

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2024

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

Decision (including any steps ordered)

1. The complainant has requested from the ICO its exchanges with Thames Valley Police (TVP) on the subject of third-party subject access requests. The ICO refused to provide the information, citing section 44(1) (prohibitions on disclosure) and 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that section 44 is engaged. He has also decided on the balance of probability that there is no further information held relevant to the request.
3. The Commissioner does not require further steps.

Naming

4. 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's 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

5. On 17 November 2023 the complainant wrote to the ICO and requested information in the following terms:

"I ask to be provided your exchanges with Thames Valley Police in respect of Third-Party Subject Accesses requests, their 'exemption' of 'not in the spirit of the Act' and enforced subject access. The information will relate to 2023 exchanges. Your references will include IC-220316-G1X1 & IC-242377-T6S4."
6. On 28 November 2023 the ICO refused to provide the requested information, citing sections 44 and 40(2) of FOIA.
7. The complainant made a request for an internal review on the same date and raised various points about subject access requests and TVP. The complainant suggested that TVP was neither an "individual nor a "business".
8. On 7 December 2023 the ICO provided an internal review that maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2023 to complain about the way their request for information had been handled. They stated that they were not interested in personal data, only in the process. The complainant raised many points about subject access requests and TVP that cannot be considered here though they indicate the importance of the request to them.
10. The ICO explained that its "general position is that exchanges about individual complaint cases are the personal data of the complainant". and that the correspondence about a complaint and its circumstances is "likely to be so intricately linked to the individuals' circumstances that they would be identifiable, and they would not reasonably expect the ICO to make this information public". The ICO "took the approach in respect of this request that any additional information" it held in scope of other complaint cases should be withheld under that exemption. It had not carried out a search to establish this.
11. In its response to the Commissioner's investigation letter the ICO effectively withdrew its citing of section 40(2) of FOIA, explaining that, "This exemption was applied to any information in scope held on complaint cases other than the cases referred to in the request." After a

search, it transpired that there was no personal information falling within scope.

12. There was no information "held in respect of IC-220316-G1X1" as the ICO "did not correspond with Thames Valley Police about that matter..." All the information "held on IC-242377-T6S4 was withheld under s.44".
13. Therefore the Commissioner considers that the scope of his investigation is to look at the ICO's citing of section 44 of FOIA and to consider whether there is any information held by the ICO that was not withheld under that exemption.

Reasons for decision

Section 1 – General right of access to information held by public authorities

14. As set out earlier, the ICO had originally cited section 40(2) to some of the requested information. Having conducted a search, it concluded that it did not hold any personal information relevant to the case. In order to determine this, the ICO ran a report from the -

"case management system of data protection complaint cases against TVP which were active in 2023 where the 'Decision primary reason' was any of the options under that category which relate to subject access requests. This includes 'Prt 3 - Ch3 - S45 - Right of Access' which was the category assigned to IC-242377-T6S4 and several other categories linked to the right of access under Part 3, Chapter 3, S45 DPA and Article 15 GDPR".

The ICO contends that any complaint cases that are relevant to this request would have been held under these search categories. The search returned 47 cases.

15. These files were checked manually and any case discounted where TVP was not corresponded with. Any case where the ICO did correspond with TVP was checked for mention of "enforced subject access", "third-party subject access" and "not in the spirit of the act". No references were located. The system was also checked for advice cases lodged by TVP. This located a limited amount of cases and "they did not concern the matters mentioned". Therefore the searches did not locate any information falling within scope.
16. On the balance of probability, the Commissioner accepts that the ICO does not hold any information falling within the scope of this request that was not withheld in the refusal notice under the section 44 exemption.

Section 44 of the FOIA – prohibitions on disclosure

17. Section 44 of the FOIA states that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.”

18. Section 44 of FOIA is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.

19. The ICO provided the information that had been withheld under section 44(1)(a) to the Commissioner.

The ICO’s view

20. The ICO explained that:

“The relevant statutory bar is the Data Protection Act 2018 and specifically section 132(1) of part 5 of that Act. The relevant legislation in this case is the DPA 2018. In this particular case, the ICO is relying on section 132 of DPA 2018 as the statutory bar preventing disclosure. Section 132(1) 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...”

The gateways for “lawful authority” are set out in paragraph 23.

21. The ICO pointed out that - "Section 132(3) of the DPA 2018 makes it a criminal offence for any person to disclose information in contravention of section 132(1)." The information it withheld "was provided to the ICO for the purpose of discharging one of the ICO's functions..."

22. The withheld information -

"contains information provided to us by TVP in the course of handling a data protection complaint, which falls under the Commissioner's functions under the UK GDPR and DPA 2018, from which TVP are identifiable, and this information was not available to the public and we did not have lawful authority to disclose it".

