

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2014

Public Authority: Information Commissioners Office

Address: Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Information Commissioner's Office (ICO) and Richard Thomas, the previous Information Commissioner, since 1 January 2011. This was later refined to focus on correspondence relating to the investigations into phone hacking by private investigators and the Leveson Inquiry into press standards. The ICO refused the request by applying section 36(2)(c) – prejudice to the conduct of public affairs to all the correspondence. It also withheld some information under section 40(2) on the basis that it constituted the personal data of a third party and its disclosure would breach the Data Protection Act 1998 (DPA).
2. During the Commissioner's investigation the ICO did disclose some information. The ICO accepted that some of that information should have been disclosed at the time of the request. In respect of the other information which it disclosed the ICO maintained that it was correct to withhold it at the time of the request under section 36, but that with the passage of time, the public interest now favoured disclosure.
3. The Commissioner's decision is that the ICO was entitled to withhold the majority of the information under section 36. Any information to which section 36 does not apply is covered by section 40(2).
4. The Commissioner does not require the public authority to take any further action in respect of the complainant's request.

Request and response

5. On 12 November 2012 the complainant wrote to the ICO quoting from a newspaper blog relating to the evidence presented by the former Information Commissioner to the Leveson Inquiry. He requested certain documents referred to in that evidence and then went onto request:

“... any correspondence exchanged between Richard Thomas and the ICO since 01 January 2011.”
6. Given the context in which the request was made, the ICO emailed the complainant on 26 November 2012 to clarify whether his request sought **all** correspondence between the ICO and its former Commissioner, or whether he only sought correspondence relating to two particular investigations, Operations Glade and Motorman, and the Leveson Inquiry. The complainant confirmed that he was happy to limit his request to the two operations and the Leveson Inquiry.
7. Following this clarification the ICO responded to the request on 10 December 2012. It provided much of the information from the documents referred to by Mr Thomas in his evidence however it withheld the requested correspondence citing sections 40(2) – third party personal data and section 36(2)(c) – prejudice to the conduct of public affairs, as its basis for doing so.
8. The complainant asked the ICO to conduct an internal review of how it handled his request for the correspondence between Mr Thomas and itself. The ICO wrote to the complainant on 23 January 2013 to inform him of the outcome of that internal review which was to uphold its original decision.

Terminology

9. This decision notice concerns an investigation by the ICO as the regulator of FOIA into whether the ICO has complied with its obligations under FOIA as a public authority. The term ‘Commissioner’ will be used to refer to the ICO when acting as regulator. The term ‘ICO’ will be used to refer to the ICO as the public authority being investigated. One of the exemptions relied on by the ICO when refusing the request was section 36 – prejudice to public affairs. The engagement of this exemption is dependent on the opinion of the qualified person. In this case the designated qualified person is Chris Graham, the current Information Commissioner. When referring to Chris Graham acting in this capacity the notice will simply use the term ‘qualified person’. Richard Thomas will generally be referred to as the ‘former Information Commissioner’.

Scope of the case

10. The complainant contacted the Commissioner on 7 April 2013 to complain about the way his request for information had been handled by the ICO.
11. During the Commissioner's investigation the ICO disclosed additional information from the correspondence between itself and the former Information Commissioner. It accepted that some of that information should have been released at the time of the request, although it also pointed out that this same information had been available by other means and therefore could have been exempted under section 21. The ICO also disclosed part of an email chain relating to organising a meeting between the two parties. The ICO maintained that it had been correct to withhold this information under section 36 at the time of the request but that with the passage of time the public interest now favoured disclosure. Since this information has now been disclosed the Commissioner has not considered it further in his investigation.
12. The outstanding issue in this case is whether the ICO was correct to withhold the remaining correspondence between itself and the former Information Commissioner relating to Operations Glade and Motorman, and the Leveson Inquiry, from 1 January 2011 up to the date of the request, ie 12 November 2012. This involves looking at whether this correspondence is exempt under sections 36 – prejudice to the conduct of public affairs, and section 40(2) – third party personal data.

