

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 October 2013

**Public Authority:** South Tyneside Council  
**Address:** Town Hall & Civic Offices  
Westoe Road  
South Shields  
Tyne & Wear  
NE33 2RL

### Decision (including any steps ordered)

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1. The complainant submitted a request to South Tyneside Council (the Council) for copies of the corporate credit card statements for four individuals for a three month period. The Council provided the complainant with a summary of some of the information falling within the scope of his request but withheld further information on the basis of section 31(1)(a) (law enforcement), section 40 (personal data) and section 43 (commercial interests).
2. The Commissioner has concluded that by simply providing the complainant with a summary of some of the information, rather than copies of the statements with the information it considered to be exempt redacted, the Council failed to meet the complainants' preference to be provided with 'copies' of the statements themselves. Furthermore the Commissioner has concluded that the only information contained in the statements which is exempt from disclosure is the credit card and account numbers, on the basis of section 31(1)(a), and the information appearing on the various statements under the column 'Transaction Description' on the basis of sections 40(2) or 43(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with **copies** of the statements falling within the scope of his request dated 12 March 2013. The only information that can be redacted from the copies of the statements is the information appearing under the column 'Transaction

Description' on each statement and any credit card and bank account numbers.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. The complainant submitted his first request regarding the Council's use of credit cards on 31 May 2012. The Council responded to this request on 13 August 2012 and refused to comply with it on the basis of section 12 of FOIA.
6. He then submitted three further requests (requests 2, 3 and 4 respectively) on 17 August 2012, 22 August 2012 and 5 October 2012.
7. The Council contacted the complainant on 24 October 2012 and explained that it had received these three requests and explained that they were being processed.
8. The Council provided the complainant with a substantive response to requests 2, 3 and 4 on 7 March 2013. Some of the information that had been requested was provided with the Council explaining that further information was exempt from disclosure on the basis of sections 12, 31, 40 and 43 of FOIA. With regard to the application of section 12, the Council's response explained that certain aspects of the requests had been refused under this provision of FOIA because undertaking the appropriate redaction (i.e. under sections 31, 40 and 43) would exceed the appropriate cost limit.
9. The complainant contacted the Council on 12 March 2013 in order to ask for an internal review of the Council's response and in doing so explained that he was specifically interested in accessing the following information:

*'... I still ask for the authority to supply copies of the first three months credit card statements of 2012 for the following senior officers, plus the leader of the elected council.*

<i>Cllr I Malcolm</i>	<i>Leader of the Council</i>
<i>Martin Swales</i>	<i>Chief Executive of the Authority</i>
<i>Helen Watson</i>	<i>Corporate Director Children, Adults and Families</i>

*Patrick Melia Corporate Director Business and Area Management.'*

10. The Council informed the complainant of the outcome of the internal review on 26 March 2013. It upheld its previous decisions in relation to requests 2, 3 and 4. The Council noted that the complainant had submitted a new request in his correspondence of 12 March 2013, i.e. the request for the credit card spending of the four individuals which is quoted in the preceding paragraph. The Council explained that although it held the information requested this was also being refused on the basis of sections 12, 31, 40 and 43 of FOIA for the same reasons in relation to requests 2, 3 and 4. However, in order to 'advise and assist' the complainant, the Council provided him with a table summarising some of the requested information. This table gave the total monthly spend by each individual under the following six categories: court fees, svc delivery, transport, bus meet, accommodation or emergency. The table confirmed that for all four individuals there were 14 transactions in total over the 3 month period.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 27 March 2013 and explained that he was dissatisfied with the Council's decision to refuse to release credit card statements for the four individuals he identified in his letter of 12 March 2013 for the first three months of 2012. That is to say, his complaint to the ICO focused simply on the further request he submitted on 12 March 2013 rather than the Council's response to requests 2, 3 and 4.
12. The complainant also explained that he objected to the choice of the Head of Legal Services, as the chair of the panel that considered the internal review as this individual also had a corporate credit card.
13. During the course of the Commissioner's investigation the Council confirmed that it had sought to rely on section 12 in relation to the complainant's broader requests for information concerning credit cards; it no longer sought to rely on section 12 to refuse to comply with the request of 12 March 2013 which is the focus of this complaint.
14. Rather the Council explained that it considered the following exemptions to apply to the corresponding information contained within the statements:
  - Section 31(1)(a) to credit card numbers, account numbers and transactional reference numbers;

