

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2021

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

Decision (including any steps ordered)

1. The complainant requested a copy of a submission provided by a public authority in response to a complaint he had made. The Information Commissioner ("the ICO") withheld the requested information as it considered that disclosure would contravene section 132 of the Data Protection Act 2018 and therefore section 44 of the FOIA (statutory prohibition on disclosure) would apply.
2. The Commissioner's decision is that the ICO is entitled to rely on section 44 of the FOIA to withhold the requested information. However, as the ICO's refusal notice was not issued within 20 working days and failed to state that it was relying on section 44 of the FOIA to withhold information, the ICO breached section 17 of the FOIA.
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty, as regulator, to make a formal determination of a complaint made against her in her capacity as a public authority – a duty confirmed by the First Tier Tribunal. 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. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request and dealing with previous complaints brought under the FOIA. It uses the term "the Commissioner" when referring to the Information Commissioner dealing with this particular complaint.

Background

5. In 2020, the complainant brought a complaint to the ICO in which he challenged Liverpool City Council's ("the Council") reliance on section 43 of the FOIA to withhold some of the information he had requested. On 5 January 2021, the ICO upheld the complaint and issued a decision notice ordering that the withheld information be disclosed.¹ The Council has lodged an appeal against this notice which, as of the date of this notice, had yet to be determined.

6. On 30 November 2020, during the course of the ICO's investigation, the complainant wrote to the case officer investigating his complaint and asked:

"I would be grateful if you could seek the Council's consent upon receipt of their submission to disclose any additional submissions to me. If they indicate that they consent, this will clearly assist with any subsequent subject access request which I make to the ICO. If they maintain the application of the exemption and do not consent to disclosure, I would invite you to draw your own inferences from that, as there would be no obvious reason for refusing to disclose the basis upon which the exemption was being maintained. Obviously I am not seeking disclosure of any correspondence which reveals the actual information which is the subject matter of this complaint."

7. The case officer was unwilling to provide a copy of the Council's submission voluntarily, but noted that if the complainant wished to make a formal request for the information, the ICO would be obligated to deal with such a request under the appropriate access regime.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619096/ic-46982-x6r1.pdf>

Request and response

8. On 8 December 2020, referring to his ongoing FOIA complaint, the complainant requested information of the following description:

"I would like to know whether or not the Council has made any new submissions which were not included in its original response, so that I can have an opportunity to respond to them before you issue a decision notice. If the only way of achieving this is by submitting a request for information to the [ICO], then I can confirm that I would like a copy of any information sent by the Council to the [ICO] in relation to this complaint. Obviously I am not requesting to see the withheld information, which is the subject matter of the complaint...I would be grateful if you could wait for this request to be processed and any information regarding the Council's submissions to be disclosed before you issue a decision notice in relation to this matter."

9. On 3 March 2021, the ICO responded. It refused to provide the requested information. It noted that it had dealt with the request both under the FOIA and as a Subject Access Request (SAR). It stated that it was unable to provide the requested information as to do so would breach section 132 of the Data Protection Act (DPA2018).
10. The complainant requested an internal review on 9 March 2021. The ICO sent the outcome of its internal review on 19 March 2021. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 6 April 2021 to complain about the way his request for information had been handled.
12. The complainant did not dispute that the information he had requested would be covered by this piece of legislation, but he argued that disclosure would satisfy at least one of the lawful gateways. These arguments are dealt with in more detail below.
13. In subsequent correspondence, the ICO has confirmed that, to the extent that the withheld information was not the complainant's personal data, it wished to rely on section 44 of the FOIA to withhold it.
14. The ICO supplied the Commissioner with a 199-page bundle of information that it wished to withhold. Having viewed the bundle, the Commissioner notes that pages 30-199 contain the information that was

withheld in relation to the original FOIA complaint. As the complainant specifically excluded such information in his request, the Commissioner is satisfied that only the first 29 pages of the bundle fall within the scope of the request and, hence, this complaint.