Background

13. Richard Thomas was the Information Commissioner from 2002 to 2009.
14. The request focuses on investigations, conducted in the early 2000's, into the activities of private investigators who obtained personal information on behalf of clients which included journalists. Operation Motorman was conducted by the ICO itself and looked at the possibility that the private investigators had breached section 55 of the Data Protection Act 1998 (DPA). Section 55 DPA makes it an offence to obtain, disclose, or procure the disclosure of personal data without the consent of the data controller (ie the body responsible for controlling the use of that data). Operation Glade was an investigation conducted by the Metropolitan Police into the corruption of officials who provided private investigators with personal data. Although Operation Motorman commenced before Richard Thomas became Information Commissioner, he was in charge when decisions were taken on what actions should be taken based on the evidence collected.

15. Both these investigations and the role of the ICO were considered by the Leveson Inquiry which examined the culture, practices and ethics of the press following the phone hacking scandals of 2010/2011. The former Information Commissioner was one of many witnesses who provided written and oral evidence to the Inquiry.
16. As the ICO explained in its refusal notice, the majority of the correspondence concerns the ICO providing its former head with access to information from his time as Information Commissioner to enable him to prepare his evidence for the Leveson Inquiry.
17. Lord Leveson published his report on 29 November 2012.

Reasons for decision

18. There is a confidential annex to this notice. It simply identifies the specific emails referred to in paragraph 61 and those considered under section 40(2). It does not contain any additional arguments regarding the engagement of the exemptions or, where relevant, the public interest test.

Section 36 – prejudice to the effective conduct of public affairs

19. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would, or would be likely to inhibit
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs.
20. The ICO has cited section 36(2)(c) as its basis for withholding the information. The exemption has been applied to **all** the information that the ICO is continuing to withhold from the complainant.
21. The engagement of the exemption is dependent on the opinion of the qualified person. In this case the qualified person is the current Information Commissioner. The ICO has provided a copy of document containing the submission presented to the qualified person when he reached his opinion. Once the qualified person reached his decision the form was completed and signed by him. The form is dated 7 December 2012. The argument presented to him as to why the prejudice would be

likely to occur was as follows,

“Employees of the Commissioner and the Commissioner himself needed to consult with Richard Thomas in the lead up to the Inquiry in order to provide the correct information to the Inquiry. The release of this information in this case would be likely to prejudice such consultation in the future. The Leveson Inquiry report has been finalised and published. Disclosure of this information at the point in time may result in uninvited contribution externally, which may in turn inhibit or prejudice the ICO’s ability to formulate its response to the report and the issues raised by the recommendations in this report.”

22. The form also records the qualified person’s conclusion as to why the prejudice would be likely to occur. This focussed on the need for the former Commissioner to be able to refresh his memory of the events surrounding Operation Motorman when preparing his evidence for the Leveson Inquiry and the rigour with which that evidence was tested during the inquiry.
23. In its refusal notice the ICO also explained the importance of the former Information Commissioner being able to prepare his evidence for the Leveson Inquiry. In order to do so he needed to be able to communicate with his former colleagues and to arrange access to documents so that his evidence was as accurate as possible. The ICO argued that disclosing the correspondence might inhibit the ability and desire of others to do the same if similar circumstances arose in the future and that this would prejudice the conduct of public affairs.
24. The importance of avoiding such an impact on people working in similar circumstances in the future was again stressed at the internal review stage.
25. For the Commissioner to accept that the exemption is engaged he must be satisfied that it is reasonable for the qualified person to consider that the prejudice described above would be likely to occur. It is noted that the qualified person’s opinion is that the prejudice would be likely to arise. This means that the qualified person’s opinion is that there is a real and significant risk of the prejudice occurring even if the probability is less than 50%.
26. As set out in the Commissioner’s guidance, for an opinion to be reasonable it simply has to be in accordance with reason ie not one which is irrational or absurd. It does not have to be the only opinion capable of being considered reasonable, it is quite possible for there to

be two differing views on the same subject, both of which are reasonable.

