal data which do not fall within subsection 40(1); and

(b) Either the first or the second condition below is satisfied.’

9. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if he made a Subject Access request under the Data Protection Act (‘DPA’) for it.
10. ‘Personal data’ is defined by section 1(1) of the DPA. The withheld information is the names of the journalists that were connected to the Commissioner’s enquiries in Operation Motorman. The information does constitute each of the data subject’s personal data because it relates to an identifiable living individual and connects them to the report. The information also does not constitute the complainant’s own personal data. Section 40(2)(a) is therefore satisfied.
11. The DPA also provides additional safeguards for sensitive personal data which is defined in section 2 of the Act. Section 2 states that personal data relating to, amongst other things, the commission or alleged commission by an individual of any offence amounts to sensitive personal data. While the ICO did not specifically state the information was sensitive personal data to the complainant, the Commissioner considers as a matter of fact that it is. This is because information held in Operation Motorman was used to consider whether the individuals involved committed a criminal offence under section 55 of the DPA and this included the names that were identified by the ICO during the course of its investigation and those that were seized when exercising its search warrant. The complainant argued that the information was not as sensitive as other sensitive personal data, but this is not relevant in deciding whether or not the information constitutes sensitive personal data.
12. In relation to section 40(2)(b) the ICO’s main arguments have been focussed on why disclosure would contravene the first data protection principle and this is what the Commissioner has focussed on.

13. For sensitive personal data, the first data protection principle has four components. They are that the disclosure of the information to the public must be:
- fair to the data subjects;
 - in accordance with one or more conditions in Schedule 2 of the DPA;
 - in accordance with one or more conditions in Schedule 3 of the DPA; and
 - lawful to the data subjects.
14. All four conditions must be satisfied for the first data protection principle not to be contravened and the exemption not to apply. If even one condition is not satisfied, the first data protection principle would be contravened and the exemption would be applied correctly.

Is the disclosure of the information unfair to the data subjects?

15. The Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves.
16. In accordance with his decision issued in **FS50286813** (Stroud District Council), the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.
17. To do so, he has specifically borne in mind the following factors:
- Why the ICO holds the information;
 - The individuals' reasonable expectations of what would happen to their personal data;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing these details weighed against the effects of disclosure on the data subject.
18. The ICO explained that the information was gathered during its Operation Motorman investigation. It explained that some of the information came into its possession as it made progress with its

investigation, but the majority of the information was seized using the Commissioner's formal powers under the execution of a search warrant.

19. The ICO confirmed that it continued to hold the information in connection with its regulatory functions under the DPA – particularly the need to retain evidence for alleged criminal offences under the DPA (such as under section 55).
20. The ICO explained that it considered that the reasonable expectations of the journalists in this case were that they would neither anticipate nor expect their information to be released into the public domain by the ICO. It explained that after Mr Whittamore's case [the private investigator] who received a conditional discharge in the courts, it took the decision to make a report to Parliament about the scope of the problem ('What Price Privacy?') instead of fully investigating the conduct of all the named journalists. This meant the list of names contained either those who were suspected of committing an offence (which would amount to sensitive personal data) or those who were innocent. It explained that a number of the individuals would not even be aware the ICO holds this information about them and that disclosure would therefore be even more unfair in those cases. It explained that the circumstances of acquiring the information added further weight to the reasonableness of the expectations that the information would not be released. Bearing in mind the fact that this information relates to investigations of allegations of criminal behaviour, and that the investigations did not result in a hearing, the Commissioner finds this argument persuasive.
21. The ICO confirmed that it had not contacted the individual journalists to get their consent in this case. It explained that given how it obtained the disputed information, it considered that the journalists would not consent to the disclosure of their names (particularly when their situation has not been investigated in detail by the ICO). The complainant said that the ICO ought to have done so, however the Commissioner notes that it has no obligation to do so and given the nature of the information he is satisfied that their consent to its disclosure to the public would have been very unlikely indeed.
22. The ICO confirmed that it considered that the disclosure of the information would be likely to cause the journalists both damage and distress. It would be a disclosure of very private information and released in the current form would imply that the journalists had committed criminal acts, without adequate evidence and without the right to reply. The Commissioner is satisfied that in the climate at the time of the request, the individual journalists would not anticipate the disclosure and the disclosure of the information could cause real distress.

