

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2013

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision

1. The complainant requested copies of the legal advice referred to by the Information Commissioner, Chris Graham, in his written evidence to the Leveson Inquiry concerning the ICO's decision not to pursue prosecutions against journalists for unlawfully obtaining personal data.
2. The ICO originally identified two pieces of legal advice held as part of 'Operation Motorman' as falling within the scope of the request. It refused the request under section 14(2) on the grounds that the request was a repeat of an earlier request. Later the ICO dropped section 14(2) and relied on section 21 to withhold the information on the basis that the two pieces of legal advice had already been provided to the complainant in response to the earlier request. Ultimately, the ICO argued that the information falling within the scope of the request was not limited to just the two documents originally identified. Instead it argued that the external legal advice referred to consisted of the entire body of external legal advice that had been obtained during Operation Motorman. It went on to withhold this information under section 21 on the basis that the information was on the Leveson Inquiry website.
3. The Commissioner's decision is that the request could not be refused under section 14(2). The information provided in response to the earlier request is exempt under section 21. Information redacted from one of those documents is exempt under section 40(2). The remaining external legal advice falling within the scope of the request is not exempt under section 21 as the ICO has failed to identify to the complainant what

advice that is or clearly direct him to it. The ICO did not breach its duties to provide advice and assistance under section 16.

4. The ICO should provide the additional external legal advice which falls within the scope of the request or apply appropriate exemptions. This includes the information redacted from December 2003 advice.

Request and response

5. On 12 December 2012, the complainant wrote to the ICO. He quoted from paragraph 4.8 of Chris Graham's evidence to the Leveson Inquiry as follows,

"4.8 This experience informed our decision not to prosecute any of the journalists involved in these cases. We were concerned that even if we were successful in securing convictions the sentencing would be minimal. External legal advice at the time suggested that for this reason it would not be in the public interest to pursue possible prosecutions. This was also because of the difficulty in proving that the journalists involved knew that the information they were seeking could only be obtained by unlawful means."

6. The complainant then requested a copy of the legal advice referred to in that statement.
7. It should be noted that only part of paragraph 4.8 has been quoted. The concluding sentence reads,

"Furthermore the broad scope given to the public interest in journalism in *Campbell v Mirror Group Newspapers*, suggested to us that a successful prosecution would be unlikely."

8. The ICO responded on 15 January 2013. It stated that the complainant had already been provided with the information he sought in response to an earlier request and that no further information was held. Later the same day the ICO clarified that since the complainant had already been provided with the information, it considered that his latest request was a repeat request and therefore the ICO was not obliged to deal with it under section 14(2) of the FOIA.
9. Following an internal review the ICO wrote to the complainant on 23 January 2013. It upheld its decision that the request was a repeat of an earlier request and therefore could be refused under section 14(2).

Background

10. The Leveson Inquiry was a public inquiry, chaired by Lord Justice Leveson, into the culture, practices and ethics of the British Press. Part 1 of the Inquiry ran from July 2011 and culminated in the publication of the Leveson Report in November 2012. Part 2 of the inquiry will commence following the conclusion of police investigations into the activities of some journalists and any subsequent criminal prosecutions. One of the main issues looked at by the Inquiry was the methods used by journalists to obtain personal details of both celebrities and ordinary members of the public linked to news stories.
11. The ICO provided evidence to the Inquiry in respect of an investigation it conducted, known as Operation Motorman, into criminal breaches of the Data Protection Act by private detectives who provided services to journalists.

Terminology

12. This decision notice relates to an investigation by the ICO as regulator of the FOIA into whether the ICO has complied with its obligations under the FOIA as a public authority. The term 'Commissioner' will be used to refer to the ICO when acting as regulator. The term 'ICO' will be used to refer to the public authority being investigated. The request relates to the evidence provided by Chris Graham, the Information Commissioner himself. When referring to the Commissioner in respect of the evidence he provided he will be referred to by name, Chris Graham.

Scope of the case

13. The complainant contacted the Commissioner on 2 February 2013 to complain about the way his request for information had been handled.
14. In particular he was concerned that the information the ICO had identified as falling within the scope of his request did not discuss the decision not to prosecute journalists, nor did it address the difficulty in proving that journalists knew they were committing an offence. He therefore considered that the use of section 14(2) was inappropriate.

