

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2019

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

Decision (including any steps ordered)

1. In this case the Information Commissioner is both the public authority which is the subject of the complaint and the regulator of the FOIA responsible for investigating the complaint. The notice will use the term Information Commissioner's Officer (ICO) when referring to the Information Commissioner as the public authority subject to the complaint and the term Commissioner will be used to refer to her as the regulator.
2. The complainant has requested from the ICO a copy of its policy in compliance with Schedule 1 Part 4 of the Data Protection Act 2018 (having an appropriate policy document in place when processing personal data on reliance on a condition in Part 1, 2 or 3 of the schedule). The ICO initially applied section 22 of the FOIA to withhold the information. During a review of its handling of the request the ICO changed its position and denied holding information within the scope of the request. However, during the course of the Commissioner's investigation the ICO reverted back to its original position applying section 22 of the FOIA to withhold the requested information.
3. The Commissioner's decision is that the ICO was correct to apply section 22 of the FOIA in this case and that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining

the exemption.

4. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

5. On 19 July 2018, the complainant wrote to the ICO and requested information in the following terms:

"a copy of your Policy designed to show compliance with Schedule 1, Part 4 of DPA 2018"

6. On 17 August 2018 the ICO responded. It confirmed holding information within scope of the request but withheld it citing section 22 of the FOIA (future publication) as its basis for doing so.
7. On 21 August 2018 the complainant wrote to the ICO and requested a review of its handling of the request.
8. On 9 February 2019 the ICO provided its review. It denied holding the requested information. It said that at the time the request was received the policy was in draft form and was not a finalised document. It said that the policy document had now been published and provided the complainant with links to where it could be found on the ICO website. It also apologised for the length of time taken to carry out the review.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically about whether or not the requested information was held at the time of the request, and if it was not held, why she was not informed of this in its initial response.
10. However, during the course of the Commissioner's investigation the ICO reverted back to its original decision and applied section 22 of the FOIA to withhold the information.
11. The Commissioner has therefore considered whether the ICO was correct to apply section 22 of the FOIA to withhold the information. As part of her investigation, the Commissioner has considered whether the

information that has been withheld is within scope of the request and why the ICO said that it was not (within scope) in the review.

Reasons for decision

Section 22 of the FOIA – information intended for future publication

12. Section 22 of the FOIA states that information is exempt from disclosure if the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not) and in all the circumstances it is reasonable to withhold the information until its planned publication.
13. This exemption is also subject to the public interest test. So, in addition to demonstrating that section 22 of the FOIA is engaged, the public authority must consider the public interest arguments for and against disclosure and demonstrate in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
14. The ICO has explained that at the time of the request the policy document was held in draft and could have been subject to change prior to publication and this is why it changed its position during the review and said that the information was not held. On reflection however the ICO said that there was a settled intention to publish the information in the draft (as it appeared at the time of the request and could not reasonably predicted any changes prior to publication) in the future (although a date had not yet been determined) in accordance with its legal duty to comply with Schedule 1, Part 4 of the DPA, that is, to publish a policy document and therefore reverted back to its original position applying section 22 of the FOIA to withhold the information.
15. The ICO has provided the Commissioner with a copy of the draft policy document held at the time of the request and also the final published version. She notes the requirement of Schedule 1, Part 4 of the DPA for the ICO to produce a policy document and that information in the draft appears in the final version, which was published. She also notes that the policy document explains that for processing special category and criminal conviction data the ICO is required to have an appropriate policy in place and that the latest version confirms that this document is the policy document required under schedule 1, part 4 of the DPA . She also notes that there is no requirement in the exemption (section 22) to have a determined publication date. The public authority only has to

demonstrate that there was a settled intention to publish the requested information at the time of the request.

