

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 April 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 information concerning an ongoing investigation relating to data analytics. The Information Commissioner's Office (ICO) has withheld the requested information under section 31(1)(g) of the FOIA (law enforcement) and considers that the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
 - The ICO is entitled to rely on section 31(1)(g) to withhold the requested information and the public interest favours maintaining the exemption.

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

Request and response

4. On 31 August 2018 the complainant wrote to the ICO and requested information in the following terms:

"I would also like to request copies of the written correspondence between [Individual 1] and the other members of your legal team, referred to [Individual 2's] response dated 30 July 2018, below."

5. The ICO responded on 27 September 2018. It refused to disclose the requested information under section 31(1)(g) of the FOIA and confirmed that it considered the public interest favoured maintaining this exemption.
6. The ICO provided a review on 26 October 2018. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 30 October 2018 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on whether section 31(1)(g) is engaged, and the balance of the public interest.

Reasons for decision

Section 31 – law enforcement

9. Under subsection 31(1)(g) of the FOIA information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2).
10. In its correspondence with the complainant, and in its submission to the Commissioner, the ICO has cited subsection 31(2)(a), which is the purpose of ascertaining whether any person has failed to comply with the law and subsection 31(2)(c), which is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

11. The ICO has confirmed that it considers that disclosing the disputed information 'would be likely' to prejudice those purposes, rather than 'would' prejudice. 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.
12. The ICO has explained to the Commissioner that the ICO exercises a number of statutory functions for the purpose of ascertaining whether a data controller or public authority 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. These regulatory functions are set out in statute within the data protection legislation – namely the Data Protection Act 1998, the General Data Protection Regulations and the Data Protection Act 2018.
13. The ICO says that in this case the requested information relates to an ongoing ICO investigation into the use of data analytics for political purposes. In its view it therefore follows that the purposes referred to in subsection (a) and (c) above apply in relation to this information.
14. The ICO considers that disclosing the information, particularly while the investigation is ongoing, would create a real risk of distracting from, and causing interference to, the investigative process. This would, the ICO considers, result in prejudice to the functions of the ICO both in relation to the current investigation and any future investigations. By way of examples, the ICO says that disclosing the information may reveal information about potential lines of enquiry and would also be likely to inhibit effective and productive relationships with the various parties with which it communicates. The ICO considers that it is essential that organisations continue to engage with it in a constructive and collaborative way without fear that the information they provide to it will be made public prematurely, or at a later date, if it is inappropriate to do so.
15. The ICO has confirmed that disclosure at this juncture would be likely to prejudice its regulatory functions, regardless of whether any formal regulatory action is ultimately taken.
16. The ICO has referred the Commissioner to her decision in FS50774650¹. That case also concerned a request for information associated with the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614084/fs50774650.pdf>

ICO's investigation into the use of data analytics. The ICO also applied section 31(1)(g) in that case and the Commissioner upheld its position.

17. As in that case, the Commissioner has decided that section 31(1)(g), with subsection 2(a) and (c), is again engaged. The ICO is formally tasked with regulatory functions to ascertain whether any person has failed to comply with the law or whether circumstances would justify regulatory action. The request in FS50774650 was submitted to the ICO on 14 June 2018. The current request was submitted on 31 August 2018. As the investigation to which the withheld correspondence relates was still live at the time of this request, the Commissioner considers the likelihood of prejudice occurring; that is, by affecting the ICO's ability to discharge its regulatory functions, is real and significant. She has gone on to consider the public interest arguments.

Public interest test

Arguments in favour of disclosing the information

18. The ICO provided the following public interest arguments in favour of disclosing the information:
 - Increased transparency in the way in which the ICO carries out its investigations.
 - Evidence of the progress it has made in this particular investigation, what the ICO had found and who it had been in contact with.
 - The significant public interest in understanding how data analytics are being used and the impact on individuals.
 - The heightened public interest in the outcome of this investigation, particularly given the number of people it potentially affects and the high profile nature of the issues.
19. The ICO provided the following public interest arguments in favour of maintaining the exemption:
 - Disclosure of this information would be likely to prejudice the discharge of the ICO's regulatory function in vital areas, including its ability to influence the behaviour of data controllers and to take formal action.
 - There is a public interest in maintaining the ICO's ability to conduct investigations as it sees fit without undue external influence and with the ability to make decisions without a high

degree of scrutiny which might affect its decision making or divert its resources.

- There is a public interest in the ICO being able to maintain effective and productive relationships with the various parties it communicates with. It is essential that organisations continue to engage with the ICO in a constructive and collaborative way without fear that the information they provide to it will be made public prematurely, or at a later date, if it is inappropriate to do so.
- The very significant public interest in this particular investigation gathering the information it needs to and reaching the right outcome. The ICO is conducting this investigation exactly because it recognises the need to probe into these activities and it wants to be able understand the full picture and reach the right conclusion.
- Routine disclosure piecemeal during this and/or other investigations would be likely to result in caution from involved organisations the ICO requires to further any investigation and consequently prejudice its ability to deliver its regulatory objectives. There is a strong public interest in the ICO being an effective and efficient regulator.
- The ICO has explained in broad terms the work that it is doing in this area and the fact that it is conducting this investigation, as well as recently publishing a detailed update on the investigation. It is likely to make further public statements during the life of the investigation and this goes some way to address the public interest in transparency about the ICO's work. This information can be found on the ICO's website here: <https://ico.org.uk/action-weve-taken/investigation-into-data-analytics-for-political-purposes/>

Balance of the public interest

20. The Commissioner again considers that there is a strong public interest in the ICO being effective in its role as a regulator and carrying out its statutory functions, particularly in relation to such high profile issue such as the use of data analytics in politics.
21. As such, the Commissioner is satisfied that there is also a strong public interest in not disclosing information which would be likely to impede the ICO's ability to carry out its functions effectively.
22. She considers that the public interest in the investigation in question, and in the ICO being open and transparent in its role as regulator, is

met through the related information that the ICO has published on its website.

23. On balance, the Commissioner considers that the public interest in favour of disclosure is again outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsection (2)(a) and (c).

Right of appeal

24. 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

25. 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.
26. 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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SK9 5AF