15. The complainant accepted that no other information was held. He argued that if the information he had previously been provided with was not that described by Chris Graham in his evidence, and if no other information was held, the correct response to his request should have been that no information was held, ie that the legal advice referred to by Chris Graham did not exist, or at least was not held in a recorded format.
16. The complainant also complained that the ICO had failed to provide advice and assistance under section 16.
17. During the course of the Commissioner's investigation, the ICO withdrew its application of section 14(2) and instead relied on section 21 – information accessible to the applicant by other means, and section 40(2) - personal information about a third party.
18. Initially this late reliance on section 21 was on the basis that, although the ICO no longer believed the request could be regarded as a repeat request, it still considered the information provided in response to the earlier request was the same as that captured by the latest request, and that therefore the information was already available to the complainant. The only exception to this was a limited amount of information that had been redacted from one document on the grounds that it was personal data of a third party and its disclosure would breach the data protection principles of the Data Protection Act 1998 (DPA).
19. The Commissioner considers that the main issue to be decided is whether the ICO is entitled to rely on sections 21 and 40 to withhold the requested information. However the notice will first deal with the ICO's initial application of section 14(2). Finally the notice will consider whether the ICO was obliged to provide advice and assistance under section 16.

Reasons for decision

Section 14(2)

20. The ICO's original response to the request was to refuse it on the basis that it was repeat of an earlier request. The original decision was upheld following an internal review.
21. Section 14(2) states that where a public authority has previously complied with a request from the same person, it is not obliged to comply with a subsequent identical or substantially similar request unless a reasonable time elapsed between the two requests.

22. It is important to recognise that at the time of Operation Motorman, which had ran its course by 2005, Chris Graham's predecessor, Richard Thomas was the Information Commissioner. It is understood that legal advice was obtained at different stages as Operation Motorman progressed and circumstances changed. The decisions in relation to that operation, including whether to pursue prosecutions against journalists evolved in light of these changes in circumstances, the various pieces of legal advice obtained, both internal and external, together with the deliberations and discussions of the staff involved at that time, some of whom have since left. The ICO has therefore explained that there is not one particular piece of legal advice which explains all the reasons behind the decision not to prosecute journalists. The Commissioner accepts that this entirely plausible.
23. When initially responding to the request Chris Graham was consulted regarding what legal advice he was in fact referring to in his evidence. From that discussion it was established that in preparing his evidence Chris Graham was aware of and briefed about all the relevant files on Operation Motorman. Chris Graham's understanding of the decision not to prosecute journalists was therefore formed from that material as a whole.
24. When initially responding to the request the ICO searched through all the material that Chris Graham would have been aware of. Having consulted with him the ICO was aware that there would not be one specific piece of legal advice that related to the public interest in pursuing prosecutions against journalists because of the minimal sentences that journalists may receive even if convicted. Therefore it tried to identify information that most closely related to this issue.
25. As a result it identified two pieces of external legal advice that it believed most closely resembled the advice referred to in Chris Graham's evidence. The first was part of a counsel's opinion from December 2003 (the December 2003 advice) and the note of a meeting with an external adviser from May 2005 (the May 2005 meeting note).
26. Both these pieces of advice had previously been provided to the complainant in response to an earlier request he had made for the legal advice referred to by the previous Information Commissioner, Richard Thomas, in his evidence to the Leveson Inquiry. That earlier request was made on the 12 November 2012.
27. When responding to the complainant's second request in January 2013 the ICO followed the Commissioner's guidance that was current at that time. That guidance stated that,

"... a request will be substantially similar to a previous request only if you need to disclose substantially similar information to respond to both requests (ie with no meaningful differences)."

28. The Commissioner recognises that the ICO's response accorded with that guidance. However the Commissioner has conducted a review of his guidance and his approach to repeat requests has changed. His new approach is to focus more on the actual request rather than the information which falls within the scope of that request. That is, the focus is on how the request describes the information sought; how it defines the limits or parameters of the information.
29. When seeking the advice referred to in Richard Thomas's evidence to the Leveson Inquiry, the complainant adopted a similar approach to that used in his later request. He quoted from a newspaper blog reporting Richard Thomas's evidence,

"12.04: Thomas says a note of a meeting on May 27 2005, supports his position that he was keen to prosecute journalists but he had been prevented because of the result of the Blackfriars trial which resulted in conditional discharges against private investigators in relation to Operation Glade.

