

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 July 2015

**Public Authority:** The Information Commissioner's Office (ICO)  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

### **Decision (including any steps ordered)**

---

1. The complainant has requested information about an alleged data protection breach involving discs containing information relating to the deaths of Mark Duggan, Azelle Rodney and Robert Hamill. The ICO provided the complainant with some of the information he requested. It withheld the remaining information under section 31(1)(g) with subsection (2) (a) and (c), and section 40(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the ICO has correctly applied section 31(1)(g) with subsection 2(a) and (c), and section 40(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

### **Request and response**

---

4. On 30 January 2015 the complainant requested information of the following description:

"I write with a request for information under the Freedom of Information Act.

My request is as follows:

\* Please provide copies of all communications with the Ministry of Justice surrounding an alleged data protection breach involving discs containing information relating to the deaths of Mark Duggan, Azelle Rodney and Robert Hamill.

I have been told the ICO was alerted to the alleged breach on January 22.

\* If not included in the above, please provide copies of all security breach notification forms in relation to the case.

\* Please also provide copies of all communications involving Christopher Graham relating to the case from (and including) January 22 to today's date (January 30). By "involving" I mean sent or received by Mr Graham, including "copied in" communications."

5. On 25 February 2015 the ICO responded. It provided the complainant with some of the information he requested but withheld some of the requested information under section 31(1)(g) with section 31(2)(a) and (c) and section 40(2) FOIA.
6. The complainant requested an internal review on 26 February 2015. The ICO sent the outcome of its internal review on 27 March 2015. The ICO provided the complainant with one further email which had originally been withheld under section 40(2) FOIA, otherwise it upheld its original position.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 31 March 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the ICO was correct to withhold the information which was withheld under section 31(1)(g) with subsection 2(a) and (c), and section 40(2) FOIA.

### **Reasons for decision**

---

9. The ICO has argued that the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority the functions set out in 31(2) of FOIA.
10. The purposes that the ICO has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2):

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (c) Ascertaining whether circumstances would justify regulatory action;
11. In order for section 31(1)(g) of FOIA to be engaged, the ICO must be able to demonstrate that the potential prejudice being argued relates to at least one of the interests listed above.
  12. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
  13. The ICO has stated that it believes the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a lower evidential burden on the ICO to discharge, it still requires the ICO to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
  14. The Commissioner has sought to test the validity of these arguments by considering the following questions; Is the ICO formally tasked with ascertaining whether any person has failed to comply with the law or whether circumstances would justify regulatory action? What stage had the investigation reached when the request was submitted? Does the ICO have powers to compel engagement in the regulatory process and, if so, do these mean the chances of prejudice occurring are effectively removed?
  15. The ICO explained that it exercises a number of statutory functions for the purpose of ascertaining whether a public authority/data controller has failed to comply with the law and/or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation.
  16. It said that a considerable proportion of the ICO's regulatory work is concerned with ascertaining whether public authorities/data controllers have complied with the statutory requirements placed upon them by both the Data Protection Act (DPA) and FOIA.
  17. It confirmed that the information the complainant requested relating to, "an alleged data breach" is information which the ICO needs to consider in determining whether a data controller has breached the DPA. It therefore confirmed that the purposes referred to in subsection (a) and (c) above apply in relation to this information.

18. It said that disclosure of this information in relation to the ICO's regulatory work, particularly in relation to a live case would be likely to prejudice the ICO's regulatory functions. It also argued that disclosure would have the effect of inhibiting open dialogue between the ICO and public authorities/data controllers.
19. The ICO went on to explain that in order to carry out an effective, timely and efficient regulatory function it must maintain the trust and confidence of the public authorities/data controllers it regulates to ensure their co-operation. It said the best way to achieve this is by informal, open, voluntary and uninhibited exchange of information with these public authorities/data controllers. It explained that this informal exchange of information and co-operation by public authorities/data controllers would be likely to be adversely affected if details of their failings, as discussed in those informal exchanges, were routinely made public. The consequence of this would be that its regulatory functions would be prejudiced. Disclosure of the withheld information would therefore be likely to prejudice the ability of the ICO to carry out its regulatory functions of monitoring the performance of public authorities to ensure compliance with the relevant law. It would be likely to prejudice the exchange of information between the ICO and public authorities/data controllers which would become more guarded and cautious in proactively providing information if they thought it would be disclosed. This would in turn be likely to prejudice the effectiveness of the ICO's regulatory processes.
20. The Commissioner considers that the ICO is formally tasked with regulatory functions to ascertain whether any person has failed to comply with the DPA or FOIA and whether circumstances would justify regulatory action. Given the nature of the requested information, it is information that the ICO would need to consider to fulfil its regulatory functions. As the investigation into this alleged data breach was live at the time of the request, the Commissioner considers the likelihood of prejudice occurring, that is by inhibiting the free flow of information between the ICO and the public authorities/data controllers it regulates, is real and significant. Whilst the ICO does have the power to compel engagement, it is able to operate in a more effective and efficient manner if information is shared openly and proactively. The Commissioner therefore considers section 31(1)(g) with subsection (2)(a) and (c) are engaged in this case. He has therefore gone on to consider the public interest arguments.