27. In deciding whether the qualified person's opinion is reasonable the Commissioner has taken account of the matters to which the information relates and the circumstances that existed at the relevant time. In respect of the subject matter of the information, the Commissioner recognises the importance of judicial inquiries and the need for witnesses to have the opportunity to prepare their evidence properly. He also recognises that at the time the former Information Commissioner was consulting with his ex-colleagues there would have been an expectation that the process would have been confidential.
28. In terms of the relevant time for applying the exemption this is generally regarded to be at the time of the request or at the latest the statutory time for compliance with that request. The request was made just before Lord Leveson published his report. However, as is clear from the record of the opinion provided by the ICO, the qualified person formed his opinion based on the circumstances that existed after the report had been published. The actual refusal notice was issued 3 days later but still within the 20 working days allowed by the Act for responding. Therefore the Commissioner has taken the relevant time for considering the application of the exemption (and therefore the public interest) to be the 7 December 2012.
29. Although this was a year after the former Information Commissioner gave his oral evidence to the Leveson Inquiry, the conclusion of the inquiry and the publication of its report clearly focussed the public's and the media's attention on the matters to which the requested information relates. This can clearly heighten an individual's sensitivity to any disclosure and so, in theory, could increase the risk of others, in similar circumstances being reluctant to consult fully and openly with others when preparing evidence in the future.
30. The Commissioner has also taken account of the qualified person's knowledge or involvement in the issues raised by this request. The qualified person was not personally involved in the Operation Motorman investigation or the decisions that followed. However as the qualified person is the current Information Commissioner, he is well placed to form an opinion on whether disclosing these communications would deter someone who had held that post from seeking material or having briefings if the need arose to prepare evidence for a judicial inquiry in similar circumstances. He was also a party to at least some of the correspondence.
31. In light of the above the Commissioner can understand the rationale for concluding that if correspondence created during the preparation of

evidence for a very high profile judicial inquiry was released, and especially, at a time of particular sensitivity in the mind of the participants, there is a risk that this would inhibit the willingness of either the public authority or one of its former heads to participate in the preparation of evidence in this way in the future.

32. According to the submission to the qualified person, section 36(2)(c) has also been engaged on the basis that, in the opinion of the qualified person, disclosing the information immediately after the publication of the Leveson Inquiry report could hinder the ICO's response to the Leveson Inquiry and the issues raised by the recommendations in the report. Again the Commissioner can understand an argument that if disclosing the requested information drew the attention of any commentators, either from the media or from campaign groups, on the ICO, this may distract the ICO from its focus on responding to the Inquiry or implementing its recommendations.
33. In light of the above the Commissioner is therefore satisfied that the opinion of the qualified person that the disclosure would be likely to prejudice the effective conduct of public affairs is a reasonable one. The Commissioner is satisfied that the exemption is engaged. How great that prejudice to public affairs would be needs to be looked at more closely under the public interest test.

Public interest

34. Section 36 is subject to the public interest test as set out in section 2 of the Act. Only if the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the information can the information be withheld.
35. When weighing the public interest one of the key factors is the qualified person's assessment of the likelihood of prejudice. The greater the likelihood, the greater the weight attributed to the factors in favour of preventing that prejudice occurring. In this case the qualified person was of the opinion that the prejudice to the effective conduct of public affairs would be likely to occur. Therefore the public interest factors in favour of withholding the information carry less weight than they would have if the qualified person had decided the prejudice would occur.
36. The public interest test examines the severity, extent and frequency of the prejudice to the effective conduct of public affairs which, in the reasonable opinion of the qualified person, would be likely to occur. Therefore the first thing to consider under the public interest is the severity and extent of the prejudice identified by the qualified person. That prejudice is the chilling effect on those preparing evidence in similar circumstances and the hindrance to the ICO's ability to respond

to the Inquiry's conclusions and the issues raised by its recommendations.