15. Having viewed the remaining withheld information, the Commissioner considers that its relationship to the complainant is minimal. The focus of a complaint under section 50 of the FOIA is whether the public authority has complied with a request, thus any decision has minimal effect on the complainant. Therefore with the exception of a few paragraphs which relate to the actions of the complainant, the Commissioner is satisfied that the majority of the information being withheld falls to be treated under the FOIA.
16. The Commissioner considers that the scope of her investigation is to determine whether or not section 44 applies to those sections of the withheld information that are not the complainant's own personal data.

Reasons for decision

17. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by another piece of legislation or would constitute a contempt of court.
18. In this particular case, the ICO is relying on section 132 of the DPA2018 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.*
19. Section 132(3) of the DPA2018 makes it a criminal offence for any person to disclose information in contravention of section 132(1).

20. It is common ground between the parties that the withheld information was provided to the ICO for the purpose of the discharge of one of the ICO's functions: namely, to investigate complaints arising under section 50 of the FOIA and to issue a decision. Therefore the DPA2018 would prevent this information from being disclosed unless a lawful gateway to disclosure applied.

21. Section 132(2) of the DPA2018 originally set out six possible gateways through which disclosure could take place with lawful authority:

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) the disclosure was made for the purposes of, and is necessary for, the discharge of an EU obligation,*
- (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.*

22. Gateway (d) was repealed on 31 December 2020 as part of the UK's withdrawal from the European Union and would not therefore have been available to the ICO at the point it responded to the request (although the Commissioner considers it unlikely to have applied in this case). As noted above, the information was not provided with a view to it being published and therefore gateway (b) cannot apply either.

23. At various points during the course of the request and complaint, the complainant has argued that gateways (a), (c), (e) and, particularly (f) would allow for disclosure of this information. The Commissioner will consider each one in turn.

24. In respect of consent, the ICO noted that:

"Liverpool City Council was consulted on the disclosure of this information in the course of handling this request. The initial response from [the Council] flagged up concerns with disclosure. The request handler returned to [the Council] for clarification as to precisely what they felt should be withheld and with a proposed disclosure. However, no response to the suggested disclosure was forthcoming. In the absence of consent to disclose this information and the clear indication from the content of the correspondence from [the Council] that they objected to disclosure of information the decision was made to withhold the requested information, and that the gateway at section 132(2)(a) was not fulfilled."

25. Consent is a binary choice: either the Council has provided its consent or it has not. The Commissioner accepts that it is possible that the Council may not have objected to the entirety of the withheld information being disclosed, however, the ICO's submission makes plain that, at the point it dealt with the request, it did not have the Council's explicit consent to disclose any of the withheld information. As such, the ICO could not have relied on gateway (a) to disclose the information.
26. Turning to gateway (c), in his original grounds of complaint, the complainant argued that, since the decision notice the ICO issued in respect of his complaint had summarised the Council's arguments, the full submission should be disclosed and that it was inconsistent (and, he argued, "unlawful") to make only a partial disclosure of the information.
27. The Commissioner notes that the particular decision notice in question only summarised or paraphrased the Council's arguments, but she accepts that many ICO decision notices (including this one) do contain quotes lifted directly from the submissions provided by the parties to the complaint.
28. Nevertheless, the Commissioner does not consider that gateway (c) is satisfied for the disclosure of the withheld information. To satisfy this gateway, it is not sufficient for a disclosure to be made as part of the discharge of one of the ICO's functions, it must also be *necessary* for the discharge of that function.
29. When the ICO receives a valid complaint under section 50 of the FOIA, it must, in most circumstances, issue a decision as to whether the public authority has complied with the FOIA in responding to the request in question. Whilst the ICO is not required, by the FOIA, to provide reasons for its decision, as a matter of public law fairness, it does. This enables both the public authority and the person who brought the complaint to understand why the ICO has reached the decision that it has. That is the function being discharged here.