The note says

"At the end of the day, RT stated that had to swallow hard and accept the advice he was given by counsel on this matter." "
30. The complainant then requested the legal advice referred to and, if different, a copy of the meeting note.
31. The meeting note and legal advice referred to by Richard Thomas proved to be one and the same document ie the May 2005 meeting note referred to at paragraph 25 above. It appears that the portion of December 2003 advice was provided to be helpful. It can be seen therefore that the ICO had in fact already provided the complainant with the information it initially believed fulfilled his later request. Therefore, following the guidance that was current at the time, it would have seemed appropriate to the ICO to apply section 14(2).
32. However under the Commissioner's amended guidance, a later request will only be substantially similar to the first request if the parameters of the information sought in both requests are the same or do not differ significantly. It is therefore necessary to compare how the two requests were phrased.
33. In this case the new request was made by reference to Chris Graham's evidence. Where the requested information is described by reference to

a third party in this way, the Commissioner will consider how that third party's description could reasonably be interpreted by the individual making the request. If it is reasonable to expect that the individual making the request would have understood that the information they were seeking was the same as that which they had previously asked for, that request would be a repeat of the earlier one.

34. Therefore in this case it is necessary to consider how the description of the legal advice referred to by Chris Graham compares with that referred to by Richard Thomas.
35. The Commissioner recognises that Chris Graham's evidence could be construed as suggesting that the legal advice he referred to dealt explicitly with the potential for journalists to receive only minimal sentences. In light of this the Commissioner considers that it is not reasonable to find that the complainant would have believed he was seeking the same information that he had previously requested. (As is explained later on in the decision notice, the Commissioner is ultimately satisfied that the legal advice being referred to was in fact a broad body of legal advice and not limited to just the two pieces of advice identified by the ICO when initially responding to the request.)
36. The Commissioner finds that the ICO was wrong to treat the request of the 12 December 2012 as a repeat of the 12 November 2012 request.
37. Once the ICO was made aware of the change in approach (which was still being finalised at the time of the complaint to the Commissioner), it withdrew its reliance on section 14(2). Instead it withheld the information on the basis that it was exempt under section 21 – information accessible to the applicant by other means, and section 40(2) on the basis that some information had been redacted from the May 2005 meeting note as it was the personal data of a third party, the disclosure of which would breach the DPA.

Section 21

38. Section 21 provides that information is exempt if it is reasonably accessible to the applicant without it being necessary for them to formally request the information under section 1 of the FOIA.
39. It should be noted that section 21 is concerned with how accessible the information is to the applicant, not the general public.
40. The ICO informed the complainant in a letter emailed 26 July 2013 that it was now relying on section 21 to withhold the information he had requested. This was still on the basis that the information referred to by

Chris Graham was limited to the two pieces of legal advice that it had provided in response to his earlier request. That is, that as he already had copies of the information believed to fall within the scope of his request, that information was already reasonably accessible to him.

41. The Commissioner accepts that information is reasonably accessible to an applicant if they already have a copy of the information in question.
42. However it then became apparent that the ICO no longer considered the information referred to by Chris Graham was limited to the two pieces of legal advice already provided. It now explained that as Chris Graham's evidence was based on the totality of the information held by the ICO on Operation Motorman his evidence should be interpreted as referring to all the external legal advice contained within that information. That is to say, all the external legal advice contributed to his understanding of the ICO's decision not to prosecute journalists. The ICO went on to explain Chris Graham was unable to pin point any particular piece of external legal advice from that body of information as being that which he was referring to in his evidence.
43. The ICO claimed that as all this information was available on the Leveson Inquiry website it was still reasonably accessible to the applicant. Therefore it maintained its reliance on section 21.
44. The Commissioner has considered the ICO's argument very carefully. To determine whether the ICO's position is plausible it is necessary to decide both the scope of the request and what information falls within that scope. In this context the scope of the request is defined by the objective interpretation of Chris Graham's witness statement.
45. In his correspondence with the ICO the complainant interpreted Chris Graham's evidence as referring to external legal advice stating that it was not in the public interest to prosecute journalists because of the likely sentences and the difficulty in proving they knew they were committing an offence. The Commissioner does not accept this is an objective interpretation of the evidence.
46. Firstly the Commissioner considers that evidence only refers to external legal advice in respect of the minimal sentences that journalists were likely to receive and how this affected the public interest in pursuing prosecutions. This becomes clear when paragraph 4.8 is read carefully. Paragraph 4.8 of Chris Graham's evidences refers to concern over minimal sentencing and then says, "External legal advice at the time suggested that for **this** reason it would not be in the public interest to pursue possible convictions." (emphasis added). The evidence refers to "this reason", singular, that reason being the minimal sentences.

47. Secondly the Commissioner notes that paragraph 4.8 refers to legal advice that "**suggested**" the potential minimal sentences would mean it was not in the public interest to pursue prosecutions. The Commissioner considers that, given the way in which thinking developed over time, it is reasonable to interpret Chris Graham's evidence as meaning that external legal advice held at the time, helped inform and supported the decision that it would not be in the public interest to pursue a prosecution against any journalists, rather than there was advice that explicitly addressed this issue.
48. Therefore the Commissioner needs to decide whether it is credible for the ICO to argue that all the external legal advice accumulated throughout Operation Motorman could help inform the decision that it was not in the public interest to pursue prosecution against the journalists because of the potential minimal sentences.
49. The ICO initially identified the May 2005 meeting note as being one of the pieces of external legal advice that informed that decision. The note contains legal advice that it would not be in the public interest to pursue prosecutions against private investigators due to the minimal sentences they were likely to receive even if convicted. It is easy to see how such advice, could also inform decisions relating to the prosecution of journalists. It is therefore understandable why the ICO initially identified this meeting as falling within the scope of the request. However the Commissioner considers that many factors are capable of influencing the public interest in pursuing prosecutions. For example whether the cost of investigating journalists would have been proportionate bearing in mind the possible minimal sentencing.
50. For this reason the Commissioner does accept that it is plausible that any or all of the external legal advice held in respect of Operation Motorman could have influenced a judgement as to whether it was in the public interest to pursue prosecutions against journalists in light of the potential minimal sentencing. This includes not only the external legal advice that has a relatively obvious connection with the issue of minimum sentencing such as the May 2005 meeting note, but also the less obvious.
51. The ICO has explained that Chris Graham was briefed on, and was aware of, the totality of the information relating to Operation Motorman and that his evidence drew on these documents, which would have included all the external legal advice accumulated over the operation. This being so the Commissioner accepts that the ICO is correct to identify all the external legal advice relating to Operation Motorman as being the legal advice referred to by Chris Graham in his evidence. It follows all this information falls within the scope of the request.

52. Clearly this body of legal advice includes the portion of the December 2003 advice and the May 2005 meeting note which had previously been provided to the complainant. The Commissioner is also satisfied that the ICO has informed the complainant that this information falls within the scope of his request. The Commissioner is therefore satisfied the ICO is entitled to withhold that portion of the December 2003 advice and the May 2005 meeting note under section 21.
53. The complete set of legal advice including the December 2003 advice and the May 2005 meeting note is in the public domain by virtue of being published on the Leveson Inquiry website. It is on this basis that the ICO has claimed that this information is reasonably accessible to the complainant. However, except in relation to the information that the ICO has already provided to the complainant (ie the portion of the December 2003 advice and the May 2005 meeting note), the Commissioner is not satisfied that the ICO can rely on section 21 to withhold this information.
54. The Commissioner considers that where a public authority is relying on section 21 by virtue of the fact that the requested information is already in the public domain that public authority must have precisely directed the applicant to the information.
55. To date the ICO has not informed the applicant of its final position on this matter, ie that in effect, Chris Graham was referring to the totality of the external legal advice held in connection with Operation Motorman in his evidence. Currently the complainant is under the impression that the ICO still believes it is only the May 2005 meeting note and December 2003 advice that was being referred to. The ICO did, in its letter to the complainant dated 26 July 2013, provide links to other documents on the Leveson Inquiry website which might be of interest to him. It also explained that if any of them were considered to be in the scope of the request they too would be exempt under section 21 as they were already publicly available.
56. However when dealing with a request it is the responsibility of the public authority to determine what information falls within the scope of the request and, if applying section 21, to direct the applicant to that information. The Commissioner considers that so far the ICO's responses to the complainant have not provided sufficient clarity as to what information it considers falls within the scope of the request. In light of this it is not possible for the ICO to have directed the complainant, with sufficient precision, to that information. It follows that the Commissioner finds that the ICO is not entitled to rely on section 21 in respect to the remaining external legal advice, based on its responses to date.

57. The Commissioner notes some of the documents filed as exhibits with Chris Graham's evidence on the Leveson Inquiry website have been redacted. Any redacted information that falls within the scope of the request could not be regarded as being reasonably accessible to the applicant and could not be exempt by section 21.
58. The Commissioner notes that there has been information redacted from the two pieces of external legal advice that the complainant has already been provided with. Again, such information is not exempt under section 21. The ICO has not explicitly claimed any exemptions in respect of the redactions from the December 2003 advice. However the ICO has applied section 40(2) to the information redacted from the May 2005 meeting note. Therefore the Commissioner has gone on to consider the application section 40(2) to that document.