16. The Commissioner has considered a number of previous cases concerning the application of section 22 of the FOIA to draft information. It has been the Commissioner's established viewpoint that documents can go through many drafts before they are finalised. However, if the intention or expectation in producing any one of the drafts is to publish the information in it, the exemption can be considered. Therefore, if there is a settled intention at the time of the request to publish information within scope of the request contained within a draft, the exemption can apply.
17. For the reasons given above, the Commissioner is satisfied that the ICO has sufficiently demonstrated that at the time of the request, information contained in the draft policy document was held with a settled expectation that it will be published at a future date, although this had not yet been determined. The Commissioner notes that at paragraph 67 in the section 22 guidance, it says that it is good practice to provide the requester with an anticipated date of publication¹. She however notes that in this case, the publication date had not been finalised at the time of the request and therefore it was not possible for the ICO to provide an anticipated publication date at the time of responding to the request.
18. Turning now to whether it was reasonable to withhold the information until its intended publication. The Commissioner notes that in its initial response to the requester the ICO did not provide any explanation as to why it was reasonable to withhold the information.
19. The ICO has explained that in order to satisfy Schedule 1, Part 4 of the DPA 2018 it was required to produce the information (a policy document) setting out conditions for the processing of special category and criminal offence data. That at the time of the request it was already in the process of doing so and had committed to publishing the information as soon as agreed and feasibly possible. It was therefore sensible and reasonable to control the release of information in accordance with this commitment. It said that the information is a requirement under new legislation (DPA18) and is therefore of interest to the general public and relates to the processing of data for

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf> v

employment purposes of every ICO member of staff. It is therefore the Commissioner's view that it was sensible and fair to all, to control and manage the release of this information by way of an established publication process in line with the ICO's accepted publishing practice. This would have ensured that the requestor receives the information at the same time as the ICO staff and general public and not prior to general publication.

20. Also, under point 26 of the section 22 guidance it states that the closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place. In this case, the ICO said that the decision to delay the internal review response was taken on the basis that its expectation at the time was that a link to the policy document was set to be made available for disclosure "imminently" and that this could accompany the review response. As the request was made in 19 July 2018 and the review request made on 21 August 2018 at which time the ICO believed the information would be published imminently, although the Commissioner accepts it then was not, she is satisfied that at the time of the request the ICO believed it was close to publishing the information.

Public interest

21. In terms of the public interest, the ICO recognised the public interest in transparency and accountability. It also said that there is a legitimate public interest in the ICO's compliance with the legislation it regulates. However, in this case the ICO felt it was in the public interest to maintain the exemption. It said that there was no pressing public interest in disclosing the information early. The public interest in transparency and its compliance with the legislation would be achieved by pro-active publication of the information on the ICO website which it intended to do and was in the process of completing. Responding to individual requests for the information would therefore also unreasonably impact on the ICO's resources.
22. The Commissioner acknowledges the public interest in transparency and accountability and in ICO employees and members of the public having access to information that would enable them to understand the ICO's processing of special category and conviction data. However in this case the Commissioner is satisfied that there are stronger public interest arguments in favour of maintaining the exemption. She considers it in the public interest that a policy document (containing fair processing information) intended to inform ICO employees and the general public about how the former's data is processed should not cause confusion (by release of incorrect or misleading information into the public

domain) and is accessible fairly to all. She also accepts that there is a legitimate public interest in ensuring that public authorities (funded by the public purse) allocate their resources appropriately and proportionately and notes in this case that there was work already in progress at the time of the request to publish the requested information contained in the draft policy document. The Commissioner is therefore satisfied that disclosure of the requested information does not outweigh the public interest arguments in favour of maintaining the exemption.

