

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the ICO is entitled to withhold information associated with a complaint case under section 44(1) of FOIA as there's a prohibition on its disclosure. It's not necessary for the ICO to take any corrective steps.
2. This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him 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.

Request and response

3. On 23 April 2023, the complainant requested the following information from the ICO:

"This is a meta request asking for disclosure of all recorded information held by the Information Commissioner's Office, in any type or form (including any printed documents, draft, notes, recordings of telephone conversations, computer files, letters, emails, photographs, and sound or video / CCTV recordings) which relates –

directly or indirectly – to the following case reference: IC-157474-FOJ6”

4. The ICO handled information in scope that is the complainant’s own personal data under the data protection legislation.
5. The ICO considered the remaining information under FOIA and withheld that information under section 44(1).
6. In respect of the information handled under FOIA, the ICO provided an internal review on 11 July 2023. The ICO disclosed some information it had previously withheld but maintained its reliance on section 44(1) in respect of correspondence between it and HM Treasury.

Reasons for decision

7. This reasoning focusses on whether the ICO is entitled to withhold correspondence between it and HM Treasury.
8. Section 44(1)(a) of FOIA says that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it’s not subject to the public interest test.
9. In its initial response to the request the ICO had explained that the enactment that prohibits it from disclosing the information is the Data Protection Act 2018 (DPA). Section 132(1) of part 5 of that Act states 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 sources, unless the disclosure is made with lawful authority.”
10. The ICO also explained that section 132(2) lists circumstances in which a disclosure can be made with lawful authority but that none of them applied here.

11. With regard to the criterion at section 132(1)(a) of the DPA, the information was provided to the Commissioner by HM Treasury during the course of the Commissioner's investigation under section 50 of FOIA into a complaint submitted to him. As such, the information being withheld under section 44(1) was provided to the Commissioner for the purposes of discharging the Commissioner's functions.
12. With regard to section 132(1)(b), the information relates to an identifiable public authority – HM Treasury - which the Commissioner considers to be a business for the purposes of the legislation.
13. Finally, the Commissioner is satisfied 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. If it were public, the complainant would not have had to request it under FOIA.
14. As the ICO noted, section 132(2) of the DPA provides gateways for lawful disclosure. The Commissioner accepts that none of these gateways have been met.
15. In view of the above criteria being met, the Commissioner considers that the ICO correctly applied section 44(1) of the FOIA to the disputed information. This is in line with his decision in numerous other similar cases.¹
16. Section 44 is an absolute exemption and is not subject to the public interest test. The Commissioner's decision is therefore that the ICO is entitled to withhold the information under section 44(1) of FOIA.

¹ [ic-206342-b1z8.pdf \(ico.org.uk\)](#)

Right of appeal

17. 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

18. 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.
19. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF