

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 16 April 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 a full unredacted copy of an ICO audit report into the DVLAs data protection practices. The ICO refused the request on the basis of section 31, 40 and 44 of the FOIA.
2. The Commissioner's decision is that the section 31(1)(g) exemption with section 31(2)(a) and (c) is engaged and the public interest favours maintaining the exemption and withholding the requested information. The Commissioner therefore requires no steps to be taken.

Request and response

3. On 12 February 2019 the complainant made a request to the ICO in the following terms:

"did the audit check to see if the DVLA checks for reasonable cause for wanting data prior to releasing data to private parking companies etc. pursuant to Reg 27.1.e of The Road Vehicles (Registration and Licensing) Regulations 2002?"

Disclosure of registration and licensing particulars

27.?(1) The Secretary of State may make any particulars contained in the register available for use?

(a) by a local authority for any purpose connected with the investigation of an offence or of a decriminalised parking contravention;

(b) by a chief officer of police;

(c) by a member of the Police Service of Northern Ireland;

(d) by an officer of Customs and Excise in Northern Ireland; or

(e) by any person who can show to the satisfaction of the Secretary of State that he has reasonable cause for wanting the particulars to be made available to him."

4. The complainant sent a follow-up email on 13 February 2020 asking: *"you sent me the executive summary, how about the full report etc.?"*
5. The ICO responded on 11 March 2020 stating that this was a repeat of a request made on 26 September 2019. The request was therefore refused under section 14(2) of the FOIA.
6. The complainant asked for an internal review of this decision and the ICO responded on 1 May 2020. The review found that section 14(2) had been incorrectly applied. However, the ICO still refused the request citing sections 40 and 31 of the FOIA. During the course of the Commissioner's investigation the ICO also cited section 44 of the FOIA as an alternative basis for withholding the information.

Scope of the case

7. The complainant contacted the Commissioner on 1 May 2020 to complain about the way his request for information had been handled.

8. The Commissioner considers the scope of her investigation to be to determine if the ICO has correctly withheld the information within the scope of the request on the basis of either section 31, section 40 or section 44 of the FOIA.

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 submissions 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. In this case the withheld information is a report following an audit into the data protection practices of the DVLA, based on information the DVLA provided to the ICO. The ICO stated that it considered disclosing the withheld information would have the effect of fewer data controllers agreeing to such audits or voluntarily providing relevant information. This would, in turn, undermine the ICOs ability to effectively regulate the information acts and prejudice its ability to perform its statutory role.
12. The ICO also considered that disclosure would likely undermine and affect the free uninhibited flow of information. This in turn could result in data controllers being less willing to engage and cooperate with the ICO in the future. The ICO argued that it was essential that organisations continued to engage with it in a constructive and collaborative way without fear that the information they provide will be made public prematurely, or at a later date, if it is inappropriate to do so. Disclosure of this information would therefore be likely to prejudice the ICOs regulatory functions.
13. In its submissions, the ICO has confirmed that it considers disclosing the information 'would be likely' to prejudice the above purposes. The ICO has explained 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 purposes of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation.

14. These regulatory functions are set out in statute within the data protection legislation – namely the General Data Protection Regulations (GDPR) and the Data Protection Act 2018 (DPA18), and previously, the Data Protection Act 1998 (DPA98).
15. The ICO states that a considerable proportion of its regulatory work and resources are focused on ascertaining whether data controllers have complied with the statutory requirements placed upon them by data protection legislation.
16. In this case the ICO has confirmed the requested information relates to the ICO data protection audit report carried out in respect of the DVLA and their processing of personal data. The ICO therefore argues that it follows that the purposes referred to in subsections (a) and (c) of section 31(2) apply in relation to this information.
17. The ICO argues that disclosing this information would create a real risk of distracting from and causing interference with its audit process and would be likely to prejudice its ability to effectively regulate data protection legislation and establish compliance with the laws it regulates.
18. The Commissioner is satisfied that 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.
19. The information withheld under section 31(1)(g) directly relates to a data protection audit, conducted to assess the data protection practices of a data controller with a view to establishing if it is compliant with the data protection legislation.
20. However, for the exemption to be engaged there must be a clear causal link between disclosure of the information and the stated prejudice. Whilst it is apparent to the Commissioner that the information can be linked to the statutory functions cited she must also consider how disclosing the information might prejudice these functions either now or in the future.
21. The primary argument advanced by the ICO is the so-called 'chilling effect' argument – that is that disclosing the report may disrupt the voluntary flow of information and the ways in which data controllers or public authorities interact with the ICO in the future.
22. The Commissioner notes that the standard practice for ICO audits is for executive summaries to be published on its website. There is no precedent for the full audit reports to be made publicly available. It therefore stands to reason that the information supplied by data

controllers during an audit is done so with some expectation this will not be shared more widely and is to inform the audit process and the ICOs ability to assess compliance with data protection legislation.

23. As such the Commissioner cannot dismiss the argument that disclosing full audit reports may have an impact on the ways in which organisations engage with the ICO. In many cases audits are voluntary and disclosing information which may affect data controllers thinking in proactively engaging with the ICO may affect the quality and uptake in audits; thus having a prejudicial effect on the functions at subsections (a) and (c) of section 31(2).
24. The Commissioner has now gone on to consider the public interest test.

Public interest arguments in favour of disclosure

25. The ICO accepts that disclosing the information would help to demonstrate that the ICO is complying with its duties by overseeing the performance of organisations.
26. It also acknowledges that there is a public interest in increasing transparency around the data protection practices and measures in place at individual organisations.

Public interest arguments in favour of maintaining the exemption.

27. The ICO argues there is a public interest in ensuring that organisations are not deterred or inhibited from participating fully and candidly with the auditing process, either as a part of this audit or future audits.
28. It further argues that in order to ensure effective and productive relationships with the organisations it regulates it must continue to have open and collaborative engagement without the fear that information provided to the ICO will be made public prematurely or, as appropriate, at all.
29. The ICO also states there is a public interest in it not disclosing the measures that organisations have in place regarding their data protection practices where such a disclosure could undermine the effectiveness of those measures.

Balance of the public interest

30. The Commissioner does not consider there are particularly strong arguments for disclosure of the withheld information. She accepts there is value in the disclosure of information that increases transparency and may increase understanding of the data protection practices in place at organisations.

31. That being said, the ICOs audit functions are important in achieving its statutory functions, particularly in identifying areas of concern that may warrant regulatory action. Organisations can voluntarily engage with the audit process and for it to be as efficient as possible it is logical that engagement between the parties should be unhindered by fear of disclosure. Whilst the arguments are not compelling on either side the Commissioner does accept the weight given to the need to allow for free and frank exchanges of information to maintain the efficiency of the audit process does outweigh any public interest in disclosure in this case. There is a stronger public interest in the ICO being an effective regulator, able to assess if breaches of data protection legislation have occurred and further action is needed, and a regulator that organisations want to willingly engage with.
32. On balance the Commissioner therefore 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 subsections 31(2)(a) and 31(2)(c). The Commissioner has therefore not gone on to consider the application of the other exemptions cited by the ICO.

Right of appeal

33. 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

34. 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.
35. 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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