Other matters

Section 45 – Code of Practice

23. The ICO's 'Section 45 - Code of Practice – request handling' recognises that there are no statutory time limit on how long an internal review should take to complete. Nevertheless it provides that any deadlines set by the public authority should be reasonable.
24. The ICO considers that generally an internal review should take no longer than twenty working days to complete. In exceptional circumstances it may be necessary to extend this to forty working days².
25. In this case the complainant requested an internal review on 21 August 2018. The ICO confirmed receipt of the request on the same day and on 23 August 2018 replied stating that a review would be carried out.
26. On 20 September 2018 the ICO then wrote to the complainant stating it had been unable to complete the review but would provide a review at the earliest opportunity. On 16 October 2018 the complainant wrote to the ICO chasing the review decision. On 2 November 2018 the ICO replied confirming that the review is still live and it will respond as soon as possible. On 10 December 2018 the complainant wrote to the ICO and made a complaint because of its failure to provide the review decision. On 22 December 2018 the ICO replied and said that it had been unable to complete the review and that it will now do so in January 2019. On 6 February 2019 the complainant wrote to the ICO expressing further dissatisfaction with the length of time being taken to complete

² <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

the review. On 9 February 2019 the ICO provided its review, 121 working days following receipt.

27. The complainant said that the ICO was aware 2 months prior to providing the review that the information was held in draft. This is because, in a response (dated 21 December 2018) to a different request made on 30 November 2018 via whatdotheyknow.com seeking the date the ICO adopted an "appropriate policy document" required for the processing of special category data under the GDPR, and for sensitive processing under Part 3 of the Data Protection Act 2018 (the LED). The ICO replied stating "*I can advise that the Safeguards Policy was approved in December 2018 by the ICO's Data Protection Officer with input from our policy and legal departments.*"
28. The Commissioner asked the ICO for an explanation why if it was aware that the policy was approved in December 2018, the review (stating the information was not held, which, was its stance at the time) in this case was not provided sooner. The ICO replied simply stating it does not dispute that the policy was held in draft format and that the complainant was advised of this in the internal review.
29. The Commissioner also asked the ICO for an explanation why it took 7 months to provide the review and details of any/all action that had been taken after receiving correspondence from the complainant chasing the review.
30. The ICO accepts that when it concluded that the information was not held this should have been communicated to the requester. The ICO said that the decision to delay the response was taken on the basis that its expectation at the time was that a link to the information was set to be made available for disclosure imminently and that this could accompany the review response. This stance was taken in the interests of providing a full and final response and to be helpful, unfortunately the information was not available however for this duration of time. Once it became clear that this was not the case, the review response should have been provided and it regrets that it was not. The ICO acknowledged that the delay in providing the review was lengthy and inappropriate and said it contacted the requester to apologise for this.
31. The Commissioner notes that the ICO failed to provide details of any/all action taken after receiving chaser correspondence from the complainant. She however also notes that the ICO confirmed in its explanation to her its intention to delay the response. The Commissioner acknowledges the ICO's intention in delaying the response in order to provide a link to the requested information in order to be helpful. However, the ICO guidance is clear that a review should take no longer than 20 working days or 40 in exceptional circumstances, and the

Commissioner is concerned by the ICO's failure to conform with the specified timeframe and also in its failure to provide the requester with adequate replies in response to her correspondence chasing the review.

Other information provided (in response to the request)

32. The complainant said that she was dissatisfied that in its review decision the ICO disclosed information that was not within the scope of the request. The complainant requested a policy document relating to the ICO's processing of special category data under Schedule 1 Part 4 of the DPA and says she was provided with links to a 'Safeguards Policy' which is required for sensitive processing of personal data for law enforcement purposes.
33. The ICO has explained to the Commissioner that it provided the complainant with 3 links. 1 link to the Policy Document relating to the processing of special category data and criminal convictions (within scope of the request). As mentioned above, this document states it has been created to satisfy the requirements of Schedule 1, Part 4 of the DPA 2018. In the spirit of customer service and providing assistance the ICO also provided the complainant with 2 links to its safeguarding policy in its entirety, which, it considered maybe of interest to the requester as it includes sensitive processing for law enforcement purposes. It said that this was a discretionary disclosure.
34. The Commissioner has reviewed the information located at all 3 links and notes that the ICO provided the policy document relating to its processing of special category data that was requested. She also acknowledges that the safeguarding policy was outside the scope of the request, but notes the ICO's intention (to be helpful) in supplying this information and she does not consider that in doing so there has been a breach of the Act.

Right of appeal

35. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

**Pamela Clements
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