37. In considering the severity and extent of the prejudice it is important to be clear about the circumstances that existed at the relevant time. The period for complying with the request spans the time from just before the Leveson Inquiry published its report to the period immediately following its publication. It is clear from the documentation provided by the ICO that the qualified person took into account the circumstances that existed after the report was published when forming his opinion. Therefore the Commissioner will only consider public interest arguments relating to the circumstances that existed post publication.
38. It is also important to look at the content of the actual information itself when considering the severity and extent of any prejudice. The vast majority of the information can be characterised as relating to the preparation of evidence and in particular the preparation of evidence by the former Information Commissioner. There are also a limited number of emails which concern responses to the Leveson Inquiry.
39. The correspondence relating to the preparation of evidence deals with a variety of issues. Some of the early correspondence establishes what assistance the ICO is able to offer its former head and arranges meetings. In other correspondence the former Information Commissioner keeps the ICO abreast of his involvement in the inquiry and provides copies of the statements he has submitted or copies of correspondence from the inquiry team. In some emails the former Information Commissioner informs the ICO of the lines of inquiry being pursued by the inquiry team. There are also instances where he is seeking clarification of events, facts and figures together with supporting documentation.
40. The Commissioner considers that some of this information simply reveals the process by which the former Information Commissioner sought to marshal the information he required. The Commissioner considers that the disclosure of such information would not have a severe impact on the willingness of others to prepare evidence in the same way in the future.
41. There are exceptions though. There are some examples where the final version of a witness statement has been refined from an earlier draft. Although the Commissioner considers that there is nothing controversial in the earlier versions, he accepts that any witness to a high profile judicial inquiry is entitled to safe space in which to carefully craft their evidence so that it accurately conveys the witness' understanding of events. Therefore, even though in this case the earlier drafts are not in any way controversial, the Commissioner considers that their disclosure

would signal to others who found themselves in similar circumstances, that the deliberations they expected to remain private could be disclosed at a later date and that this could have a noticeable chilling effect. This chilling effect is heightened because it is likely that the preparation of evidence would have to adhere to strict deadlines and there may not always be the opportunity to fine tune drafts before needing to share them with others.

42. However it has to be recognised that the introduction of the FOIA meant that it was impossible for any public authority to guarantee that such correspondence would never be disclosed. This has a particular bearing on this case where obviously both the ICO and the former Information Commissioner were very aware of the implications of the Act and may have anticipated that their involvement in the Leveson Inquiry would attract freedom of information requests.
43. Some of the correspondence includes requests for clarification of particular points. In general the correspondence reveals a process of fact finding. Although the Commissioner accepts that disclosing any correspondence between the ICO and the former Information Commissioner would have some chilling effect, the nature of some of the information limits the severity of that effect. However the nature of that information also has the effect of reducing the public interest in disclosing it.
44. The Leveson Inquiry was conducted under the Inquiries Act 2005 (IA). The IA gives the Inquiry's chairman the power to require the production of evidence, both written and oral. It is an offence to fail to provide such evidence without a reasonable excuse. The inquiry process itself is very public with transcripts of oral evidence and witness statements being published. In light of this the Commissioner considers that witnesses would be highly motivated to prepare their evidence fully and ensure its accuracy, particularly where the evidence related to the witness's professional performance and so had a bearing on their professional standing. The question is, if this correspondence was disclosed, to what extent someone, looking coolly and objectively at that information, would be less inclined to consult with his former colleagues in the preparation of evidence, bearing in mind his obligation to a judicial inquiry. Similarly to what extent would the ICO, or any other public authority be reluctant to allow its former head access to information. The Commissioner considers that the chilling effect would generally be less than that argued by the ICO.
45. The Commissioner has also considered the extent of the prejudice that is likely to occur in terms of how widespread the chilling effect could be. So far the arguments have focussed on how the existing and former senior management of the ICO would respond to future judicial

inquiries. Whilst it is possible that a disclosure of this information would signal to **other** public authorities and their former employees that any correspondence they produced in similar circumstances could also be released, the Commissioner considers that the chilling effect would be limited. However the Commissioner also recognises that there is the potential for there to be more junior staff, within the ICO, who may be involved in the matters being investigated by a judicial inquiry and therefore be required to contribute to the information gathering process. Therefore the chilling effect may be felt wider than just senior management and it is conceivable that the effect may be felt more acutely by junior staff. On balance the potential for the prejudice to be more widely felt adds further weight in favour of withholding the information.

