

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2019

Public Authority: Information Commissioner
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 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 from the ICO the results of an information risk review the ICO carried out for the Equality and Human Rights Commission. The ICO withheld the information under section 44(1)(a) of the FOIA (prohibitions on disclosure) and section 31(1)(g) (law enforcement).
2. The Commissioner's decision is as follows:
 - The ICO is entitled to withhold the requested information under section 44(1)(a) of the FOIA.

3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 11 July 2018 the complainant wrote to the ICO and requested information in the following terms:

"...I'm writing to follow up my original request and ask if I can now have a copy of the result of the Information Risk Review you carried out in the EHRC in May 2018."

5. The ICO responded on 19 July 2018. It withheld the information the complainant has requested under section 44(1)(a) of the FOIA.
6. The complainant requested an internal review on 19 July 2018. She argued that the ICO could redact information about an individual or business that it could not disclose [and disclose the remainder]. The ICO provided an internal review on 31 July 2018. It maintained its reliance on section 44(1)(a) with regard to all the information and said it also considered the information is exempt under section 31(1)(g), with the public interest favouring maintaining this exemption.

Scope of the case

7. The complainant contacted the Commissioner on 31 August 2018 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed on the ICO's application of section 44(1)(a) to the information it is withholding and, if necessary, its application of section 31(1)(g).

Reasons for decision

Section 44 – prohibitions on disclosure

9. Section 44(1)(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under the Act) by the public authority holding it is prohibited by or under any enactment. It is an absolute exemption; that is, it is not subject to the public interest test.
10. In its submission to the Commissioner the ICO has provided a background. It has explained that as part of its role regulating data protection compliance in the UK, its Assurance Department conducts

consensual information risk reviews (IRRs). The purpose of such reviews is to identify improvements to the measures that an organisation takes to comply with the data protection principles.

11. The Equality and Human Rights Commission (EHRC) agreed to an IRR and the requested information is the result of that review. The report describes what, in the ICO's analysis of the information provided to it, are the areas of good practice and the areas of risk that require improvement. The entire essence of the report is, according to the ICO, therefore information provided to the ICO by the EHRC with a view to helping it perform its regulatory function, and the ICO's bespoke analysis of that information.
12. The ICO has referred to its response to the complainant dated 31 July 2018. In that response it had provided the complainant with details of the relevant enactment that prohibits the ICO from releasing the information in question; namely, section 132 of the Data Protection Act 2018 (DPA). To address a point raised by the complainant in her correspondence to the Commissioner, the DPA came into force in May 2018, superseding the Data Protection Act 1998; the DPA was therefore in force at the point that the ICO responded to the complainant's request and the ICO was correct to refer to it. Part 5, section 132(1) of that Act states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

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

(c) is not available to the public from other sources 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."

13. In respect of these three conditions the ICO says it found that:
14. The condition at subsection (a) was met because the information in the report is that which was provided by the EHRC to the Commissioner in order for her to carry out her role as regulator of the Information Acts.
15. The condition at subsection (b) was met because the information relates to an identifiable business, the EHRC.

16. And the condition at subsection (c) was met because the information is not, and was not previously, publicly available from other sources.

17. The ICO has gone on to explain that section 132(2) of the DPA lists the circumstances in subsections (a) – (f) in which information fitting the above criteria could be disclosed with lawful authority, as follows:

"(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,"

"(b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),"

"(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions,"

"(d) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation,"

"(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising,"

"(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

18. In her complaint to the Commissioner, the complainant has disputed the ICO's arguments with regard to the conditions above. First, she says that EHRC consented to the IRR and has queried whether the ICO had asked EHRC whether it would consent to the IRR report's disclosure. Second, the complainant says she had a reasonable expectation that the information would be disclosed to her, for a reason that the Commissioner does not intend to detail in this notice. Third, the complainant considers that one way for the Commissioner to fulfil her function under section 51(1) of the Data Protection Act 1998 to *"promote the observance of the requirements of this Act by data controllers"* would be to 'name and shame' data controllers, where necessary.