- Section 40(2) to credit card numbers, account numbers, details of individual purchases and the names of individuals (if linked to individual purchases);
  - Section 43(2) to a small amount of information, the disclosure of which the Council believes would be likely to prejudice its commercial interests.
15. However, during the course of his investigation the Commissioner noted that the complainant requested copies of the credit card statements in question. Furthermore the Commissioner established that there is information contained on these statements which has not been withheld by the Council on the basis of the three exemptions listed above and nor has it been disclosed to the complainant by the Council on 26 March 2013 in its attempts to 'advise and assist' him.
16. At this stage it is relevant for the Commissioner to clarify that, technically, section 1(1) of FOIA provides a right of access to information rather than copies of documents. Similarly, section 11(1)(a) of FOIA provides applicants with the right to express a preference to be provided with copies of the information, not copies of documents. This means that neither section 1 nor section 11 provide an explicit right to receive copies of documents.
17. However, a request for a copy of a document will generally be a valid request for all of the information contained within that document (including visual format, design, layout etc). In practice, in the vast majority of cases the only way to communicate all of the information recorded in a document (ie the only way to comply with section 1) will be to provide a copy of the document. If the Commissioner decides that the information should be disclosed, he will therefore usually order disclosure of a copy of the document. Moreover, a public authority should comply with a preference expressed under section 11(1)(a), ie for a copy of a document, unless it is not reasonable practicable to do so.
18. In the circumstances of this case, the Commissioner asked the Council to explain why it would not be reasonably practicable to provide the complainant with copies of the statements with redactions made to any information it considered to be exempt from disclosure. In response the Council suggested that disclosure of the statements themselves would result in the disclosure of personal data which would breach the Data Protection Act 1998 (DPA) and provision of the data spend via copies of the statements could not be seen to promote transparency when the data spend had already been provided, i.e. the disclosures made to the complainant on 26 March 2013.

19. The Commissioner has commented on the Council's approach to the provision of non-exempt information contained in the statements, rather than providing redacted versions of the statements themselves, below. He has then gone on to consider the application of the exemptions to the specific information described above.
20. In terms of the complainant's concerns regarding how the internal review was undertaken, the Commissioner has not reached a formal finding on this matter as the requirement for public authorities to conduct an internal review is not a formal requirement of FOIA. Instead the Commissioner has commented on the complainant's concerns in the 'Other Matters' section at the end of this notice.

## Reasons for decision

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### Section 1 and section 11

21. For the reasons discussed above, the Commissioner believes that a public authority should comply with a preference expressed under section 11(1)(a), ie for a copy of a document, unless it is not reasonably practicable to do so. In the circumstances of this case, the Council has effectively argued that disclosure of the statements themselves would result in the disclosure of information it considers to be exempt from disclosure under section 40(2). This is because disclosure of the statements themselves would show the name of the card holder alongside individual transactions which contain personal data regarding subsistence payments to individual employees.
22. In the Commissioner's view in the circumstances of this case the fact that the statements contain **some** information that the Council considers to be exempt from disclosure is not a valid basis to refuse to provide copies of the statements in the scope of the request. This is because the Commissioner believes that it would be reasonably practicable for the Council to provide copies of the statements with the information it considers to be exempt from disclosure redacted.
23. Furthermore, by failing to provide copies of the statements, redacted where necessary, in the Commissioner's opinion the Council would be failing to comply with the requirements of section 1(1). This is because, as noted above, there is recorded information contained on the statements which has neither been provided to the complainant by the Council previously nor has it been withheld under one of the three exemptions cited above. Such information falls within the scope of this request and should be provided to the complainant.