46. The actual content of the information is also very important when considering arguments in favour of disclosure. The issues of press ethics considered by the Leveson Inquiry are very important and to a large extent the whole inquiry was prompted by public concern over the press's intrusion into the private lives of both celebrities and ordinary members of the public and in particular the phone hacking scandals. The ICO's approach to the press and its decisions based on the evidence gathered as part of Operation Motorman proved to be an important part of the Inquiry. The ICO's involvement in the Leveson Inquiry was certainly a major event in its history. Therefore there is a clearly a public interest in disclosing information relating the ICO's regulation of the press's compliance with the DPA.
47. However having gone through the information in detail the Commissioner is satisfied that the correspondence exchanged while the former Information Commissioner was preparing his evidence sheds little light on those events. Occasionally, an email seeking clarification of or assistance in respect of a particular issue does reveal a line of thought that the former Information Commissioner is developing. Some responses do explain how the ICO presented the evidence collected during Operation Motorman. Generally, however, there is very little discussion of these issues within the e mails themselves, instead they simply raise matters to be discussed and clarified later. As most of these issues are subsequently addressed in the witness statements which had been published on the Leveson Inquiry website by the time of the request, the requested correspondence adds little to the understanding of the conduct of Operation Motorman or the decision making that followed.
48. The complainant has argued that there is a public interest in understanding how the former Information Commissioner prepared his evidence and that this is particularly so considering what he believes to be the criticism of the evidence in the Leveson Report. The

Commissioner accepts that if the correspondence did contain significant debates over the contents of the evidence then there would be more public interest in its disclosure. However this is not the case.

49. The correspondence records arrangements to provide the former Information Commissioner with the information he required so that his witness statements to the Inquiry accurately reflected his understanding of events. That evidence was then rigorously tested through the cross examination when the former Information Commissioner gave oral evidence before the Inquiry. The Commissioner considers that examination of the ICO's role, or that of its former head, in the regulation of the press undertaken by the Leveson Inquiry was thorough and that this goes a very long way in meeting the public interest in understanding these important issues. In comparison the public interest met by disclosing the correspondence exchanged when preparing the evidence is limited.
50. There will of course always be some public interest in there being transparency in the ways public authorities conduct their business and this is heightened where the information relates to high profile issues. In this case transparency would serve to inform the public about the process followed in the preparation of evidence to be provided to a Judicial Inquiry.
51. Finally when looking at the public interest test it is necessary to assess how frequent the chilling effect would be. It should be remembered that the argument is that disclosing this information would have the effect of inhibiting those who find themselves in similar situations in the future from liaising with one another in order to prepare for inquiries such as the Leveson Inquiry or respond to their findings and the issues arising from their recommendations. Therefore the more often either the ICO or its former employees are likely to be required to present such evidence, the greater the risk of prejudice and the greater the public interest in maintaining the use of section 36.
52. The ICO's involvement in the Leveson Inquiry can certainly not be described as routine. It was a landmark event in the history of the organisation. The complainant has argued that it was in fact fairly unique. The ICO has countered that it has in the past contributed to inquiries such as the Bichard Inquiry into child protection and that it is plausible that it could be required to provide evidence to other inquiries in the reasonably near future.
53. The Bichard Inquiry was another very high profile inquiry resulting from the murder of two school children. It had been alleged at one stage that the application of the Data Protection Act had prevented the police properly vetting a job application. Although this allegation had been

withdrawn by the time the Inquiry heard evidence, the regulation of the Data Protection Act by the ICO was an important part of the Inquiry. However the focus on the ICO was significantly less than that in the Leveson Inquiry. Furthermore the Leveson Inquiry required a former Information Commissioner to consult with the ICO in order to prepare his evidence. This dimension was missing from the Bichard Inquiry. Evidence to the Bichard Inquiry was provided by Information Commissioner in post at that time.

