

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

### **Decision notice**

**Date:** 19 November 2015

**Public Authority:** The Information Commissioner's Office (ICO)

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

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

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1. The complainant has requested information relating to the ICO's action to close down an office in Hove thought to be responsible for a large portion of the nuisance calls made in the UK. The ICO refused to disclose the requested information under section 31(1)(g) with subsection (2)(c) FOIA.
2. The Commissioner's decision is that the ICO has correctly applied section 31(1)(g) with subsection 2(c) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 16 March 2015 the complainant made the following request for information under the FOIA for:

"I read in Saturday's Times of your action to close down an office in Hove thought to be responsible for a large portion of the nuisance calls made in the UK. My elderly mother & to a lesser extent my own household have been pestered by these calls for several years. Unfortunately, we have not been able to identify the culprits.

Can you please let me have the legal address of the entity in control of the offices you took action against? I am planning a civil action on behalf of my Mother & myself for damages arising from their behaviour. Whilst the ICO will take whatever action you feel

appropriate against those responsible, as an individual I am entitled to seek my own redress for the harm they have caused. I believe in time that this form of action will prove a bigger deterrent than any fines you may administer although the ICO's role in helping to identify those responsible will continue to play a key part."

5. On 8 April 2015 the ICO responded. It refused to provide the complainant with the requested information under section 31(1)(g) with subsection 31(2)(c) FOIA.
6. The complainant requested an internal review on 8 April 2015. The ICO sent the outcome of its internal review on 5 May 2015. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 24 June 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 requested information under section 31(1)(g) with subsection 2(c) FOIA.

### **Reasons for decision**

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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 purpose that the ICO has argued would be likely to be prejudiced if the information was disclosed is section 31(2)(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 the interest contained in section 31(2)(c).
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 weaker 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 first considered whether the ICO is formally tasked with ascertaining whether circumstances would justify regulatory action.
15. The ICO explained that it has statutory powers to take regulatory action under the Privacy and Electronic Communications Regulations by virtue of Part V and Schedules 6-9 of the Data Protection Act 1998 as amended by Regulation 31 Privacy and Electronic Communication Regulations 2003 and 2011.
16. The ICO confirmed that it raided an address in Hove in relation to the Privacy and Electronic Communications Regulations. The withheld information is the legal addresses of the businesses believed to be involved.
17. The ICO explained that investigations of this type can be difficult and protracted in nature. It said that businesses that make telephone calls in breach of the Regulations are prone to closing down quickly and reopening in another guise. It explained that calls are often routed from or via other countries which can make the process of identifying those responsible for making the calls tricky. The ICO confirmed that it is committed to carrying out these investigations in as thorough and effective way as possible. It said however, part of doing this means it necessarily needs to keep information confidential until such time as it will no longer cause prejudice to the investigation or to other investigations.
18. It went on to state that it is often the case that it is able to link one organisation to another. Prematurely disclosing the details of businesses it is interested in might have the effect of tipping off another business if they know they are linked to the first business. It also pointed out that this is still an open investigation and the ICO's enquiries are continuing.
19. Given the nature of the withheld information, and based on the ICO's arguments contained in this Notice, the Commissioner considers that the ICO is formally tasked with ascertaining whether circumstances would justify regulatory action. Its ability to fulfil this function effectively is dependent upon it being able to gather evidence without 'tipping off' potential perpetrators by disclosure of information whilst investigations are ongoing. The Commissioner therefore accepts that

disclosure would be likely to result in the prejudicial effects to the ICO's purposes described at sections 31(2)(c) of FOIA. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Public interest test**

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

20. The ICO provided the following arguments in favour of disclosure:

- There is a public interest in the ICO being open and transparent about the work that it is doing and being accountable for that work.
- There is widespread dissatisfaction and concern amongst people who receive unwanted calls and there has been increased attention on this area of regulation

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

21. The ICO provided the following arguments in favour of maintaining the exemption:

- There is an overriding public interest in the ICO continuing to conduct these investigations in the best way it sees fit and unhindered by disclosure of information that could prejudice them.
- If the ICO is so transparent that it can no longer take effective action, this runs counter to the fundamental purpose of the ICO.

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

22. 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 in an area which is causing dissatisfaction and is of concern to a vast number of the population.

23. The Commissioner does also consider that there is a strong public interest in not disclosing information which would be likely to impede the ICO's ability to carry out its functions effectively. Particularly as in

this case the ICO's investigations are ongoing. If the ICO's ability to determine whether regulatory action is necessary is impeded, by disclosure of information which may 'tip off' potential offenders, this is contrary to the interests of the members of the public adversely affected by this widespread issue.

24. 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)(c) FOIA was correctly applied in this case to the withheld information.

## Right of appeal

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25. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**