24. Therefore, as a default step, this decision notice orders the Council to provide the complainant with a copies of the credit card statements that it holds. In addition, the Commissioner has also gone on to consider whether the Council has correctly applied the three exemptions cited above, i.e. whether it can redact the various categories of information from the copies of the credit card statements.

### **Section 31(1)(a) – law enforcement**

25. Section 31(1)(a) is a prejudiced based exemption which can only be relied upon if disclosure of the information would, or would be likely to, prejudice the prevention or detection of crime.

26. In order for a prejudice based exemption to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

27. In support of its reliance on section 31(1)(a) the Council explained that withholding credit card numbers and account numbers was necessary in order to prevent crime given that such information could be used by those intent on committing credit card fraud. In support of this position the Council cited a previous decision notice in which the Commissioner

had concluded that information of this nature was exempt from disclosure on the basis of this exemption.<sup>1</sup>

28. The Council also argued that disclosure of the transactional reference numbers would also be likely to prejudice the prevention of crime when disclosed in conjunction with the purchase dates. This information, if released into the public domain, could provide those individuals intent on obtaining fraudulent refunds for goods and/or services purchased by the Council greater opportunity to commit such fraud, particularly where retailers provide refunds by alternative methods such as a credit note, rather than refund back to the original payment card.
29. With regard to the first criterion of the three limb test described above, the Commissioner accepts that nature of the prejudice envisaged by the Council, i.e. credit card fraud, is clearly one which the exemption contained at section 31(1)(a) is designed to protect.
30. The Commissioner also accepts that the second criterion is met in relation to the credit card numbers and account numbers. This is on the basis that the nature of the prejudice envisaged by the Council is one that can be correctly categorised as real and of substance. Furthermore, the Commissioner accepts that there is a logical connection between disclosure of these numbers and potential fraud occurring. In other words there is a causal link between disclosure of the credit card and account numbers and the potential for credit card fraud. However, the Commissioner believes that the likelihood of the transactional numbers falling within the scope of this request being used fraudulently is so remote that there is not even a causal link between the disclosure of the reference numbers and fraud occurring. The Commissioner has reached this view for a variety of reasons, firstly because the reference numbers relate to relatively small value purchases; secondly, the purchases were made over 12 months before the request; and thirdly, the purchases relate exclusively to 'consumable' items, i.e. food, drink or transport. As an example, the Commissioner believes that it is so unlikely that an individual would attempt, or indeed be successful in gaining, a credit note for a restaurant meal which was purchased 12 months ago.
31. With regard to the third criterion, the Commissioner accepts that disclosing credit card and account numbers would be likely to result in a more than a hypothetical risk of credit card fraud occurring given the specific and direct way which such information could be used to facilitate fraud.

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<sup>1</sup> FS50447909, Cleveland Police Authority.

32. Therefore, the Commissioner accepts that this information is exempt from disclosure on the basis of section 31(1)(a).

### **Public interest test**

33. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the credit card and account numbers.
34. The Commissioner recognises that there is a public interest in disclosure of information in order to ensure that public authorities are transparent as to how public funds are spent. However, the degree to which disclosure of credit card numbers and account numbers serves this public interest is very minimal. In contrast, there is a significant and weighty public interest in protecting public authorities against fraud. Therefore, the Commissioner accepts that the public interest favours maintaining section 31(1)(a).

### **Section 40(2) – personal data**

35. As noted above the Council has argued that the following information is exempt from disclosure on the basis of section 40(2): credit card numbers, account numbers, details of individual purchases, and the names of the individuals linked to those purchases. In light of his finding that credit card numbers and account numbers are exempt from disclosure on the basis of section 31(1)(a), the Commissioner has not gone on to consider whether such information is also exempt from disclosure on the basis of section 40(2).
36. The Commissioner has begun by considering whether the details of individual purchases, linked to the names of card holders, are exempt from disclosure. The Commissioner notes that in its response to the complainant the Council disclosed the total monthly spend by each individual in relation to one of six categories. However, it did not include the value of each individual transaction. Therefore, the information concerning 'individual purchases' which is being withheld on the basis of section 40(2) consists of the specific dates of a particular transaction; the date that transaction was 'posted' to the account; a description of the transaction; and the amount of an individual transaction. This information is of course all aligned to the particular named card holder.
37. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the DPA. The Council argued that disclosure



of the information withheld on the basis of section 40(2) would be unfair and thus breach the first data protection principle which states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

38. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) 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.'*

39. The Commissioner is satisfied that disclosure of details of an individual's spending on a corporate credit card constitutes their personal data.

40. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
  - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
41. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
42. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

### The Council's position

43. With regard to the expectations of the four individuals in question, the Council explained that although they would expect the personal data associated with their credit card use to be processed for the purposes of administering the card facility, they would not expect this information to be processed in response to a FOI request. Consequently, the Council did not seek – and would not have not been provided with – consent to disclose this personal data. Furthermore, the Council noted that the individuals in question had expressed dissatisfaction with their personal data associated with their corporate credit cards being disclosed.
44. With regard to the consequences of disclosure, the Council explained that it operated a subsistence policy for certain officers where subsistence allowances were payable if officers were prevented by their official duties from taking a meal at home, administrative centre or establishment where they usually take their meals, thus incurring

additional expenditure. Subsistence allowances also apply to officers working at their normal place of employment but outside their normal working hours if they are above the salary limit for overtime and are working beyond 8.30pm.

45. Council officers who hold corporate credit cards are permitted to use those cards to pay for their meals and refreshments under the subsistence policy, rather than paying for those meals and refreshments with their own funds and claiming the money back from the Council. The Council explained that using the corporate credit cards in this way provides the Council with better value for money and efficiencies rather than submitting and processing such claims manually.
46. The Council argued that disclosure of the details of individual transactions would show where individual officers have purchased meals and refreshments under the subsistence policy when having meals in their own time. The Council argued disclosure of this information would reveal an individual's personal preference for the type of food and establishment. The Council argued that disclosure of this information would cause unwarranted damage and distress as the individual officers had a reasonable expectation of privacy that such information would not be made public. Furthermore, given the pattern of spending indicated on the cards, and because of the regular nature of the external meetings involving the officers concerned, disclosure of the information would indicate where officers are likely to be on a given day which would be likely to cause unwarranted damage and distress to those officers if their movements could essentially be 'tracked' by members of the public.
47. With regard to the legitimate interests in disclosure of the information, the Council noted that FOIA had been introduced to promote transparency in public life. Whilst there is an inherent public interest in how the Council spends public money, the release of personal data pertaining to individuals in statements relating to the Council's corporate credit facilities cannot be seen to promote public transparency, particular when the spend detail had already been provided. The Council was of the view that disclosure of the personal information was not necessary to meet the legitimate interests of the public.

#### The Commissioner's position

48. In terms of the reasonable expectations of the individuals, the Commissioner accepts that they would not expect to have details of the individual purchases made on their corporate credit card disclosed under FOIA given that as matter of custom and practice the Council had only used such information in order to administer the cards themselves. The Commissioner notes that the individuals themselves have objected to disclosure of the information, a clear indication that they would not

expect to have such information disclosed. However, the Commissioner is not persuaded that in the culture of transparency and openness that has resulted from the introduction of FOIA such expectations were necessarily reasonable ones. More specifically, the Commissioner notes that many public authorities proactively disclose more detailed information about the spending incurred on corporate credit cards by senior staff members than the information the Council has already provided to the complainant. Furthermore, such proactive disclosures include the release of copies of card statements with the information which has been redacted on the basis of section 40(2) willingly disclosed.

