

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2021

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)

1. The complainant has requested communications between the ICO and NHS Improvement about a FOI complaint the ICO considered under reference FS50800552. The ICO released some information and withheld some under section 40(2) of the FOIA (personal data) and section 44(1)(prohibitions on disclosure).
2. The Commissioner's decision is as follows:
 - The ICO is entitled to withhold some information the complainant has requested under section 40(2) and section 44(1) of the FOIA.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 10 February 2020 the complainant wrote to the ICO and requested information in the following terms:

“On 12.7.19 the Commissioner issued DN FS50800552

On 9.8.19 appeal EA/2019/0284 was lodged with the Information Tribunal

On 20.9.19 the Commissioner renounced her Decision Notice

This FoI request is for the complete record held by ICO of all communications between the public body concerned (NHS Improvement, now merely a name for a function within NHS England) and the Commissioner regarding the complaint referred to in FS50800552, from the date the complaint was made to the Commissioner (7.11.18) up to today's date (10.2.20). I request electronic copies of all letters and email communications and any record of telephone communication connected with this case. I have attempted to ensure that the requested information is included by the Commissioner in the collection of papers produced in the usual way for the Tribunal panel, but my applications have not been successful. Therefore this FoI request became necessary.”

5. The ICO responded on 5 March 2020. It advised that the request included information that is the complainant's own personal data and that this would be processed separately. The ICO released some information – copies of correspondence and records of contact with NHS Improvement - and withheld some under section 40(2) and section 44(1) of the FOIA.
6. The ICO provided an internal review on 8 April 2020. It maintained its reliance on sections 40(2) and 44(1) and explained why it does not hold further information which the complainant considered it should hold.

Scope of the case

7. The complainant contacted the Commissioner on 30 April 2020 to complain about the way his request for information had been handled.
8. In his complaint to the Commissioner, the complainant has asked her to consider whether it is appropriate for the ICO to have communicated with NHS Improvement by phone (as well as in writing) and not to have recorded those phone calls.

9. The FOIA was established to promote transparency but it is not a requirement of the FOIA for public authorities always to communicate in writing. As such, that is not a matter the Commissioner can consider as part of this investigation under section 50 of the FOIA.
10. The Commissioner's investigation has focussed on whether the ICO is entitled to withhold information the complainant has requested under sections 40(2) and 44(1) of the FOIA.

Reasons for decision

Section 40 – personal data

11. The ICO has withheld names and contact details – of a member of its staff and members of NHS Improvement staff – under section 40(2) of the FOIA.
12. Section 40(2) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A), 40(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In this case, the information being withheld under section 40(2) is the names and contact details of certain members of NHS Improvement staff and a member of ICO staff.
21. The Commissioner is satisfied that this information relates to and identifies living individuals - members of NHS Improvement and ICO staff. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

27. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

29. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects

30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader

¹ Article 6(1) goes on to state that: -

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. The Commissioner understands that the complainant has been pursuing concerns about University Hospitals of Morecambe Bay NHS Foundation Trust for approximately 10 years. This has included various interactions with the ICO during that period. The complainant has not been satisfied with decisions made and aspects of the service he has received from the ICO.
33. From his correspondence to her it appears that the complainant considers that the ICO is demonstrating "slavish adherence" to the wishes of NHS Improvement in the redactions it has made to the information he has requested. He does not consider the redactions to have been necessary. It seems to the Commissioner that the complainant is not interested in the identities of those individuals whose personal data has been redacted, per se. His interest is in whether the ICO has acted free from the influence of any other party. In the Commissioner's view this is a personal interest for the complainant, but it is nonetheless a legitimate interest to have.

Is disclosure necessary?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner will accept that disclosure would be necessary to meet the complainant's legitimate interests. He has told the Commissioner that he submitted his complaint to her in order to "test" the redactions. The complainant disputes that the redacted information should be withheld. Disclosing it would, in his view, demonstrate whether the ICO was entitled to have relied on section 40(2) to withhold it or whether the ICO had been influenced by NHS Improvement when it redacted the information.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response

to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

37. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause
- whether the information is already in the public domain
- whether the information is already known to some individuals
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

40. With regard to the personal data of the member of its own staff, the ICO has said that this individual's role is not customer-facing, nor of a senior nature. That individual could therefore hold no expectation that their name would be disclosed in response to an information request. The name of this individual was therefore withheld in line with the ICO's own policy on disclosing information relating to staff, as well as under section 40(2) of the FOIA.

41. With regard to the personal data of NHS Improvement's staff, the ICO says that it did not have NHS Improvement's consent to disclose information which would identify the NHS Improvement staff named throughout the requested information.