30. For gateway (c) to be satisfied, disclosure to the world at large (which is what is required under the FOIA) must be necessary to the discharge of that function. The use of the word "necessary" implies that the discharge of the function could not otherwise take place – or would be severely impaired.
31. Plainly, it is not necessary to disclose the entirety of a public authority's submission in order for the ICO to discharge its function of reaching decisions on section 50 complaints. Whilst the ICO may, on occasion, quote or summarise a submission, it does not follow that it cannot discharge its function without disclosing the entire submission. The Commissioner is therefore satisfied that such a disclosure is not "necessary" and hence gateway (c) is not satisfied.
32. In his request for an internal review, the complainant also argued that gateway (e) would apply – although this was not referred to in subsequent correspondence. The Commissioner is satisfied that this gateway would not apply here either.
33. The complainant has noted that, where a decision notice is appealed, the parties to the appeal have an agreed bundle of evidence which will usually include the public authority's submission. However, this is a disclosure, to the parties to the appeal, for the purposes of conducting the appeal on a fair basis. It is not disclosure to the world at large.
34. Any disclosure under FOIA would not be made for the purposes of any criminal or civil proceedings – it would be made because the ICO, as a public authority, has a legal obligation to respond to requests made under the FOIA. Therefore gateway (e) is not satisfied.
35. Finally, the Commissioner must consider the last of the lawful gateways: that disclosure is necessary in the public interest.

The complainant's position

36. In explaining why he believed that the disclosure was necessary, the complainant argued that, based on the ICO's decision notice, the Council appeared to have altered the focus of its arguments between those quoted in its refusal notice and those quoted in the decision notice. He noted that:

"This is unfortunately indicative of the Council's general approach. In my original complaint letter, I provided you with examples as to how, in case ref: FS50909734, the Council had misled the ICO. The Council appears to have attempted to mislead the ICO again in this case, by the introduction of new prejudicial evidence, the content of which I had no opportunity to dispute.

"This is supportive of the public interest in disclosure. When dealing with public authorities, requestors are entitled to know the legal basis upon which information has been refused, so that they can have an opportunity to dispute this with the local authority or subsequently with the ICO if appropriate. If the public authority deliberately withholds its reasons for the application of an FOIA exemption, then explicitly relies upon those reasons in its subsequent correspondence with the Regulator, this is strongly supportive of the public interest in disclosure of that correspondence. The public interest in disclosure is supported further on the facts of this case, where the ICO as Regulator has explicitly rejected the new reasons given by the public authority as to why the exemption was applicable."

37. In his original grounds of complaint, the complainant referred to the Council as having provided "misleading and inaccurate" information to the ICO in respect of a previous complaint he had submitted. He considered that this information had resulted in a "seriously flawed decision notice in the local authority's favour", which he had successfully appealed.
38. Had the ICO shared with him a copy of the Council's submission, the complainant argued, he would have been able to draw attention to the misleading information, thus preventing the ICO from issuing an "inaccurate" decision notice. Because the decision notice would have been different (he believed), the ICO would not have needed to incur costs in defending an appeal – because he would have had no need to appeal.
39. The complainant was sceptical that disclosure would deter other public authorities from providing submissions in future. He noted that public authorities in general (and the Council in particular) were (or, at least, should be) aware that their submissions might eventually be disclosed either in full or in part. He also noted that any submissions which rehearsed the same arguments as already presented in the refusal notice or internal review outcome should be disclosed.
40. Finally, the complainant criticised the ICO's "blanket approach" to the application of section 132 and argued that it should "routinely" share information with both parties. Whilst he noted other decisions where the ICO reliance on this exemption had been upheld, he also noted that those decisions had generally involved individuals attempting to use the ICO as a "back door" to acquire information that another public authority had previously denied them. There was, he argued, a distinction to be drawn between trying to use the ICO as a way of circumventing the legislation and in ensuring a level playing field in terms of the reasons why particular information has been withheld.

