

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that, under section 44(1)(a) of FOIA, the ICO is entitled to withhold communications between the ICO and Potto Parish Council 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. The complainant made the following information requests to the ICO on 21 November 2023 and 26 November 2023:

ICO reference IC-271671-Q4C9:

"I would also be most grateful to receive a copy of whatever advice was sent to Potto council. [...] see excerpt below from its October 2023 minutes.

'Email from ICO commissioner. Discussed policy from 'What do they know' and 'FOI' about pseudonyms.'"

and

ICO reference IC-273058-N4P8:

"...I note the excerpt in the minutes above records that there has been a 'meeting with the ICO'...Please can you send me information confirming the nature and detail of this 'meeting', including the advice or Recommendations made by the ICO."

4. The ICO responded to both requests on 8 December 2023. Regarding IC-271671-Q4C9, the ICO confirmed that it considered that the requested information comprised advice it provided to Potto Parish Council ('the Council') which had been referred to in the Council's meeting minutes of 17 October 2023. Regarding IC-273058-N4P8 the ICO confirmed that it had a meeting with the Council on 23 October 2023 and that this request was for any advice, or recommendations the ICO had given to the Council.
5. For both requests the ICO relied on section 44 and section 31 of FOIA to withhold the requested information. Section 31 concerns law enforcement. The ICO provided an internal review on 13 February 2024. It maintained its position.

Reasons for decision

6. In the first instance, this reasoning covers the ICO's application of section 44(1) of FOIA to the complainant's two requests. If necessary, the Commissioner will consider the ICO's application of section 31.
7. 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.

8. In their request for an internal review the complainant put forward the following arguments for why the ICO wasn't entitled to withhold the information under section 44:
 - The minutes of Potto Parish Council meetings must (by law) be published.
 - It's in the public interest for the information to be disclosed.
9. The Commissioner has taken account of these arguments but the majority of cases involving section 44 of FOIA, including this one, are quite straightforward.
10. In its refusal notices to the complainant, the ICO explained that the enactment that prohibits it from disclosing the requested information under FOIA is the Data Protection Act 2018 (DPA), specifically section 132(1) of part 5 of that Act¹.
11. The ICO went on to explain that section 132(2) of the DPA lists circumstances in which a disclosure can be made with lawful authority but that none of them applied in this case. As a result, the information was exempt from disclosure.
12. The ICO repeated this explanation in its internal review response.
13. The Commissioner has reviewed the information the ICO is withholding.
14. With regard to the criterion at section 132(1)(a) of the DPA 2018, the information was provided to the Commissioner by the Council during the course of the Commissioner's investigation into a complaint submitted to him under section 50 of FOIA. As such, the information being withheld under section 44(1)(a) was provided to the Commissioner for the purposes of discharging the Commissioner's functions.
15. The Commissioner is satisfied that the criterion at section 132(1)(b) is also met. This is because the information relates to an identifiable public authority – Potto Parish Council - which the Commissioner considers to be a business for the purposes of the legislation.

¹ <https://www.legislation.gov.uk/ukpga/2018/12/section/132>

16. Finally, the Commissioner is satisfied that the criterion at (c) is met ie that the information wasn't, and hadn't previously been, available to the public at the time of the disclosure. If it had been public, the complainant wouldn't have had to request it under FOIA.
17. 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.
18. As noted, section 44 is an absolute exemption and isn't subject to the public interest test.
19. Since the above criteria have been met, the Commissioner is satisfied that the ICO correctly applied section 44(1)(a) of FOIA to the disputed information. This is in line with his decision in numerous other similar cases².

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024418/ic-206342-b1z8.pdf>

<https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4030190/ic-292802-f3x8.pdf>

Right of appeal

20. 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

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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