

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 October 2019

**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 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)**

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1. The complainant has requested a copy of a monetary penalty notice (MPN) issued to STS Commercial Ltd and information associated with STS Commercial's appeal against the MPN. The ICO has withheld the relevant information it holds under section 31(1)(g) of the FOIA (law enforcement), section 32(1)(a) (court records) and section 42(1) (legal professional privilege).
2. The Commissioner's decision is as follows:

- The ICO is entitled to withhold the requested MPN under section 31(1)(g) of the FOIA by virtue of subsection 31(2)(c), and the public interest favours maintaining the exemption.
  - The Grounds of Appeal document that the ICO holds is exempt information under section 32(1)(a).
  - The ICO is entitled to withhold the recorded discussions with its solicitors and its external counsel under section 42(1) and the public interest favours maintaining the exemption.
3. The Commissioner does not require the ICO to take any remedial steps.

### **Request and response**

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4. On 22 January 2019, the complainant wrote to the ICO and requested information in the following terms:

*"[1] On 6 July 2018 the ICO announced that the Information Commissioner had imposed a fine of £60,000 on STS Commercial Ltd. I request the ICO to provide a copy of that Monetary Penalty Notice, that it originally issued to STS Commercial Ltd.*

*[2] STS Commercial Ltd appealed that Monetary Penalty Order and by way of a Consent Order issued by the First-tier Tribunal (General Regulatory Chamber) Information Rights on 25 September 2018, the ICO accepted that, after considering the grounds of appeal filed by STS Commercial Ltd, their appeal against the Monetary Penalty Notice should be allowed and no monetary penalty should be imposed. I request the ICO to provide a copy of STS Commercial Ltd's grounds of appeal and any other documentation, including records of internal deliberations, that the ICO holds related to its decision that STS Commercial Ltd's appeal should be allowed and no monetary penalty should be imposed."*

5. The ICO responded on 29 March 2019. It said the MPN that the complainant has requested in the first part of his request is exempt information under section 31(1)(g) by virtue of section 31(2)(c) and indicated that disclosure would be likely to prejudice its regulatory functions. With regard to the information it holds that falls within the scope of the second part of the request, the ICO applied section 32(1)(a) and section 42(1) to this information. The ICO considered that the public interest favoured maintaining the section 31 and section 42 exemptions.

6. The complainant requested an internal review on 1 April 2019. The ICO provided an internal review on 6 April 2019. It maintained its original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 9 April 2019 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on the ICO's reliance on section 31(1)(g), section 32(1)(a) and section 42(1) of the FOIA to withhold the information the complainant has requested, and the balance of the public interest where relevant.

## **Reasons for decision**

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### **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 refusal notice the ICO cited 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. Section 31 is subject to the public interest test.
12. The ICO is withholding under section 31(1)(g) the MPN it issued to STS Commercial and it has provided the Commissioner with a copy of this document.
13. The ICO has explained to the Commissioner that it 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, as well as the Privacy and Electronic Communication Regulations 2003 (PECR).

14. In this case the requested information relates to a MPN issued by the ICO following an investigation it conducted in its role as regulator of PECR. The MPN was subsequently withdrawn on appeal by STS Commercial to the First-tier Tribunal. The MPN details the basis upon which the penalty was issued. The ICO says it follows therefore that the purposes referred to in subsection 31(2)(c) above apply in relation to this information.
15. The ICO considers that disclosing this withdrawn MPN would create a real risk of distracting from, and causing interference with, the investigative process. It also considers that further disseminating a withdrawn MPN would undermine the confidence of data controllers in the ICO's ability to undertake proportionate and accountable investigations. The MPN was removed from the ICO's website and is not in the public domain.
16. According to the ICO, disclosure would be likely to result in prejudice to its functions in relation to its investigative process going forwards. Having published a MPN and then withdrawn it with an accompanying apology it would not, the ICO says, be appropriate to then release it again under FOIA to the world at large. The ICO argues that it is essential that organisations continue to engage with it in a constructive and collaborative way without fear that it will continue to promulgate information that is an inaccurate depiction of their compliance and which has a potentially detrimental effect on affected organisations. The ICO says this would be likely to undermine public trust in the ICO and be prejudicial to its ability to have effective and productive relationships with those that it regulates.