19. Finally the complainant has argued that, in relation to the condition at (f) above, disclosure is necessary in the public interest. She says that the EHRC is a statutory body with significant legal powers to investigate lawbreakers and represent the victims of discrimination and human rights abuses. In the complainant's view it is of significant interest if persons employed by the EHRC were suspected of breaking the law and she has referred to a particular investigation that prompted the ICO's IRR in May 2018. The complainant has gone on to provide details and

arguments associated with the circumstances of her request, which the Commissioner does not intend to detail here.

20. In its submission to the Commissioner, the ICO has confirmed that it explained to the complainant that it is not satisfied that any of the above conditions at DPA section 132(2) have been met:
21. The circumstance at subsection (a) is not met because the ICO does not have consent to disclose this information. With regard to the point raised by the complainant, the ICO is not obliged to seek consent from EHRC to disclose the report – the ‘gateways’ under section 32(2) and the ICO’s role as regulator is discussed further at paragraph 26. The ICO says that the circumstance at subsection (b) is not met because the information was not obtained by or provided in order to make it available to the public. This would appear to address the point the complainant raised about her own expectations.
22. The ICO says that the circumstances at subsection (c) and (d) are not met because disclosure is not necessary in order to fulfil any of the Commissioner’s functions or any EU obligations. The Commissioner agrees with the ICO. To address the complainant’s point about ‘naming and shaming’, the ICO promotes observance of the DPA through any number of routes – including by carrying out IRRs – and so the Commissioner does not consider that, as part of that promotion, the ICO would need to disclose the specific review report in this case.
23. The circumstance at subsection (e) is not met because disclosure would not be for the purposes of criminal or civil proceedings. And finally, the circumstance at subsection (f) is not met because there is no public interest necessity to do so. The ICO says the Commissioner and her staff risk criminal liability if it discloses information without lawful authority. The right of access under the FOIA is not sufficient to override these important factors. The ICO says it therefore considers that section 132 of the DPA prohibits disclosure of the information the complainant has requested, and in doing so engages the exemption at FOIA section 44(1)(a).
24. The Commissioner has considered the “bespoke analysis” that is referred to in paragraph 11 and whether that analysis can be regarded as information that the ICO obtained from EHRC. If it is not, the statutory bar would not apply. The IRR report is presented as a table that looks at different areas within the EHRC, makes observations on that area’s conformity with data protection principles (which the Commissioner assumes is based on information provided by EHRC) and then makes recommendations. Those recommendations are clearly generated by the ICO itself, but they are inextricably linked to the information EHRC provided to it. The Commissioner is therefore

satisfied that the ICO's recommendations do include information provided by the EHRC, and that the statutory bar also applies to the "bespoke analysis".

25. The Commissioner has considered all the withheld information and is satisfied that section 132 of the DPA applies. The information was clearly obtained by the ICO for the purposes of its investigation of the EHRC under the FOIA. The information relates to the EHRC which is an identifiable business for the purposes of section 132 of the DPA. Finally the Commissioner is satisfied that the information is not publicly available and therefore she finds that the statutory prohibition was correctly applied.
26. Section 132(2) allows the ICO to disclose information where it has lawful authority to do so. However, the ICO had said that none of these 'gateways' to disclosure applied in this case, for the reasons it has given above. The Commissioner has noted the complainant's arguments but she is satisfied that section 132 applies and that therefore the information is covered by the statutory prohibition.
27. With regard to the ICO's approach to the 'gateway' and the complainant's public interest arguments associated with condition (f) of section 132(2), in line with the Upper Tribunal decision in *Ofcom v Gerry Morrissey and the Information Commissioner GIA/605/2010*, and her own published guidance¹ (paragraph 35), the Commissioner is not required to question how the ICO exercised its discretion with regard to the 'gateways' under section 132(2). If an authority, EHRC in this case, has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.
28. The Upper Tribunal's decision and its implications, and the question of public interest, are discussed in more detail in the Commissioner's decision in FS50611377² at paragraphs 17-26 (and in the above guidance). The Commissioner does not intend to reproduce these

¹ <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

² https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1623970/fs_50611377.pdf

matters in this notice but in that earlier case the Commissioner found that section 44 was engaged. For the same reasons, she is satisfied that the section 44 exemption is also engaged in the current case. Because the Commissioner has found that the withheld information is exempt from release under section 44(1)(a), it has not been necessary to consider whether it is also exempt under section 31.

Right of appeal

29. 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

30. 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.
31. 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

Pamela Clements
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