54. The Commissioner considers the Leveson Inquiry is the most high profile and most critical inquiry that the ICO has been involved in to date. However the nature of the ICO's regulatory functions does mean that it is plausible that the current or former staff may be required to provide evidence to inquiries in the future. Nevertheless the Commissioner considers that such involvement is likely to be relatively infrequent. This to some extent reduces the weight of the public interest in favour of maintaining section 36.
55. The Commissioner has accepted the qualified person's opinion that disclosing the requested information would be likely to make individuals less willing to cooperate fully and openly with former colleagues when preparing evidence for judicial inquiries and responding to their findings. In doing so he has accepted that there is at least a real and significant likelihood of that harm occurring.
56. Before concluding his consideration of the public interest test the Commissioner must take account of the second means by which the qualified person found that the effective conduct of public affairs would be prejudiced. This is the impact that disclosure would have on the ability of the ICO to respond to the findings of the Leveson Inquiry. In its submission to the qualified person the ICO stated that disclosing the requested information may result in uninvited contributions from other parties which would inhibit the ICO's ability to formulate its response to the report and the issues raised by the recommendations. The information contained in the correspondence exchanged during the preparation of evidence is not itself a response to the Lord Leveson's conclusion as it was obviously created before then. The Commissioner recognises that following the criticism of the ICO contained in the report the ICO would have been sensitive to adverse comment either in the press or by campaign groups. It is plausible that if the disclosure of the correspondence placed the ICO in the media spotlight it could result in a distraction of resources at a time when the ICO's focus needed to be on considering Lord Leveson's recommendations including that the ICO should take immediate steps to prepare good practice guidelines and standards for the press to observe when processing personal data.

57. However the Commissioner has looked at the media coverage of the Inquiries findings. It naturally received a great deal of press attention. At the time the ICO was dealing with the complainant's request the main stories concentrated on opposition to statutory regulation of the press, and the divisions of the main political parties on that issue. There was also significant coverage of opposition to Lord Leveson's recommendations on amendments to the Data Protection Act and in particular the exemption from important parts of that Act for journalism and changes to the criminal offence for obtaining and procuring personal data. Even so, the Commissioner considers that the press's interest in the disclosure of the correspondence exchanged when preparing evidence would be limited and therefore so would the impact on the ICO's ability to tackle a data protection code of conduct for the press. It follows that this adds little weight to the public interest in upholding section 36 in respect of this information. The main public interest arguments therefore relate to the chilling effect on those preparing evidence for future inquiries.
58. However there are some emails which specifically deal with responses to the Inquiry. The public interest in disclosing this information is dealt with below at paragraphs 61 and 62.
59. Returning to the harm that would be caused by disclosing the correspondence exchanged during the preparation of evidence, the Commissioner has found there are a number of factors that lead him to conclude the chilling effect caused by disclosing the correspondence relating to the preparation of evidence would not be overwhelmingly significant. These include the nature of the information itself together with the motivation and professional integrity of former heads of public authorities such as the ICO to explain their position as fully as possible. However the Commissioner does accept that any risk that the evidence presented to a judicial inquiry is not as full or as accurate as possible is unwelcome and potentially damaging. Poor quality evidence could only undermine the ability of a judicial inquiry to reach robust findings and this would very clearly work against the public interest. Weighing all the competing factors against one another, the Commissioner considers that the public interest is finely balanced in respect of much of the information. He considers that the chilling effect would be limited rather than overwhelming, however, ultimately the Commissioner concludes that the public interest favours withholding the majority of the information.
60. The public interest in favour of maintaining the exemption is far greater in respect of the draft witness statements which the former Information Commissioner copied to the ICO when preparing his evidence. The Commissioner considers that although the majority of the drafts were very similar to the final versions the former Information Commissioner

was entitled to expect to be able to develop those drafts in private, sharing his thoughts with only those he chose. Any threat to the confidentiality of that process would have a significant chilling effect. Therefore the Commissioner concludes that in respect of these drafts the public interest in favour of withholding the information is very significant. To be clear the Commissioner considers that there is a very strong public interest in withholding all the drafts in their entirety to avoid this chilling effect. If drafts were disclosed with only the odd sentence redacted this would just pin point the more sensitive issues and cause the same chilling effect.