The ICO's position

41. The ICO did not accept that disclosure was necessary in the public interest. It pointed to precedent cases and the importance of establishing a "safe space" in which organisations (because the DPA2018 does not apply only in the FOIA context) could discuss confidential matters with the ICO and the consequences for its work if that safe space were thought not to exist.

42. The ICO recognised that there is a general public interest in transparency, but it noted that:

"Details of the Commissioner's findings in relation to section 50 complaints are published on the ICO's website and will contain the general arguments put forward by the 'complained about' public authority in question. It is not necessary to publish the entirety of their submissions or copies of the withheld information that is often supplied to the Commissioner. Furthermore, the requester also has recourse to First Tier Tribunal should he be dissatisfied with the outcome of the decision notice. Through the provisions of the appeals process he may be entitled to LCC's submissions, however, this would be outside of the FOIA and would not be a publication to the world at large."

43. Whilst the application of section 132 is yet to be tested by the First Tier Tribunal, the ICO noted that the Tribunal had considered several appeals involving section 59 of 1998 Data Protection Act – which provided an equivalent prohibition on disclosure. In *Lamb v Information Commissioner* (EA/2010/0108), the Tribunal had noted that:

"Although a determination under section 59(2)(e)² is based on a public interest test it is a 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

² Section 59(2)(e) of the Data Protection Act (which the Commissioner considers to materially the same of section 132(2)(f) of the DPA2018) stated that:

having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

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."

44. In respect of a deterrent effect, the ICO noted that:

"In this case there is clearly a public interest in allowing the ICO to receive information from the organisations it regulates in confidence. We would stress that disclosing confidential information which we have received for the sole purpose of adjudicating on a section 50 FOIA complaint, would have a significant and detrimental impact on our ability to investigate complaints and maintain the confidence of public authorities. There is a clear and significant public interest in not undermining the operation of the FOI regime. Furthermore, the requested information contains the and makes reference to the disputed information subject to the complaint. Whilst the DN [Decision Notice] has ordered disclosure of some information in this case, I note that [the Council] are in the process of appealing this DN to the Tribunal. Disclosure at this juncture would therefore also subvert the appeals process and, again, undermine the operation of the FOI regime. As [the Council] are in the process of appealing the DN, it is clear that they maintain their reliance on section 43 was correct. Therefore, for the ICO to disclose the requested information, it would appear likely that publication would also harm the commercial interests of [the Council], as well as undermining their appeal to Tribunal and their right to due process.

"It is important to understand that in order to fulfil our regulatory function, the ICO relies on the co-operation of organisations responding to our enquiries. If we were to release all the information which we receive from organisations relating to these issues (and without consent) this would be outside their reasonable expectations and likely to deter them from providing information to us in future. This is particularly relevant when we receive copies of information which has not been disclosed in response to an information request. In order to decide whether the information should have been disclosed, we will usually need to see it. Therefore, if we were to disclose this to a requester, this would negate the process and undermine the ability of a public authority or controller to (legitimately) refuse to disclose information. If we are not able to receive such information in confidence, this would undoubtedly seriously undermine our regulatory function. This is overwhelming contrary to the public interest.

"In our view it would be unreasonable and illogical if the FOIA were to allow requests to the ICO to become another route for applicants to obtain the information they want. We consider requests of this kind are an inappropriate use of FOIA. In our view any legitimate interest in disclosure is very heavily outweighed by the public interest in protecting the ability of the ICO to receive information in confidence from public authorities and controllers."

