

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2018

Public Authority: Information Commissioner's Office

Address: Wycliffe House

Water Lane

Wilmslow

SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ("the Commissioner"). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as a regulator to make a formal determination of a complaint made against her 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.

Decision (including any steps ordered)

1. The complainant has requested files held by the Information Commissioner's Office (ICO) on the Ministry of Justice's (MoJ's) compliance with the FOIA. The ICO confirmed information was held but refused to provide this on the basis of the exemption from disclosure at section 31 of the FOIA.
2. The Commissioner's decision is that the ICO has correctly applied section 31(1)(g) in conjunction with 31(2)(c) and the public interest favours maintaining the exemption and withholding the information.

Request and response

3. On 14 July 2017, the complainant wrote to the ICO and requested information in the following terms:

"Could you please provide me with any files you hold (especially correspondence but also internal notes etc.) on FOIA delays in the Ministry of Justice and its constituent agencies?"

To be clear I am not asking for case files of individual s50 complaints involving the MOJ but for records relating to authority-level enforcement/compliance monitoring.

In terms of time period, I would restrict my requests to records from the last 12 months."

4. The ICO responded on 14 August 2017 confirming information within the scope of the request was held but refusing to provide this on the basis of the exemption at section 31 of the FOIA, specifically section 31(1)(g) in conjunction with subsections (2)(a) and (c).
5. The complainant requested an internal review of this decision on 16 August 2017. He raised concerns about the accuracy of the assertions that disclosing the requested information would deter organisations from voluntarily working with the ICO and the lack of explanation for this.
6. Following an internal review the ICO wrote to the complainant on 12 September 2017. It clarified what information it held falling within the scope of the request and reconfirmed its position that the information was exempt on the basis of the exemption at section 31 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 12 September 2017 to complain about the way his request for information had been handled.
8. During the course of her investigation the Commissioner was also informed by the ICO that it considered section 44 of the FOIA would apply if it was found that section 31 had been incorrectly applied. However, as this was cited at a later stage the Commissioner is of the view it is appropriate to firstly consider the use of section 31.
9. The Commissioner considers the scope of her investigation to be to determine if the ICO has correctly applied the provisions of section 31 to the requested information and, if so, where the balance of the public interest lies.

Reasons for decision

10. The ICO has argued that the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of the functions set out in 31(2) of FOIA.
11. The purpose that the ICO has argued would be likely to be prejudiced if the information was disclosed is section 31(2)(a), *the purpose of ascertaining whether any person has failed to comply with the law, and* section 31(2)(c), *ascertaining whether circumstances would justify regulatory action.*
12. In this case, in order for section 31(1)(g) of FOIA to be engaged, the ICO must be able to demonstrate that the potential prejudice being argued relates to the interest contained in section 31(2)(a) and/or (c).
13. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice ‘would’ occur, the second that prejudice ‘would be likely’ to occur.
14. The ICO has stated that they believe the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the ICO to discharge, it still requires the ICO to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
15. The Commissioner has considered the application of section 31(1)(g) with subsection (2)(a) and (c). She has therefore considered whether the ICO is formally tasked with ascertaining whether circumstances would justify regulatory action.
16. The Commissioner is aware that the ICO has a number of statutory functions for the purpose of ascertaining whether a public authority or data controller has failed to comply with the law and/or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation.
17. The ICO states that a considerable proportion of its regulatory work and resources are focused on ascertaining whether public authorities and data controllers have complied with the statutory requirements placed upon them by both the DPA and FOIA.
18. The Commissioner is satisfied that the ICO is formally tasked with ascertaining whether circumstances would justify regulatory action.

