

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2019

Public Authority: Information Commissioner's Office

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The 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 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.

Decision (including any steps ordered)

1. The complainant has requested information associated with the Information Commissioner's categorisation of applications for a decision under section 50(1) of the FOIA from Mr Alan Dransfield as frivolous or vexatious under section 50(2)(c). The ICO confirmed it does not hold some of the information requested. It has refused to disclose the information it does hold under section 40(2) of the FOIA as it considers this to be the personal data of a third person.
2. The Commissioner's decision is as follows:

- On the balance of probabilities, the ICO does not hold information falling within the scope of part (ii) of the request and has complied with section 1(1)(a) of the FOIA in respect of this part.
 - The recorded information falling within the scope of parts (i) and (iii) of the request to which the ICO has applied section 40(2) is the personal data of a third person and is exempt from release under this exemption.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 22 August 2018, the complainant wrote to the ICO and requested information in the following terms:

"...If true, this would be a blanket ban on accessing the Commissioner and the Tribunal system. I therefore ask for (i) the email correspondence between Mr Dransfield and the Commissioner concerning the effective ban imposed on Mr Dransfield (including any warnings that were made) (ii) any minutes or internal correspondence discussing the basis for implementing this decision and (iii) the contents of s.50 complaints that were rejected under s.50(2)(c). The reason I ask is that I am genuinely interested in how the ICO would reach such a decision, given the extreme implications of it.

Given the voluminous material that Mr Dransfield publishes on social media, and the fact that he is well known as the complainant in the lead case in the Upper Tribunal concerning vexatiousness, it is highly doubtful that s.40 would apply to any of the information requested."

5. On 17 September 2018 the ICO responded. It confirmed it holds information within the scope of parts (i) and (iii) of the request and that it does not hold information within the scope of part (ii).
6. The ICO withheld the information it holds under section 40(2) of the FOIA because it is personal data and disclosure would breach one of the data protection principles; namely the principle under Article 5(1)(a) of the General Data Protection Regulation (GDPR). The ICO provided some general information with regard to the subject of the request ie its application of section 50(2)(c) in a particular case and generally.
7. The ICO provided a review on 15 October 2018. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 November 2018 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the ICO holds information falling within the scope of part (ii) of the complainant's request and whether it can rely on section 40(2) to withhold information it does hold that falls within the scope of parts (i) and (iii) of the request.

Reasons for decision

Background

10. Under section 50(1) of the FOIA any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information he or she has made to a public authority has been dealt with appropriately.
11. Section 50(2)(c) says that the Commissioner shall make a decision unless it appears to her that the application for a decision is frivolous or vexatious.
12. The Commissioner relied on section 50(2)(c) with regard to applications submitted to her by Mr Dransfield, referred to in the request.

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

13. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held and is not exempt information.
14. The complainant considers that the ICO holds information falling within the scope of part (ii) of his request, which was for "*any minutes or internal correspondence discussing the basis for implementing this decision*".
15. In its submission to the Commissioner, the ICO has explained that any documents created in the handling of its casework are held on its electronic casework management system (CMEH). In order to answer this part of his request the ICO says it performed searches of CMEH, and specifically reviewed all the documents and records held on the cases raised by Mr Dransfield that were subject to its application of section

50(2)(c) in this instance. The ICO says it also undertook consultations with the author of the section 50(2)(c) letter and the case officer and other department group managers who may have been involved in the handling of these cases. The ICO requested that they conduct searches for any information in scope of the request not held on CMEH. This would include their official email accounts and any other locations that they store information, such as Sharepoint.

16. The ICO has confirmed that searches located no information that fell in scope of the request and no information falling in scope of the request was returned by any of the individuals involved in handling these complaints.
17. The ICO also confirmed that further searches had been conducted at internal review stage by the reviewer, the Principal Adviser in its FOI Complaints and Appeals department, including a review of the material held on the request file and a meeting with the Head of FOI Complaints and Appeals. The review was satisfied that no information falling in scope of part (ii) of the request is held.
18. The Commissioner considers that the ICO undertook thorough and appropriate searches for any information it might hold that falls within the scope of part (ii) of the request. She is satisfied, on the balance of probabilities, that the ICO does not hold any information relevant to this part.

Section 40 – personal data

19. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA').

Is the information the personal data of a third person?

21. Section 3(2) of the DPA defines personal data as: '*any information relating to an identified or identifiable living individual*'.
22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. The ICO has provided the Commissioner with a copy of the information it is withholding under section 40(2). With regard to part (i) of the request the information comprises:
 - correspondence from the ICO to Mr Dransfield
 - internal correspondence; and
 - correspondence from Mr Dransfield to the ICO, the Commissioner and the First Tier Tribunal (Information Rights).
26. With regard to part (iii) of the request the information comprises correspondence between Mr Dransfield, other public authorities and the ICO associated with FOI complaints that he submitted to the ICO under section 50 of the FOIA.
27. The Commissioner is satisfied that all this information is Mr Dransfield's personal data for the reasons given at paragraphs 23 and 24. As the ICO has noted in its submission to her, the requested information refers specifically to Mr Dransfield by name and relates to correspondence between him and the ICO, and the contents of his section 50 complaints to the ICO under the FOIA.
28. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

Is a condition under section 40(3A) satisfied?

29. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The ICO considers that disclosure would contravene principle (a) under Article 5(1) of the GDPR.
30. Article 5(1)(a) of the GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
31. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

33. The lawful basis most applicable is GDPR basis 6(1)(f) which states:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

34. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

36. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

37. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

38. The information in this case has been summarised above. In his request, the complainant has expressed his interest in the information – and the ICO's reliance on section 50(2) of the FOIA in a particular case – as a genuine interest *"... in how the ICO would reach such a decision, given the extreme implications of it."* As such, although appearing to be a private interest of the complainant's, the Commissioner considers the interest is legitimate.

Is disclosure necessary to meet the legitimate interests?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. In its submission to the Commissioner, the ICO has confirmed that it does not consider that disclosure is necessary in this case. It considers that disclosing the third party's correspondence with the ICO and the contents of his section 50 complaints would be overly intrusive and unnecessary to fulfil the legitimate interest in disclosure.
41. The ICO has noted that the test is one of 'reasonable necessity' which involves considering alternative measures; disclosure would not be necessary if the legitimate aim could be achieved by something else. The ICO notes that in its response to the complainant it provided an explanation as to the circumstances of the specific case associated with Mr Dransfield. It considers it is difficult to see why providing this explanation, along with the more general guidance the ICO publishes in respect of the FOIA, would be insufficient to meet the legitimate interest in respect of the requested information.
42. The ICO considers that disclosing the actual correspondence with Mr Dransfield would add little of value to the explanation provided and would be unnecessarily intrusive into the third party's private life. In particular, it notes that the information requested relates to correspondence and complaints raised with the ICO as a private individual. The ICO considers that the individual in question would have communicated with the ICO with an expectation of confidence and he would not expect their correspondence to be disclosed in response to a request made under the FOIA.
43. To a large degree the Commissioner considers that the complainant's interests have been satisfied through the general information the ICO provided in response to his request. In correspondence to the Commissioner, however, the complainant has argued that "*The derogation from open justice always requires very strong justification, as the authorities make clear.*" The ICO has also acknowledged that there is a wider interest in the circumstances that could lead to individuals being prevented from accessing the ICO's services [through section 50(2)(c)], and in being open and transparent about the reasons as to why this decision was taken.

44. In its submission the ICO has referred to its general published guidance but the Commissioner has not been able to find any published guidance on section 50(1) and 50(2) specifically. Because it is not certain that the legitimate interests in this case have been fully satisfied by the information the ICO provided in its response to the complainant, the Commissioner considers that disclosing the specific information requested would be necessary to meet the legitimate interests in this case.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

45. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause
- whether the information is already in the public domain
- whether the information is already known to some individuals
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

46. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that his information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

47. In its submission to the Commissioner the ICO has said that even if it was to accept that disclosure is necessary to meet a legitimate interest, it considers this would be outweighed by the third party's rights and freedoms. As it has explained above, it says the information requested is the personal data of the person who has raised complaints and corresponded with the office ie Mr Dransfield. It considers the individual in question would have raised complaints and correspondence with an expectation of confidence and he would not have a reasonable expectation that this information would be disclosed in response to a request made under the FOIA. The ICO confirmed that it considers that in the circumstances of this request there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the data subject, Mr Dransfield.

48. Finally, with regard to the wording under Article 5(1)(a), the ICO says that because it does not consider disclosing the information to be lawful, it has not given particular consideration as to whether disclosure would be fair or transparent. But the ICO has confirmed that for the reasons it

has given and which are discussed above, it considers that disclosure would be neither fair nor transparent.

49. In correspondence to the Commissioner, the complainant has drawn her attention to the fact that "*since the request was made*", Mr Dransfield appears to have published "*most of the information*" requested in this case. The Commissioner is aware that Mr Dransfield has his own weblog on which FOIA matters and the Information Commissioner are written about extensively. The complainant provided the Commissioner with a link to the blog, on which the requested information is published. It is not "*most*" of the requested information but one of letters that the ICO sent to Mr Dransfield. It was published on the blog on 9 January 2019.
50. The complainant considers that Mr Dransfield has a philosophical belief in the publication of such information to such an extent that it is inappropriate and in breach of the principles of open justice for the ICO to rely on section 40 to withhold the information. He also considers it manifestly apparent that if the ICO had asked Mr Dransfield, he would have consented to the information being released.
51. With regard to the matter of consent, in her published guidance on section 40 the Commissioner notes that for this basis for disclosure to be satisfied the individual must give their consent freely to the specific disclosure, with the understanding that their personal data will be disclosed to the requester under FOIA and therefore potentially to the world at large.
52. She goes on to advise that given the practical difficulties of meeting this condition, it is unlikely to be used in most circumstances and that when a request is made under FOIA, legitimate interests is likely to be the most relevant.
53. The Commissioner has not considered this matter further other than to note that at the time of the request the ICO did not have Mr Dransfield's consent to disclose the requested information.
54. The Commissioner has considered the situation as it was at the time of the request on 22 August 2018. At that point the element of the requested information discussed above had not been published and the Commissioner has not been made aware of any of the information that was published at 22 August 2018. Nor has she been presented with any evidence to suggest that the information was already known to other individuals (ie other than Mr Dransfield).
55. The complainant's arguments as to what Mr Dransfield's position would be in this case are conjecture. Taking account of all the circumstances, and despite Mr Dransfield's interactions with the ICO and the views and

opinions that are published about the ICO on his blog, the Commissioner is satisfied that he would nonetheless have the reasonable expectation that his private correspondence with the ICO about complaints he submitted to it would not be released to the wider world in response to an FOIA request. As such, she considers that disclosure would be likely to cause him a degree of distress.

56. Finally, the wider public interest in the ICO being open and transparent about its operations has been met, in the Commissioner's view, through the ICO's broad discussion of its application of section 50(2) in its response to the complainant, which concerned both Mr Dransfield and more generally.
57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
58. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
59. The Commissioner has therefore decided that the ICO was entitled to withhold the information under section 40(2) of the FOIA by way of section 40(3A)(a). This being the case it has not been necessary to consider the remaining conditions under section 40(3A), 40(3B) or 40(4A).

Right of appeal

60. 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@justice.gov.uk

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

61. 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.
62. 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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