Section 40(2)

59. Section 40(2) provides that information is exempt if it is the personal data of a third party and its disclosure would breach any of the data protection principles set out in the DPA. The first data protection principle requires that personal data shall only be processed fairly and lawfully and in particular shall not be processed unless one of the conditions set out in Schedule 2 can be met.
60. When the ICO provided the May 2005 meeting note in response to the complainant's earlier request for the advice referred to by Richard Thomas, it redacted some information from that note. This was on the grounds that it was exempt under section 40(2). This information is not in the possession of the complainant and cannot be deemed to be reasonably accessible to the complainant. In answering the complainant's second request the ICO has maintained its reliance on section 40(2) to withhold this information.
61. The ICO argues that disclosing the withheld information would be unfair to the data subjects ie the individuals the information is about. Having seen an un-redacted copy of the May 2005 meeting note, the Commissioner agrees that it would be unfair to release the information in question. He is satisfied that this is not the sort of information that an employee would normally expect their employer to disclose to the public. In the circumstances it is not appropriate for the Commissioner to provide any further explanation as to why the disclosure would be unfair.
62. The Commissioner finds that the information withheld from the May 2005 meeting note is exempt under section 40(2).

Section 16

63. Section 16 places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to anyone who has made a request. Under section 16(2) a public authority is considered to have met that duty if it follows the section 45 code of practice. In broad terms, the section 45 code of practice is guidance, produced by the Secretary of State, on how public authorities should deal with information requests. It includes what is expected from a public authority in terms of advice and assistance.
64. The complainant originally asked the Commissioner to consider whether the ICO had fulfilled its duty to provide advice and assistance when responding to his request. This was at the time when the ICO was still relying on section 14(2) to refuse his request.
65. At that stage the complainant was under the misapprehension that external legal advice described by Chris Graham in his evidence dealt explicitly with the minimal sentences for journalists and the difficulty in proving they knew they were soliciting unlawful acts. This point was clarified at paragraphs 46 and 47 above. By the time he asked for an internal review the complainant was also aware of a previous request that had been made to the ICO, by a different applicant, for the legal advice referred to by David Smith, one of the ICO's Deputy Commissioners, in a newspaper article. In that press article the Deputy Commissioner was quoted as saying the decision not to prosecute journalists
- "... was based on expert legal advice that it was not in the public interest to pursue prosecution against journalists because of the difficulty in proving beyond all reasonable doubt that the journalists who received information ... knew it could only be obtained illegally."
66. The ICO had responded to this request (the press article request) by stating that the legal advice referred to was not held.
67. Based on the complainant's mistaken belief that the advice referred to by Chris Graham and which he had requested, contained legal advice on this very point, he was understandably confused that the ICO had previously claimed no such advice was held whereas now, it appeared to him, that the ICO was saying the advice existed and had already been provided to him. The complainant argued that in light of this apparent contradiction the ICO should have explained its change in position under its duty to provide advice and assistance.

68. The section 45 code of practice provides guidance in relation to how a public authority should deal with four aspects of the request process. Firstly it deals with the advice and assistance that may be appropriate to help someone make a request under the FOIA. Secondly it provides advice on the steps that a public authority should take if it needs the applicant to clarify what information they are seeking. Thirdly it advises on the limits of the steps it is expected to obtain such clarification. Finally, the code provides guidance on what advice and assistance is appropriate if complying with the request would exceed the cost limit for dealing with requests or where an applicant has indicated that they are not prepared to pay any fees that the public authority has a right to charge in respect of their request.
69. There is nothing in the section 45 code of practice that requires a public authority to help an applicant make sense of the information that has been communicated to them, or that they have been directed to. Nor is there any requirement to address the matters raised by the complainant.
70. Where there is a realistic possibility of satisfying the complainant's concerns the Commissioner considers that it would be good practice for a public authority to do so. However this is often a matter best decided by the public authority itself. Certainly, where a public authority provides a response but fails to take the opportunity to provide any additional explanations of that response, it will not be in breach of its duty to provide advice and assistance.
71. It follows the Commissioner finds that the ICO has not breached section 16.

Specified steps

72. The Commissioner finds that the information falling within the scope of the request and which has not already been provided to the complainant is not exempt under section 21. The Commissioner requires the ICO to disclose this information. However the ICO is entitled to redact from that information any personal data which it is necessary to do so in order to comply with the requirements of the Data Protection Act 1998.
73. For clarity this includes:
 - a. Those parts of the December 2003 advice, not previously disclosed in response to the complainant's request of 12 November 2011.

b. All other external legal advice held in connection with Operation Motorman.

74. The Commissioner does not require the ICO to take any further steps in respect of the May 2005 meeting note.

Right of appeal

75. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

76. 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.
77. 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

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