19. The Commissioner has therefore gone on to consider the ICO's arguments as to why it considers disclosure of the withheld information would be likely to prejudice its ability to ascertain whether circumstances would justify regulatory action.
20. In its responses to the complainant, the ICO stated that the disclosure of the withheld information would likely prejudice its ability to carry out its regulatory functions which include engaging with public authorities on performance issues to ensure their compliance with the relevant law. The ICO argued it would be likely to prejudice the exchange of information between the ICO and public authorities which would become more guarded and cautious in proactively providing information if they thought the information would be disclosed. This would in turn be likely to prejudice the effectiveness of the ICO's regulatory processes.
21. The information that has been withheld is correspondence between the MoJ and the ICO on performance issues in relation to the FOIA. The Commissioner recognises the argument that the ICO has an ongoing relationship with the MoJ and releasing correspondence between the two parties on the subject of FOIA performance would be likely to be detrimental to the ICO's ability to engage effectively with the MoJ.
22. Given the nature of the withheld information, and based on the ICO's arguments, the Commissioner considers that the ICO is tasked with ascertaining whether circumstances would justify regulatory action. Its ability to fulfil this function effectively is dependent upon it being able to gather information and correspond with public authorities efficiently whilst it looks into performance. The Commissioner therefore accepts that disclosure would be likely to result in the prejudicial effects to the ICO's purposes described at section 31(2)(c) of FOIA.
23. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

24. The ICO acknowledged there was a public interest in increased transparency in the way in which it conducts its FOIA and EIR compliance monitoring and in being transparent about any monitored public authority's potential compliance failings.

Public interest arguments in favour of maintaining the exemption

25. The ICO consider the public interest lies in maintaining its ability to engage with public authorities in order to positively influence their compliance. To do this the ICO states it needs to be able to maintain effective relationships with public authorities and that they feel they can engage with the ICO without fear that the information they provide will be made public prematurely or, in some cases, at all.
26. In addition, the ICO argues that the public interest lies in maintaining the ICO's ability to fully perform its regulatory role, ensuring that organisations are not deterred from participating fully and candidly with compliance monitoring. The ICO considers this would be undermined by the disclosure of information such as in this case, particularly before the conclusion or outcomes of any monitoring are finalised.

Balance of the public interest arguments

27. The Commissioner considers that there is a strong public interest in the ICO operating openly and being accountable in its effectiveness in carrying out its regulatory functions, in particular it's monitoring of public authorities compliance with the FOIA.
28. The complainant argued that whole files of correspondence should not be withheld and disputed that disclosure would prevent public authorities from working with the ICO as it has formal information gathering powers.
29. However, the Commissioner notes that whilst the ICO does have formal information gathering powers in the form of Information Notices which can be served on public authorities compelling a response to questions and the provision of information; using these powers comes with some consequences. Relying solely on Information Notices is likely to impact on the efficiency of the ICO to investigate issues as there is formal procedure around these notices, including the right of appeal to the Information Tribunal. This would not be in the public interest as it would cause investigations to become much lengthier and tied up in bureaucratic processes.
30. The Commissioner therefore recognises that maintaining less formal methods of gathering information is important to the ability of the ICO to effectively carry out its regulatory responsibilities. At the time the request was received the MoJ had, in the previous 12 months which was the time scale set out by the request, been undergoing monitoring by

the ICO for its timeliness at responding to requests under the FOIA¹. Following the period of monitoring, correspondence took place between the MoJ and the ICO and it is this correspondence which forms the information within the scope of the request.

31. The Commissioner notes that this correspondence and information gathering between the two parties took place without the need to use formal powers to obtain information. At the time of the request discussions with the MoJ were still ongoing and this adds weight to the argument that maintaining a good working relationship with the MoJ was important and should not have been undermined by the disclosure of communications between the parties.
32. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(c) FOIA was correctly applied in this case to the withheld information.
33. As the Commissioner considers that section 31(2)(c) was correctly applied in this case, she has not gone on to consider the application of section 31(2)(a) any further.

¹ <https://ico.org.uk/media/action-weve-taken/monitoring/1432442/list-of-ico-timeliness-monitored-bodies-01092015-30112015.pdf>

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Jill Hulley
Senior Case Officer
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