The Commissioner's view

45. The Commissioner does not consider that disclosure of this information is necessary in the public interest.
46. As she noted in relation to gateway (c), the Commissioner considers that the inclusion of the word "necessary" implies that any legitimate or public interest could not be satisfied if the information were not disclosed. If there are other means of satisfying the interest, disclosure to the world at large would not be necessary.
47. She considers that such an approach is in accordance with the decision of the Tribunal in *Lamb* that, whilst the gateway mentions "public interest", the test is not the same as that which she would apply when considering a qualified exemption under FOIA. There is an assumption in favour of non-disclosure and it follows that the bar should be set high.
48. The argument by the complainant that further details of a public authority's submissions should routinely be made available are not without merit and he is not the first person to make them. However, such matters fall outside the scope of what the Commissioner is required to do here – which is to make a decision as to whether the ICO is entitled to rely on section 44 of the FOIA or not.
49. As the ICO has correctly pointed out, when it issues a decision under section 50 of the FOIA, the decision is published in full along with the reasoning for that decision (except in a small number of cases). That fulfils any public interest in transparency and provides the opportunity for either party to challenge the decision if they consider it to be incorrect in law.
50. Unfortunately, the ICO's failure to scope the request correctly meant that its arguments became somewhat infected. The complainant specifically did not ask for the withheld information and therefore the Commissioner must disregard arguments about the ICO being used as a "back door" to access information previously withheld. The ICO noted several times in the decision that forms the background to the present complaint that the Council's arguments were generic and not directly linked to the information being withheld in that case. Having viewed the

withheld information in this case herself, the Commissioner does not consider that the submission reveals substantive details of the information that was previously withheld.

51. The main thrust of the complainant's argument is that the public interest favours ensuring that the ICO makes better decisions and that disclosure would serve that public interest. The Commissioner does not consider that this is a compelling argument – either on the facts of the case or in principle.
52. The complainant's request relates to a complaint that the ICO upheld. Whether the arguments provided by the Council in its submission were the same or different to those presented in its refusal notice and review is irrelevant because the ICO found that the Council was not entitled to rely on the exemption. The complainant's input was unnecessary as the Council failed to discharge its burden of proof in demonstrating that the exemption was engaged.
53. Therefore it is not clear why the ICO would have issued a different decision in this case if the Council's submission had been published prior to the decision being made. Whilst the Commissioner appreciates that the complainant was making this argument on a more general level, the particular facts of this case demonstrate that the ICO does not need to publish a submission to find that a public authority had not complied with the FOIA.
54. The Commissioner also does not consider that the necessity has been demonstrated in principle. As the facts of this case have demonstrated, not publishing submissions does not mean that the ICO is bound to uphold the public authority's position. Routine publication *may* cause *some* decisions to be different but seeking additional submissions from complainants in every case *will* cause *all* complaints to take longer to resolve – meaning that a balance must be struck between the two.
55. In the Commissioner's view, that balance lies in allowing either party to appeal a decision notice to the First Tier Tribunal if they feel that it is incorrect in law. The Tribunal utilises an approach more similar in style to the adversarial approach favoured by the complainant – where the parties all advance submissions, can counter others' submissions and have at least agreed upon what they disagree upon by the time the Tribunal hears or reviews the appeal.
56. The relatively high proportion of ICO decision notices upheld by the Tribunal does not indicate any systemic issue with the way the ICO investigates complaints or any urgent need to change its processes.

57. Having considered the available evidence, the Commissioner is not persuaded that there is a sufficiently compelling public interest which would necessitate the disclosure of the information being withheld in this case. The ICO has pointed to the detrimental effects of disclosure, but the Commissioner need not consider those effects because she is not satisfied that there is a necessity for disclosure.
58. She is therefore satisfied that the lawful gateway to disclosure is not met and has thus not gone on to consider any balancing exercise.
59. As none of the lawful gateways to disclosure is met in this case, section 132(2) of the DPA2018 would prohibit the ICO from disclosing this information and therefore section 44 of the FOIA is engaged.

Procedural Matters

60. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

61. The ICO's refusal notice was not issued within 20 working days of receiving the request and, whilst it referred to section 132 of the DPA2018, it did not cite section 44 as the specific FOIA exemption which prevented disclosure of the information which was not the complainant's own personal data.
62. The Commissioner therefore finds that the ICO breached section 17 in dealing with this request.

Right of appeal

63. 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

64. 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.
65. 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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