

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

### **Decision notice**

**Date:** 9 January 2023

**Public Authority:** Information Commissioner  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding a data breach investigation. The above public authority ("the public authority") relied on section 44 of FOIA (statutory prohibition) to withhold the requested information.
2. The Commissioner's decision is that the public authority is entitled to rely on section 44 of FOIA to withhold the information.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 6 October 2021, the complainant wrote to the public authority and requested copies of correspondence generated in the course of investigating a particular data breach. The public authority relied on section 44 of FOIA to withhold the information it held.
5. On 3 August 2022, the complainant made a fresh request for a copy of the information that the public authority had relied on section 44 of FOIA to withhold.
6. The public authority responded on 26 August 2022. It again relied on section 44 of FOIA to withhold the requested information – a position it upheld following an internal review.

## Reasons for decision

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7. Section 44 of FOIA allows a public authority to withhold information whose publication outside of FOIA would be prohibited by law.
8. Section 132 of the Data Protection Act 2018 makes it a criminal offence for the Commissioner, or anyone currently or previously employed by his office, to disclose identifiable information that he has obtained during the course of carrying out his functions – unless the disclosure is made with lawful authority. For a more detailed explanation, see decision notice IC-100988-C1B9.<sup>1</sup>
9. The complainant has (correctly) not disputed that the information in question is subject to this statutory prohibition. However they have argued that there is a lawful authority for the disclosure because it would either be made “for the purpose of criminal or civil proceedings” or would be necessary in the public interest. This is incorrect.
10. Disclosure under FOIA is disclosure to the world at large. It is the equivalent of the public authority publishing the information on its website.
11. The lawful gateways set out in section 132(2) are intended to set out a limited number of circumstances in which it will not be a criminal offence for the public authority to disclose certain information. Those gateways should thus be read restrictively.
12. If the public authority were to publish the information on its website, it would not be doing so for the purpose of criminal or civil proceedings (unless a specific court order had been made requiring publication). The “proceedings” gateway will only apply to a restricted disclosure made, during the course of criminal or civil proceedings, to one of the other parties, or to the court itself. This is not such a disclosure and therefore this specific gateway would not provide lawful authority.
13. The Commissioner is also satisfied that disclosure is not necessary to satisfy the public interest. The complainant is pursuing a private interest which, whilst legitimate, is unlikely to be of significant interest to the wider world – and is one which could be achieved by less-intrusive means than publication to the world at large (such as bringing a court

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4019057/ic-100988-c1b9.pdf>

action and seeking a limited disclosure, either through court disclosure rules, or through pre-action correspondence).

14. As there is no lawful gateway through which this information could be disclosed, it follows that section 132 of the Data Protection Act 2018 prohibits its disclosure and the information is thus exempt under section 44 of FOIA.

## Right of appeal

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15. 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: 0203 936 8963

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)

16. 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.
17. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**