42. In the case of both the ICO and the NHS Improvement staff, the Commissioner considers that they would have the reasonable expectation that their personal data would not be put in the public domain in response to a FOIA request. Disclosing it would therefore be likely to cause them a degree of damage or distress.

43. The ICO considers that the condition at section 40(3A)(a) applies in this instance. It does not consider that disclosing this personal data into the public domain is necessary or justified. With no strong legitimate interest that would override the prejudice to the rights and freedoms of the relevant data subjects, the ICO says it took the decision that disclosing this information would have been unlawful, triggering the exemption at section 40(2) of the FOIA.

44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The complainant's interest in this information is a valid interest for him to have, but he has not made a case that it has any wider public interest. The wider public interest in the ICO demonstrating that it is open, transparent and independent has been met, in the Commissioner's view, through its release of other information in response to the complainant's request. The Commissioner therefore considers that there is no Article 6 basis for processing the personal data in question and so disclosing the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
46. The Commissioner has decided that the ICO was entitled to withhold certain information falling within the scope of the complainant's request – names and contact details of ICO and NHS Improvement staff - under section 40(2), by way of section 40(3A)(a).

Section 44 – prohibition on disclosure

47. The ICO has confirmed that it considers that the personal data of NHS Improvement staff is also exempt information under section 44(1) and that the remaining information it has withheld is exempt information under section 44(1) of the FOIA.
48. Section 44(1)(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it is not subject to the public interest test.
49. In its submission to the Commissioner the ICO has explained that when it considers a complaint about a response to a freedom of information request it will often need to consult with the public authority that issued the response. In many cases the public authority will provide the ICO with copies of the information that was withheld in its response to the request. The ICO says that this helps it to take a view on whether the information fell under an exemption or exception in the legislation that it regulates.
50. The ICO says that in this case, the scope of the request included the correspondence which it had exchanged with the relevant public authority, NHS Improvement, about the complaint reference FS50800552. This correspondence included the information that had been withheld by the public authority; information NHS Improvement

had provided to the ICO for the sole purpose of its investigation into that complaint.

51. The ICO has confirmed that this information was withheld in reliance on section 44(1)(a), along with a small amount of content provided to it for the purpose of handling the complaint as well as the names and contact details of staff at NHS Improvement that have also been discussed in the section 40(2) analysis. The ICO has provided the Commissioner with a copy of the information it is withholding under section 44 and she has reviewed it. She asked the ICO for further detail on why it is relying on section 44 in respect of a small amount of content it is withholding, which the ICO provided. The ICO explained that NHS Improvement had specifically requested that this piece of information be withheld from its disclosure to the FOI request the ICO was dealing with. NHS Improvement had provided this information to the ICO, as regulator, for the purpose of its investigation and, following consultation, the ICO did not have consent from NHS Improvement to disclose the information.
52. In its submission, the ICO says that section 44(1) is engaged because the information's disclosure is prohibited by section 132(1) of the Data Protection Act 2018. This prohibits disclosure of information that meets the criteria listed at subsections 132(1)(a-c) unless lawful authority exists to disclose it via one of the gateways provided by section 132(2).
53. The ICO confirmed that each of the three criteria at section 132(1)(a-c) were met and that none of the potential gateways provided at section 132(2)(a-f) were fulfilled. It has told the Commissioner that it consulted NHS Improvement about the request it had received but did not acquire consent to disclose any of the information that was subsequently withheld.
54. Section 132 of the DPA concerns the confidentiality of information. Section 132(1) says 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 sourcesunless the disclosure is made with lawful authority.

55. With regard to the criterion at (a), the information was provided by NHS Improvement during the course of the Commissioner's investigation under section 50 of the FOIA into a complaint submitted to her about a response NHS Improvement had provided to a request for information under the FOIA. As such, the information being withheld under section 44(1) was provided to the Commissioner for the purposes of the discharging of the Commissioner's functions. With regard to (b), the information relates to an identifiable public authority, which the Commissioner considers to be a business for the purposes of the legislation. And finally, the ICO has confirmed that the criterion at (c) was met ie that the information was not, and had not previously been, available to the public at the time of the disclosure.
56. As the ICO has noted, section 132(2)(a-f) of the DPA provides gateways for lawful disclosure. None of these gateways has been met and the ICO says it has not acquired consent from NHS Improvement to disclose the information it subsequently withheld.
57. In view of the above criteria being met, the Commissioner's decision is that the ICO is entitled to rely on section 44(1) of the FOIA to withhold the personal data of NHS Improvement staff and the remaining information falling within the scope of the complainant's request not covered by section 40(2). Section 44 is an absolute exemption and is not subject to the public interest test.

Right of appeal

58. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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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