49. The Commissioner believes that the consequences of disclosing the withheld information varies depending on the exact nature of the information released. The Commissioner notes that an individual's total monthly spend in a particular category has already been provided, e.g. in February 2012 Martin Swales spent £52.00 under the category 'business meeting'. In the Commissioner's view disclosing the number and value of transactions which make up this £52.00 total and the date(s) of those transactions is unlikely to lead to any material invasion of Mr Swales' privacy. The same is true of the number, value and dates of the other transactions detailed on the other card statements. Nevertheless, the Commissioner accepts that to a limited degree disclosure of the description of the transaction that appears on the card statements could lead to a minor infringement of the privacy of individuals in question given that it would result in disclosure of their preferences of eating establishment.
50. Therefore, with regard to the date of the transactions and the value of each individual transaction in the Commissioner's view disclosure of this information would not be unfair. This is because the Commissioner does not accept that it was necessarily reasonable for the four individuals to accept such information not to be disclosed under FOIA and further that disclosure of such information would be unlikely to result in any great infringement to the individuals' privacy. In terms of the transaction description, the Commissioner is satisfied that disclosure of this would be unfair given the potential invasion of the individuals' privacy if this information was disclosed.
51. Turning to the conditions in Schedule 2 of the DPA, the Commissioner believes that the most appropriate one in this case is the sixth condition which states that:

*'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of*

*prejudice to the rights and freedoms of legitimate interests of the data subject'.*

52. The Commissioner accepts that in light of the information already disclosed by the Council, disclosure of the date of the transactions and the value of those transactions is unlikely to add greatly to the public's understanding of how the Council uses corporate credit cards. However, for the reasons discussed above whilst the Commissioner accepts that disclosure of such information would be contrary to the expectations of the individuals in question, he does not accept that the consequences of such a disclosure are as potentially severe as the Council has argued. Moreover, there is always public interest in disclosure of such information in order to address the general principles of accountability and transparency for their own sake. Therefore for such information the Commissioner is satisfied that the sixth condition of Schedule 2 is met and thus section 40(2) cannot be relied upon to withhold this information.

### **Section 43 – commercial interests**

53. The Council has argued that a very small amount of information included in some of column 'transaction description' on some of the credit card statements is exempt from disclosure on the basis of section 43(2) of FOIA.
54. This is a prejudice based exemption which can only be relied upon if disclosure of the information would, or would be likely to, prejudice the commercial interests of a particular party. The Council has argued that disclosure of the withheld information would be likely to prejudice its commercial interests.
55. In the particular circumstances of this case the Commissioner cannot set out the Council's basis for relying on this exemption without revealing the content of the information itself. However, having considered these submissions the Commissioner is satisfied that disclosure of the information withheld on the basis of section 43(2) would be likely to prejudice the Council's commercial interests. The Commissioner has explained why he has reached this conclusion in a confidential annex which will be provided to the Council only.

### **Public interest test**

56. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld on the basis of section 43(2).

57. The Council acknowledged that there was a public interest in disclosure of the withheld information in order to improve transparency and increase accountability in relation to the spending of public funds. However, it argued that there was a stronger public interest in protecting the Council's ability to use public funds effectively. Having considered the information withheld under section 43(2) in the Commissioner's the opinion the degree which disclosure of this information would genuinely inform the public about the Council's expenditure is limited. However, disclosure of the information presents a real risk to the Council's commercial interests. The Commissioner has therefore concluded that the public interest favours maintaining section 43(2).

### **Other matters**

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58. The Commissioner notes that the complainant was dissatisfied with the involvement of the Council's Head of Legal Services in the internal review panel which considered requests 2, 3 and 4 as he also held a corporate credit card. In the Council's view this did not compromise the independence of the Head of Legal Services or debar him from involvement in the internal review. The Commissioner agrees with the Council; although he has reached a different finding in respect of some of the exemptions the Commissioner does not believe that there is any evidence that the Head of the Legal Services' independence was compromised. Therefore the Commissioner is satisfied that the Council followed the guidelines set out in the section 45 Code of Practice concerning the operation of an internal review process because in this case the process did involve 'a fair and thorough review'. Furthermore, as suggested by the Code, the individual who carried out the review was also senior to the person who took the original decision.

## Right of appeal

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59. 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)

60. 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.
61. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
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