23. The complainant did not accept that TVP are "an identifiable business under this enactment". The ICO drew the Commissioner's attention to an established point that the Commissioner himself has previously highlighted. The judgment in *Lampert v Information Commissioner* [2019] UKUT 60 (AAC) (referring to section 59 of the DPA 1998 which was the predecessor to section 132 of the DPA 2018) underpins the ICO's view that TVP is a 'business':

'If the word "business" in section 59 (1) of DPA 1998 were to be given the limited interpretation for which Mr Lampert contended, it would mean that a very considerable number of the public authorities covered by schedule 1 of FOIA, namely, those which are governmental or not for profit organisations would not be caught by section 59(1)... Such a result gives rise to a nonsense and cannot be what Parliament intended....I am satisfied for the above reasons that the word "business" in section 59 cannot be limited to bodies which are engaged in commercial activity but encompasses anybody engaged in regular professional activities, including all those bodies listed or included in schedule 1 to FOIA which are not-for-profit organisations.'

24. The ICO then turned to the "possible gateways through which disclosure can take place with lawful authority":

"(2) For the purposes of subsection (1), a disclosure is made with lawful authority only if and to the extent that -

(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),

(c) the disclosure was made for the purposes of, and is necessary

for, the discharge of one or more of the Commissioner's functions,

(d)¹.....

(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising, or

(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest."

25. The ICO was not aware if the complainant had "raised any particular challenges specific to the gateways but we consider that precedent establishes that gateways b, c, and e are not engaged in these circumstances". The ICO explains that the complainant did raise a query regarding gateway (a), "as to whether consent was or ought to have been sought from TVP for disclosure of this information". The ICO relies on what it said to the complainant in the internal review, to support its argument that (a) is not a gateway, that it did not need to seek consent again and was not required to do so:

"...we did not seek consent in respect of this particular request, because we have sought their consent for disclosure of correspondence from the same case file in relation to a recent previous request and were unable to obtain it. We therefore did not consider that it was necessary to seek consent again, and the legislation does not require us to do so, the gateway relies only upon the fact of whether we have consent or not."

26. Regarding the potential gateway at (f) the ICO underpinned its view with the judgment in *Lamb v Information Commissioner EA/2009/0108*:

'when considering the test to be applied, the Tribunal stated -

"18. Although a determination under section 59(2)(e) is based on a public interest test it is very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is

¹ The Commissioner notes that gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union.

required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure.”

27. The ICO also directed the Commissioner to his previous decision [IC-40162-K2S5](#) which -

“establishes a need for a three stage test in determining the public interest for the purposes of the gateway: “Firstly, any legitimate (public) interests in disclosure must be identified; second, it must be demonstrated that disclosure to the world at large is “necessary” to achieve those interests and that there is no less-intrusive means by which the interests can be achieved; finally, if disclosure is necessary, the interests in disclosure must be balanced against the rights and freedoms of the subject(s) of the information”.

28. The ICO’s view is that “there is some public interest in some cases in understanding how a data controller has responded to a data protection complaint against it”. This does not mean “that disclosing their responses is necessary to achieve those interests or that this cannot be achieved by less intrusive means”. The ICO publishes information in various ways – “through the complaints and concerns datasets” and when “issues arise” that are “significant enough to require regulatory action...information about that action is published routinely including copies of the relevant notice”. The ICO argues that where,

“complaints...don’t lead to regulatory action, the datasets meet the public interest in this type of information at a level of detail that is appropriate, and is no pressing public need for publication of more detailed information such as the responses provided by the data controller to the regulator”.

29. Its overall assessment is that -

“Even if disclosure was found to be necessary in the public interest, this would not outweigh the obvious public interest in data controllers being able to engage in free and frank exchanges of information with the regulator in respect of data protection complaints without fear of disclosure of that information, and thereby in the ICO’s ability to regulate effectively.”

The Commissioner’s view

30. The complainant questioned whether the statutory bar at section 132(1)(b) has been met because they do not accept that TVP is an individual or business. This factor has been considered previously in the

Commissioner's decision notices and his view is set out in paragraph 23 of this decision.

31. The Commissioner's guidance (in line with the Upper Tribunal² where it was determined that neither the Commissioner nor the tribunal had jurisdiction to determine whether the public authority had acted reasonably) states the following:

"Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable. So, if there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway, then the Commissioner will accept that section 44(1)(a) applies."³

32. The Commissioner's decision is that the ICO is entitled to rely on section 44(1)(a) of FOIA to withhold the requested information. Section 132 of the Data Protection Act 2018 prohibits the ICO from disclosing it, and there is no lawful gateway for disclosure.

² Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AC

³ [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-approach-to-transparency/foia-guidance/foia-guidance-1.1-31122020)

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: 0203 936 8963

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.

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