

26 February 2024

Case reference IC-268335-T4Y5

I write further to your correspondence of 3 December 2023 in which you confirmed that you would like us to conduct an internal review of our response to your information request, handled by the Information Access team under the above case reference number. Please accept my apologies for the delay in our response.

The purpose of an internal review is to look again at your request, at our response, and to check that any exemptions applied were appropriate.

My name is Ian Goddard and I am an Information Access Group Manager. I can confirm that I have had no prior involvement in the handling of this request.

You have challenged our decision to withhold information under the exemption at section 42 of the FOIA. You are also concerned that our response contained no written record of Mr Bonner's decision.

Your request was in connection with our investigation into EasyJet and you asked the following:

- 1) *Confirmation that the decision to drop the investigation was taken by the Commissioner himself as the quote above implies, or if the decision was in fact taken by someone else, who that person was.*
- 2) *Any recorded information showing why either Edwards / the decision maker decided to drop the case i.e. emails, notes or other internal messages that set out the reason not to take the investigation any further" "*

In our response of 1 December 2023 we confirmed that in respect of part 1 of your request, the decision to deprioritise the EasyJet investigation was taken by Stephen Bonner. In connection with part 2 of your request, we disclosed some information falling in scope of your request, however confirmed some information was exempt from disclosure under the exemptions at section 42 (legal professional privilege) and section 40(2) (personal data) of the FOIA.

You submitted a request for internal review on 3 December 2023 in the following terms:

The ICO's statement to the Telegraph in November state:

"Having carefully considered this particular case, the Commissioner decided that pursuing enforcement action would not be the best use of our limited resources at this time"

This plainly indicates that the case has been dropped due to resource issues. However, you have refused to provide me with any information beyond a very thin email exchange which does not involve the person who made the decision; the basis of your refusal is legal privilege. The Commissioner's resources - even those involving your legal teams and advisors - are a practical and perhaps a financial matter, but they are not a legal issue. You would not get privileged advice about resourcing matters. If literally every piece of information about the decision to drop this case contains legal advice, this strongly suggests that your statement to the Telegraph is misleading.

I am also concerned that there is no formal written record of Mr Bonner's decision. I could understand that if the decision contained legal advice, that element would be redacted - you have provided me with a redacted email as it is. I ask the person carrying out the review to confirm either that the decision was unrecorded, it was wholly covered by S42, or there is a record but you have interpreted it as being outside the scope of my request."

You also submitted that:

"The email asked whether SB (Stephen Bonner) had "signed off" on the decision to close the cases. The reply confirmed that he had. Unless that 'sign off' was verbal or it contained no information about why the cases were being closed, it should have been disclosed to me, even if legal advice had to be removed."

In the course of additional consultations conducted as part of this internal review, a small amount of further information falling in scope of your request was identified. This information is exempt under section 23 and 24 in the alternative, of the FOIA.

Section 42

Section 42(1) of the FOIA states:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

In our response we identified that the information in scope of your request was subject to 'advice privilege'. In the interests of clarity, this includes a record of the decision taken by Mr Bonner. Advice privilege covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.

I have carefully considered the points made in your internal review request and have undertaken further internal consultations in order to further establish the relevant legal context that would allow for the exemption at section 42 to be engaged.

The information we withheld, and that falls in scope of your request, forms part of a continuum of communication made for the dominant purpose of keeping the ICO's Legal Service apprised of decision making in relation to this case. This was so that legal advice might be given as required, in order to ensure the decision to deprioritise was in line with the public law obligations to which this office is subject.

As a result, I find the information withheld from our response is subject to legal advice privilege.

I have therefore gone on to consider the public interest test and have carefully considered the factors both in favour of disclosing the information and those in favour of maintaining the exemption. Given the strong inherent public interest in maintaining the principle of legal professional privilege I have concluded that in this case the public interest favours maintaining the exemption and withholding this information.

In respect of your following submission: *"The email asked whether SB (Stephen Bonner) had "signed off" on the decision to close the cases. The reply confirmed that he had. Unless that 'sign off' was verbal or it contained no information about why the cases were being closed, it should have been disclosed to me, even if legal advice had to be*

removed." I can advise that the phrase "*signed off*" in the disclosed email was a reference to the decision maker approving a draft of the de-prioritisation letter (the letter which was sent to EasyJet's legal representatives on 17 August, and which has previously been disclosed).

Section 23 and 24 in the alternative

As noted above, some information falling in scope of your request is exempt under either FOIA Section 23(1) (information supplied by, or relating to, bodies dealing with security matters) or Section 24(1) (national security). In choosing to cite these exemptions 'in the alternative' we are confirming that one of these exemptions is substantively engaged but declining to specify which one.

Sections 23(1) and 24(1) are cited 'in the alternative', as it is not appropriate in the circumstances to confirm which of the two exemptions is actually engaged, as to do so is likely to undermine national security or reveal the extent of any involvement, or not, of the bodies dealing with security matters. Therefore this response does not confirm which of the two exemptions is engaged.

The exemption at Section 23 is absolute and does not require the application of the public interest test.

Section 24 is a qualified exemption, which is subject to a public interest test. I have therefore gone on to consider the public interest test and have carefully considered the factors both in favour of disclosing the information and those in favour of maintaining the exemption. Whilst there is a general public interest in openness and transparency, I consider this is outweighed by the very strong public interest in safeguarding national security. I therefore conclude that the balance of the public interest is in maintaining the exemption.

This concludes my internal review. I realise that this response may be disappointing to you, but I hope our reasoning is clear.

Complaint procedure

If you are dissatisfied with the outcome of this review you can make a

formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000.

To make such an application, please write to our Customer Contact Team at the address below, or visit the 'Make a complaint' section of our website: <https://ico.org.uk/make-a-complaint/>

Please ensure you attach any documents requested to progress your complaint when submitting your complaint.

Your information

Please note that our [Privacy notice](#) explains what we do with the personal data you provide to us and what your rights are.

This includes entries regarding the specific purpose and legal basis for the ICO processing information that people that have provided us with, such as an [information requester](#).

The length of time we keep information is laid out in our retention schedule, which can be found [here](#).

Yours sincerely

Ian Goddard
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