61. As discussed not all the information relates to the preparation of evidence. Some of the correspondence concerns responses to the Inquiry. The Inquiry's findings reflect on both the ICO and its former head. It is therefore understandable that one party would wish to keep the other informed about its response to those findings. It is also important that the parties concerned can compose their responses safe in the knowledge that such preparation will remain confidential. The Commissioner is satisfied that to undermine this principle would be likely to have an adverse effect on the ability of participants in an inquiry to properly present their positions. This would be unfair to the parties concerned and so is likely to have a chilling effect on participants in future inquiries. This in turn would undermine the ability of inquiries to fully consider their conclusions. There is a significant public interest in preventing this from happening.
62. The Commissioner recognises that there is also a clear public interest in disclosing this information. There is value in understanding the process followed by a judicial inquiry when reaching its final conclusions. However on balance the Commissioner considers that some elements of the procedure require confidentiality if they are to operate properly. The Commissioner concludes that in respect of the emails responding to the Inquiry there is an overwhelming public interest in favour of maintaining the application of section 36(2)(c).
63. The Commissioner has concluded that for the vast majority of the information requested the public interest favours maintaining the exemption provided by section 36. However there is a very small amount of information where the Commissioner has concluded that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. This information is contained in three sections of three emails that were exchanged during the preparation of evidence. This information contains expressions of opinion which do not relate to the preparation of evidence. Therefore, the Commissioner concludes that disclosing this information would have a very minimal

chilling effect. However, the ICO, in the alternative, also applied section 40(2) to this information and this exemption is considered further below.

Section 40(2) – personal data

64. Section 40(2) provides that a public authority can refuse to provide information which constitutes the personal data of someone other than the requestor, if disclosing it would breach any of the data protection principles contained in the DPA. Personal data is defined in the DPA as information which both identifies and relates to a living individual. The exemption is not subject to the public interest test.
65. It is understood that the ICO believes that disclosing this information would breach the first data protection principle. The first principle states that personal data should be processed fairly and lawfully and, in particular shall not be processed unless at least one of conditions listed in Schedule 2 of the DPA is met.
66. The ICO has applied section 40(2) to a small amount of information. It has been applied to a very limited amount of information contained in the emails which the ICO disclosed to the complainant during the course of the Commissioner's investigation. It has also been applied to the information referred to above in paragraph 63, ie the information which the ICO still wishes to withhold under section 36, but in respect of which the Commissioner has found the public interest does not favour maintaining that exemption. This is the information consisting of observations made to the former Information Commissioner.
67. In respect of these observations the Commissioner is satisfied that they are the opinions of those making the comments and as such relate to those individuals. They are contained within emails which clearly identify who made those comments. The Commissioner is therefore satisfied that they are the personal data of those individuals.
68. It is now necessary to look at whether its disclosure would comply with the first principle, starting with fairness.
69. When dealing with freedom of information requests the consideration of fairness takes account of the consequences to the data subject, their expectations of how the information will be treated and the circumstances under which it was provided. This is then balanced against the public's need to access that information. These factors are often interlinked.
70. The Commissioner is satisfied that certainly at the time the emails were written their authors would have expected that their communications would be treated as being confidential. Although the emails were sent by the authors in their professional capacity the observations reflect

personal opinions. The Commissioner is satisfied therefore that the authors would have expected the comments to remain confidential. Having read the remarks the Commissioner does not consider there would be any detriment to the authors if they were disclosed. However nor does the Commissioner consider there is any great value in disclosing the comments.

71. On balance the Commissioner considers that due to the expectations of the individuals sending the emails, disclosing this information would be unfair. He therefore concludes that disclosing this information would breach the first data protection principle. Section 40(2) is engaged.
72. It is now necessary to look at the information withheld from the emails disclosed to the complainant during the course of the Commissioner's investigation. The information in question consists of the personal contact details of the former Information Commissioner including his mobile telephone number and email address. These both identify and relate to the former Information Commissioner and so constitute his personal data. The Commissioner is satisfied that these were used and provided in the clear understanding that they would remain private between the parties concerned. To disclose these details in light of this expectation would clearly be unfair and so breach the first data protection principle. Disclosing the contact details would also allow the privacy of the former Information Commissioner to be intruded upon. Again this would be unfair. The Commissioner accepts that the exemption provided by section 40(2) is engaged in respect of these contact details.

Conclusion

73. The Commissioner concludes that the majority of the information was correctly withheld under section 36(2)(c). In respect of the information not covered by section 36 the Commissioner is satisfied that section 40(2) is engaged. In light of this the Commissioner does not require the ICO to take any further action.

Right of appeal

74. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.
76. 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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