### *Conclusion*

17. Having considered all the circumstances, the Commissioner has decided that section 31(1)(g), with subsection 31(2)(c), is engaged. The ICO is formally tasked with regulatory functions to ascertain whether circumstances would justify regulatory action. Using those regulatory functions it issued STS Commercial with a MPN, which it withdrew following an appeal by STS Commercial.
18. The Commissioner agrees with the ICO's arguments at paragraph 16 that:
  - having withdrawn the MPN from the public domain, it would not be appropriate to put it back into the public domain as a result of a request under the FOIA
  - it is important that organisations continue to engage with the ICO in a constructive and collaborative way; and

- that organisations should not be concerned that the ICO will continue to make information public that is an inaccurate depiction of their compliance and which may have a detrimental effect on affected organisations.
19. The Commissioner notes that the ICO says that for the above reasons, disclosing the MPN under the FOIA would be likely to undermine public trust in the ICO and be prejudicial to its ability to have effective and productive relationships with those that it regulates. This is because individuals and organisations may be less likely to fully engage with the ICO. Although not certain to occur, the Commissioner is satisfied that the likelihood of this prejudice occurring through disclosure; that is, by affecting the ICO's ability to discharge its regulatory functions, is real and significant.
  20. The Commissioner has gone on to consider the public interest test.

### **Public interest test**

#### Public interest in disclosing the information

21. In the complainant's view it is in the public interest and the interests of the administration of justice that the circumstances (in an instance such as this) where the ICO issued a MPN and then decided to rescind it (during the course of an appeal), should be made public.
22. The complainant considers it is important that the public and those who are subject to regulation by the ICO should know what circumstances do not warrant penalty notices being issued (as in this case) just as much as those that do.
23. For its part, the ICO acknowledges that the monetary penalty notice has in the past been published on its website.
24. It also recognises that there is a public interest in the ICO being open and transparent regarding its regulatory activities.

#### Public interest in maintaining the exemption

25. The ICO's arguments are as follows:
  - It considers that disclosure of this information would be likely to compromise its ability to conduct future investigations and therefore affect the discharge of its regulatory function in vital areas, including its ability to influence the behaviour of data controllers and to take formal action. Having published a MPN and then withdrawn it with an accompanying apology it would not be

appropriate to then release it again under FOIA to the world at large.

- The MPN being placed into the public domain would not add to public understanding of how it investigates complaints about unsolicited marketing communications. Indeed disclosure is likely to be unfair to the relevant organisation – STS Commercial. Disclosure would likely cause concern within those organisations the ICO regulates that it does not take a fair and proportionate approach with its regulatory activity. This would likely undermine its ability to perform its regulatory function. The public interest does not therefore lie in disclosure in this instance.
- There is a public interest in maintaining the ICO's ability to engage with data controllers in order to positively influence their compliance. This involves it being able to have effective and productive relationships with those that it regulates and that they continue to engage with the ICO in an open, cooperative and collaborative way. Disclosure of this information under FOIA risks the further dissemination of a withdrawn MPN without the accompanying context that it was withdrawn and an apology issued. This would undermine public trust in the ICO and be prejudicial to its ability to have effective and productive relationships with those that it regulates.
- The ICO considers that the public interest in disclosure of information relating to these matters is fulfilled by the information it has placed in the public domain, such as its statement about STS Commercial published on its website<sup>1</sup> in October 2018.

#### Balance of the public interest

26. The Commissioner considers that there is a strong public interest in the ICO being effective in its role as a regulator.
27. As such, the Commissioner is satisfied that there is also a strong public interest in not disclosing information which would be likely to affect the ICO's ability to carry out its functions effectively. She does not consider

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<sup>1</sup> <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/ico-statement-regarding-sts-commercial-ltd/>

that any public interest in the content of the MPN in question is sufficiently strong to outweigh that interest.

28. She considers that the public interest in the MPN, 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. She does not consider that the public interest in circumstances in which MPNs are not warranted is particularly strong and, in any case, the ICO's published statement explains why the MPN was withdrawn in this instance.
29. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsection 31(2)(c).

### **Section 32 – court records**

30. Section 32(1) of the FOIA states:

*"Information held by a public authority is exempt information if it is held only by virtue of being contained in—*

*(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter*

*(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*

*(c) any document created by—*

*(i) a court, or*

*(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."*

31. The information the ICO is withholding under section 32(1)(a) is the Grounds of Appeal (GoA) document that STS Commercial submitted to the First-tier Tribunal (General Regulatory Chamber) as part of its appeal against the MPN that the ICO issued to it. It has provided the Commissioner with a copy of the document.
32. The ICO has confirmed to the Commissioner that it holds this information only by virtue of it being contained in a relevant document filed with the court solely for the purposes of proceedings – in this particular case, STS Commercial's appeal to the First-tier Tribunal against the MPN issued by the ICO.
33. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt

from disclosure, regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means, or to information which is already widely available.

34. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
35. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

*Is the information contained in a relevant document created for the purposes of proceedings in a particular cause or matter?*

36. What is important in this context is whether the information meets the criteria as set out in section 32(1)(a). As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document it is contained in.
37. From the evidence she has seen, the Commissioner is satisfied that the information withheld by virtue of section 32(1)(a) is contained in a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter ie STS Commercial's appeal to the First-tier Tribunal.

*Is this information held by the public authority only by virtue of being held in such a document?*

38. As noted above, the ICO has confirmed to the Commissioner that it holds this information only by virtue of it being contained in a relevant document filed with the court solely for the purposes of particular proceedings. The complainant has not presented any evidence to suggest this is not the case.
39. As section 32 of the FOIA is an absolute exemption, there is no requirement to consider whether there is a public interest in disclosure.
40. Therefore, the Commissioner's decision is that the GoA document falls within the scope of section 32(1) of the FOIA and the ICO is entitled to rely on section 32(1)(a) of the FOIA to withhold the information.



## **Section 42 – legal professional privilege (LPP)**

41. Section 42(1) of the FOIA states that:

*"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*

42. This exemption is subject to the public interest test.

43. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.

44. The information the ICO is withholding under section 42(1) is recorded discussions, during August 2018, between the ICO's Enforcement department, employed ICO solicitors and the external counsel that the ICO engaged. A document associated with the STS Commercial appeal is attached to one of the emails.

45. In its submission the ICO has noted the above; that litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. It has confirmed that the withheld information in this case related to ongoing litigation at the time this information was created, in connection to STS Commercial's appeal against the Commissioner's MPN.

46. The ICO says these communications are undoubtedly for the dominant purpose of giving or obtaining legal advice to assist in the aforementioned litigation. These communications were therefore for the sole purpose of obtaining/communicating advice from professional legal advisers acting in their professional capacity. The ICO has confirmed that it is satisfied these privileged communications remain confidential and the legal advice remains privileged.

### *Conclusion*

47. The Commissioner is satisfied that the information withheld under section 42(1) attracts LLP and that therefore, the section 42(1) exemption is engaged. The information constitutes legal advice to the ICO from its legal team and advice from its external counsel on the matter of the STS Commercial appeal. She is also satisfied that the document attached to one of the communications is covered by LPP

because it was created with the intention of use in the STS Commercial appeal, and the ICO was seeking legal advice on this document.

48. The Commissioner has gone on to consider the public interest arguments.

### **Public interest test**

#### *Public interest in disclosing the information*

49. The complainant's arguments have been given at paragraphs 21 and 22.

50. The ICO has given the following arguments:

- The general public interest inherent in FOI, ie the assumption of disclosure that is associated with the 'right to know' contained in section 1 of the FOIA.
- The need for the ICO to be open and transparent in the work that it does, and the processes which it applies when carrying out its statutory functions. Additionally, in its reconsideration of its response to the complainant's questions it considered the further public interest in understanding the legal considerations behind the withdrawal of the MPN in question.

#### *Public interest in maintaining the exemption*

51. The ICO has given the following arguments:

- The general public interest which underpins the principle of legal privilege, which is that communications between a client and a legal adviser, for the purposes of litigation, are protected.
- The need to safeguard openness in all communications between the Information Commissioner, her in-house legal advisers, and any external legal representatives that they consider it necessary to contact as part of the original complaint, or subsequent appeals process. This helps to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
- The ICO has also considered an additional public interest argument in favour of maintaining the exemption – that disclosing legal advice of this nature would lead to a reticence in seeking advice and the provision of that advice. This could lessen the effectiveness of the litigation advice process and potentially undermine the client's ability to make fully informed legal decisions.

*Balance of the public interest*

52. The Commissioner considers that the public interest in the ICO being transparent is, in this case, weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. She considers that the public interest in STS Commercial's appeal of the MPN that the ICO issued, 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. Furthermore, while the matter that is the focus of the information – the STS Commercial appeal – may have been concluded at the point of the request, it was still a fairly recent matter at the point the complainant submitted his request. In addition, the possibility exists that the ICO may be involved in similar appeals in the future, to which the legal advice in question will be relevant.
53. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption.

## **Right of appeal**

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54. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. 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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