Date: 22 July 2022

IC-172801-V8R5

Request

You asked us:

"under the terms of the FOI Act 2000 please provide the following information:

Any documents exchanged between the Department for Education ("DfE") and the ICO with regards to the new national data processing projects affecting millions of school pupils in real time, and intended to apply to all 8+ million from September 2022.

Ref: DfE trialling ‘real-time’ attendance: [link provided]

In particular we request

(a) the Article 36(4), DPIA and/or documentation that discusses the lawful basis and specific DfE purposes,
(b) recommendations or requirement made about fair processing.”

We received your request on 26 May 2022.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

Our response

We do hold documents exchanged between the DfE and the ICO in scope of your request. I can confirm we also hold information in scope of the part of your request labelled (a), as we hold the DPIA. However, I do not consider we hold any information in scope of the part of your request labelled (b) as having reviewed our recommendations, I cannot see we specifically made recommendations concerning fair processing.
I have attached the information which I consider falls in scope of your request. This includes documents exchanged between the ICO and the DfE; I have also considered the associated correspondence in scope, as it puts the documents in context. It also includes the DPIA provided to us by the DfE, which has now been published by the DfE on the GOV.UK website. Further, even though I do not consider we made any recommendations in scope of the part of your request labelled (b), the disclosure includes all of our recommendations as this forms part of the documents exchanged with the DfE.

Ordinarily, information shared with the ICO in the course of exercising our regulatory function would be exempt from disclosure by virtue of section 44 FOIA because section 132 of the Data Protection Act 2018 would prohibit its disclosure. However, one of the ‘lawful gateways’ to disclosure of information shared with us in our regulatory capacity like this would be if we had consent of the data controller. While this exemption is absolute, in the present case, I have consulted with the DfE to establish whether it would be happy to disclose the information it has shared with us. It has consented to disclosure, subject to some redactions, which I’ve detailed below.

Further, I consider section 31 FOIA would apply to our correspondence to the DfE because improper disclosure of our exchanges risks harming the relationship that we have with the DfE and may prejudice our ability to exercise our regulatory function with the DfE in future. However, section 31 is a qualified exemption, which means that I have to conduct a ‘public interest test’. I wrote to you to advise that I was extending my response time to this request to consider the public interest test. I can confirm I have conducted a public interest test. Having considered the views from internal colleagues as well as the DfE’s consent to disclose information they have shared with us, I consider the public interest test favours disclosure in the present case.

However, I have applied some redactions. These are:

- The DfE asked us to redact staff personal details and contact details. This applies to most “to”, “from”, and “cc” fields of emails, the opening sentence of emails, email signatures, and personal data in the DPIA. Where these details are someone’s personal data, I have redacted them in reliance on s.40(2) FOIA. Where these details are not someone’s personal data, I have redacted them in reliance on s.44 FOIA (on the basis that these details were provided to us for exercising our regulatory purposes).
- The ICO redacts staff details in line with its policy on disclosure of ICO employee information. In the present case, I consider staff details were
disclosable under the policy. However, I have redacted one small piece of text from a signature as I considered the information was the personal data of the sender. I have redacted this in reliance on s.40(2) FOIA.

- There was a description of an individual, a DPO, in an email on page 11 of the bundle. While the person was not named, I believe the description was sufficient to potentially identify an individual. I have not been able to consult with this individual, so I have redacted the description in reliance of s.40(2) FOIA.
- The DfE provided us with a link so that we could access its DPIA. I have redacted this link in reliance on s.44 FOIA because I consider this link was provided to us so we could exercise our general duty to provide advice. Further, I am not confident the link to the resource is already public. However, the DPIA itself has been disclosed to you, with personal data redacted, so you do have the information to which the link pointed.

Further information about each of these exemptions has been provided below. I hope you find the information helpful.

**Exemption applied: Section 31 FOIA.**

We can rely on Section 31(1)(g) of the FOIA where disclosure:

"would, or would be likely to, prejudice – ... the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”

In this case the relevant purposes contained in subsection 31(2) are 31(2)(a) and 31(2)(c) which state:

"(a) the purpose of ascertaining whether any person has failed to comply with the law” and
"(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise …”

Section 31 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure. The potential harm of disclosure in the present case is the potential for harm to our relationship with DfE which may affect our ability to work effectively with the DfE on future as well as to have open and frank discussions with them.

We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against. As advised, I have conducted a public interest test and I consider that the public interest favours disclosure on this occasion.
taking into account the views of internal colleagues as well as the DfE’s consent to disclose its correspondence with us.

Therefore, while I consider the exemption attaches to the information, I consider it is overturned by the public interest test.

**Exemption applied: Section 40(2) FOIA.**

You will see that some third-party personal data has been redacted in our response. It is exempt under Section 40 of the FOIA.

Disclosure of this data would break the first principle of data protection - that personal data is processed lawfully, fairly and in a transparent manner.

There is no strong legitimate interest that would override the prejudice that disclosure would cause to the rights and freedoms of the individuals concerned. We are withholding some under section 40(2) of the FOIA.

**Exemption applied: Section 44 FOIA.**

Some information has been withheld under section 44 of the FOIA.

Section 44(1)(a) states;

'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment’

The enactment in question is the Data Protection Act 2018. Section 132(1) of part 5 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.”

Section 132(2) lists circumstances in which a disclosure can be made with lawful authority, however none of them apply here. As a result, some of the information as described above is exempt from disclosure.

**Next steps**

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

**Your information**

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely

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