23. The complainant also explained that the journalists through exercising their right to freedom of expression would expect openness in relation to their own conduct and that they would be able to publish in their own defence. The Commissioner does not consider that this would mitigate the potential damage that would be done. This is because the sensitive personal data would be released without a contemporary right to reply and this is what would cause the damage to the data subjects in this case.
24. The complainant has argued that the alleged conduct of the journalists would have meant that their expectations would have been that if they were caught, their names would be made available. He explained that the individuals used the services of an unregistered private investigator whom they may have expected would have obtained confidential information through legal or illegal, ethical or unethical means. The Commissioner does not consider that the allegations would alter their expectations in the way that is argued by the complainant. The disclosure would involve the release of sensitive personal data and the nature of allegations cannot mean that this is any different.
25. When assessing the legitimate interests of the public, the Commissioner considers that members of the public will have a natural, and legitimate, interest in knowing how a Regulator deals with a series of complaints and the actions that it takes. The Commissioner considers that there is also a weighty public interest in knowing the process by which the ICO undertakes its responsibilities and for the ICO openness is a key part of its remit as the Regulator of the FOIA.
26. The complainant has argued that in his view the public interest in transparency outweighs the right of the journalists to not to be named. He explained that he considered this case to be analogous to the Information Tribunal Decision in *House of Commons v ICO & Leapman, Brooke, Thomas* [EA/ 2007/0060]. In that case the Information Tribunal held that the public interest in transparency over how the MPs claimed Additional Cost Allowance outweighed their interest in privacy in the circumstances of that case. The complainant claimed that this is analogous to this case. The Commissioner doesn't agree that the situation is analogous as suggested. This is because in the Additional Cost Allowance case the information spoke for itself, the MPs were in positions of responsibility where they were spending public funds and scrutiny of how the money was spent was inadequate. In this case the information would be ambiguous, sensitive personal data, there is no expenditure of public funds and there has been some scrutiny into the journalists' actions.
27. However, he also appreciates that there was and continues to be a high level of public interest in journalists wrongly obtaining personal

information. The complainant also explained that openness would be expected as it would ensure that News International was not singled out by its rivals despite them also obtaining withheld information illegally.

28. Furthermore, the ICO has pointed out that these legitimate interests are offset to some extent by the information that is available in the public domain. The ICO made two reports to Parliament about the unlawful trade of personal data and it is known from them the numbers of journalists from each paper who obtained information from Mr Whittamore. The Commissioner agrees that the information in the public domain does mitigate the necessity in transparency to a significant degree.
29. As noted above, the Commissioner did not conduct a full investigation into the journalists because he chose to make a report to Parliament instead. As the information he did hold related to an investigation into potential criminal conduct it is sensitive personal data and the legitimate public interest is not sufficient to outweigh the real damage that lies in disclosure. In short, he considers that the legitimate interests of the public are not as great as the prejudice to the interests of the data subjects in this case.
30. The complainant also argued that there is private knowledge available about some of the journalists that means that it is known by some people (such as individuals who had court orders and supervising journalists) and that this itself would render disclosure fair. The Commissioner does not consider that argument is an adequate reason to disclose all the information to the public at large against the expectations of the journalists. He does not therefore consider that this argument should be given any weight.
31. Overall, the Commissioner concludes that the disclosure of the disputed information would be unfair. He is satisfied that the disclosure would amount to an unwarranted intrusion into the journalists' lives and be a disproportionate invasion to their right to privacy. It follows that disclosure would contravene the first data protection principle, the third party personal data exemption has been applied correctly and no information should be disclosed in this case.
32. Finally, the complainant has also argued that there is no expectation that the information would be disclosed through another means such as the *Leveson Enquiry* and this adds weight to the legitimate public interest in the disclosure of this information now. The Commissioner agrees that it is unlikely that the list of journalists would be released through other means for the reasons outlined above. He does not consider that this adds weight to the public interest in disclosure.

33. As disclosure is not fair, the Commissioner does not need to consider the other aspects of the first data principle. He also need not consider any of the other data protection principles.
34. However, as noted above, as the information relates to the possible commission of an offence by the journalists the information is also their sensitive personal data. There are no conditions in Schedule 3 of the DPA that would be satisfied in this case and this alone confirms that the information has been withheld correctly under section 40(2).

Section 44(1)(a)

35. In addition, the ICO explained that the disclosure of the information would also be unlawful by virtue of section 59 of the DPA.
36. As Section 59 operates as a statutory bar on disclosure, for completeness the Commissioner has considered whether the disputed information is also exempt under section 44(1)(a) of FOIA.
37. Section 44(1)(a) provides that:

"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".