## **Public interest test**

### **Arguments in favour of disclosing the information**

21. There is a clear public interest in the ICO being open and transparent in the way it monitors and investigates the performance of public authorities/data controllers in relation to their duties and responsibilities under the relevant legislation. Such openness and transparency helps to promote public awareness and understanding of the ICO regulatory functions.
22. Further information about the way the ICO monitors the performance of specific public authorities/data controllers would be of interest to those members of the public who have a particular interest in those public authorities/data controllers. This might be because they already have been personally affected by the decision or actions of a particular public authority/data controller or because the particular public authority/data controller has already attracted media attention as a result of its failings.
23. There is also a public interest in the ICO publishing information which would help to demonstrate that it is complying with its statutory duties by overseeing the performance of public authorities/data controllers with reference to the relevant legislation. The publication of this information would be evidence that the ICO is providing an appropriate standard and quality of public service and would demonstrate accountability.
24. Disclosure of the information could provide fuller evidence as to whether the ICO was exercising its regulatory functions efficiently and effectively.

### **Arguments in favour of maintaining the exemption**

25. There is a public interest in the ICO providing an effective, timely and efficient regulatory function of public authorities/data controllers through co-operation and open dialogue to ensure compliance with the relevant legislation. To do this the ICO must maintain the trust and confidence of the public authorities/data controllers it regulates and ensure their co-operation is maintained. This is best achieved by an informal, open, voluntary and uninhibited exchange of information with public authorities/data controllers. It considers that co-operation from public authorities/data controllers may be adversely affected if details of their failings were to be made public. This would in turn prejudice the ICO's ability to deliver the levels of service required of it. For example, if the ICO could no longer rely on the informal co-operation

of authorities it might be forced to resort to regulatory intervention such as the use of Information Notices (under section 51 (1) of the Act) more often. Use of such measures would divert staff resource, and may have a cost implication for the ICO. This would have a detrimental impact upon the level of service the ICO is able to provide to the public it serves. In addition, recourse to these powers would, as an alternative to informal discussions, make the process of engagement with public authorities more drawn out and less effective by reducing open dialogue.

26. The Commissioner's obligations under section 59(1)(a) of the DPA are also relevant - there is generally an expectation on the part of public authorities/data controllers that the information they disclose to the ICO will not normally be disclosed. If the ICO were to routinely disclose all such information in every case this would inevitably hinder the flow of information in the future. This in turn would prejudice the effectiveness and efficiency of the ICO's regulatory functions.
27. There is a public interest in having an effective and efficient regulator of public authorities/data controllers to ensure compliance with the relevant law.
28. There is also public interest in encouraging public authorities/data controllers in being open and honest about any difficulties they are experiencing, without fear that any such issues will be made public prematurely, or (where appropriate) at all. Disclosure of the withheld information may dissuade authorities/data controllers from being open and honest with the ICO going forward. For example, public authorities/data controllers may no longer proactively approach the ICO about the problems they are facing, prejudicing its ability to promote observance of the relevant legislation.

### **Balance of the public interest**

29. The Commissioner considers that there is a strong public interest in the ICO operating openly and being accountable in its effectiveness in carrying out its statutory functions.
30. The Commissioner does also consider that there is a strong public interest in disclosing information which would be likely to impede the ICO's ability to carry out its functions effectively. Therefore disclosing information which would be likely to frustrate the voluntary flow of information would not be in the public interest.

31. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(a) and (c) FOIA was correctly applied in this case to the withheld information.

### **Section 40(2)**

32. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
33. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
- “data which relate to a living individual who can be identified –
- (i) from those data, or
  - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”
34. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
35. The ICO explained that the withheld information is the names and contact details of certain individuals it corresponded with at the MoJ and the name of a member of the public from an email.
36. The Commissioner considers that the information redacted under section 40(2) FOIA, is information from which the data subjects would be identifiable and would therefore constitute personal data.
37. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive

personal data at least one of the conditions in Schedule 3 should be met.

### **Likely expectation of the data subject**

38. The ICO argued that these individuals would have no reasonable expectation that this information would be made public simply because they have corresponded with the ICO on this matter and furthermore the individuals have not consented to disclosure.
39. The Commissioner considers that these individuals would have no reasonable expectation that their names and contact details would be made public. Disclosure could therefore be reasonably regarded as a privacy intrusion.

### **The legitimate public interest**

40. The Commissioner considers that there is a legitimate public interest in openness and transparency to demonstrate that it is fulfilling its regulatory functions efficiently and effectively, however disclosure of the names and contact details in this case would not go any significant way to meeting the legitimate public interest. Furthermore the data subjects would have not had an expectation that their names or contact details would be released into the public domain.
41. The Commissioner finds that disclosure would be unfair and breach the first data protection principle. He therefore considers section 40(2) FOIA was correctly applied to the withheld information in this case.



## Right of appeal

---

42. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**