38. Section 59(1), as amended by schedule 2 part II of the Act, provides –

'(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

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

(c) is not 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.'

39. Section 59(2) then goes on to define the only circumstances where the ICO has lawful authority to disclose such information.
40. The Commissioner will explain why the information meets the three criteria of section 59(1) first and then explain why he considers that there is not lawful authority to disclose it.

Does the disputed information meet the three criteria of section 59(1)?

41. In an earlier decision notice, issued under reference **FS50126668**, the Commissioner described section 59(1)(a) as referring to “...all information held by the Commissioner for the purposes of and in relation to investigations that he conducts following complaints about compliance with the legislation over which he has jurisdiction” (paragraph 21).
42. The Commissioner is satisfied that the information that has been withheld has been furnished to the ICO for the purposes of the information Acts. The ICO would not have received this information had it not been the Regulator of the DPA and acquired a court warrant in this capacity. It therefore satisfies the requirement found in section 59(1)(a).
43. With regard to section 59(1)(b), the journalists are clearly identifiable individuals and in relation to section 59(1)(c), the disputed information has not been disclosed to the public.
44. The Commissioner is therefore satisfied that section 59(1) applies to the requested information.

Does the ICO have lawful authority to disclose disputed information in this case?

45. As noted above, section 59(2) provides for a number of scenarios in which information falling within the description of section 59(1) may be disclosed. The way the statute is worded means that this is an exhaustive list of scenarios where the ICO has lawful authority and for the reasons outlined below the Commissioner is satisfied that there is no scope for him to judge that the ICO does have this authority. He will consider each of the possible scenarios in turn and explain why they cannot apply in this case.
46. Section 59(2)(a) explains that the statutory bar will not apply if the ICO has permission from the individuals concerned to disclose the disputed information. The ICO does not have such permission and thus this scenario does not apply here.
47. Section 59(2)(b) explains that the statutory bar does not apply when the information was provided for the purpose of it being made available to the public under the information Acts. The ICO was not provided the information for this purpose and therefore this scenario is not applicable here.
48. Section 59(2)(c) explains that the statutory bar does not apply if the disclosure was necessary for the ICO to undertake its functions under the information acts or comply with a community obligation. The ICO

does not believe that such a disclosure is necessary to undertake its functions. Indeed, its view is that the disclosure of the information to the public in this case would be likely to inhibit its ability to undertake its functions.

49. The Commissioner has considered the arguments outlined above. The Upper Tier Tribunal confirmed that the Commissioner as regulator does not have the power to consider how the ICO uses its discretion in its recent decision *OFCOM v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC)². This decision is binding on the Commissioner. The Tribunal confirmed that the correct channel to challenge use of discretion was the administrative court. It follows that the Commissioner must defer to the ICO's decision that this scenario is not appropriate here.
50. Section 59(2)(d) explains that the statutory bar does not apply where the ICO believes that disclosure of the information is necessary for proceedings. The ICO does not believe that the disclosure of the disputed information is necessary for proceedings and therefore this scenario is not appropriate either.
51. Section 59(2)(e) provides –

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

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

52. The ICO confirmed that it did not consider that disclosure was necessary in the public interest. It should be noted that, when assessing whether disclosure is “necessary in the public interest”, the ICO is not restricted to consider only the factors it would be able to take into account if it was conducting a public interest test under section 2 of the Act. The Commissioner does not have the power to consider the way the ICO exercised its discretion. The consequence means that he cannot determine that the scenario in 59(2)(e) applies.
53. It follows that section 44(1) is engaged. This is because the disputed information satisfies the three criteria in section 59(1) and the

²[http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20&%20Ofcom%20\(EA-2009-0067\)%20-%20Decision%2011-01-10%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20&%20Ofcom%20(EA-2009-0067)%20-%20Decision%2011-01-10%20(w).pdf)

Commissioner cannot determine that the ICO was incorrect to say that it did not have lawful authority to disclose it.

54. By virtue of section 2(3) of FOIA, the exemption in section 44(1) is absolute. The only issue the Commissioner can consider is whether disclosure of the withheld information was prohibited by or under the statutory bar and the Commissioner is satisfied that it was. Section 44(1) therefore can also be relied upon to withhold the disputed information.
55. It follows that both section 40(2) and section 44(1) can be applied appropriately to withhold the disputed information and it need not be released.

Right of appeal

56. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

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