

16 December 2020

Rosie Hought

Dear Rosie

**Case Reference IC-74161-L3P8**

## **Request for Information**

Thank you for your email of 13 November 2020.

Within your email you made a request for information. This has been handled by the ICO's Information Access Team under the provisions of the Freedom of Information Act 2000 (the FOIA).

This legislation entitles a requester to recorded information held by a public authority, unless an appropriate exemption applies. I apologise for the delay in responding to your request.

## **Request**

In your email you asked for:

*"In the context of Data Protection officers please can you tell me if you have investigated any public authority because of suspected conflict of interest with the role of the DPO, please provide the number of authorities investigated and similarly in respect of private sector DPOs."*

## **Response**

We can neither confirm nor deny that we hold information described in your request. This is in accordance with the provisions of section 31(3) of the FOIA, which I will explain in more detail below:

The exemption at section 31(1)(g) of the FOIA refers to circumstances where the disclosure of information "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.

When considering whether to confirm or deny holding information relevant to your request, we have given consideration to Section 31(3) which states:

*"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."*

If held, the information you have requested would only be held in relation to an investigation into a breach of the legislation we regulate. Consequently, any information held by the ICO would satisfy at least the requirement at section 31(1)(g) as it would be held for the purposes of an investigation to ascertain whether a person has failed to comply with data protection law and whether there were any circumstances which might justify regulatory action.

It then follows that the duty to confirm or deny that this information is held does not arise, by virtue of the provisions of section 31(3).

Section 31 is not an absolute exemption, however, and the duty to confirm or deny depends on the balance of the public interest. It is our view that the balance of the public interest supports the use of the provision to neither confirm nor deny that the requested information is held. This is because disclosure under FOIA is disclosure to the wider world, and if the ICO were to reveal that it was conducting an investigation about a named organisation, that might alert the organisation and enable it to take steps to frustrate the ICO's investigations.

It is also necessary to adopt a consistent approach to our response to requests for information about such matters, in the public interest, because any inconsistency could lead to inferences being made about that response, but also could inadvertently lead to conclusions being drawn about other 'neither confirm nor deny' (NCND) responses.

In simple terms, if the ICO adopted a general policy of neither confirming nor denying that it held information in the same or similar circumstances to those in this case, then if it occasionally departed from that policy and denied that it held information, this might enable parties to infer that in previous NCND responses, the information was more likely to have been held. Furthermore, the occasional confirmation that information was held could enable conclusions to be drawn about other NCND responses, for example where the information was of a broadly similar nature and, if held for one, would have been likely to be held for the other.

The risk is that a confirmation or denial which in itself appears benign, could enable somebody to deduce whether information was in fact held or not in other circumstances, where an NCND response had been given, and where that deduction could itself prejudice the investigations and proceedings undertaken by the ICO.

Unfortunately, therefore, it is our view that, irrespective of the specific public interest in transparency in any individual case, the importance of maintaining the integrity of the NCND responses, past and present, is of the greater public interest. Combine this with the public interest which applies to the present circumstances and I trust it will be clear why our response in the present case must be to neither confirm nor deny that the information you have requested is held by the ICO.

For the avoidance of doubt, therefore, nothing in the above should be taken as being either confirmation or denial that the ICO holds information about the organisations you describe in your request.

### **Next steps**

If you are dissatisfied with our under the FOIA or wish to complain about how your request has been handled please write to the Information Access Team at the address below or email [icoaccessinformation@ico.org.uk](mailto:icoaccessinformation@ico.org.uk)

A request for internal review should be submitted to us within 40 working days of

receipt by you of this response. Any such request received after this time will only be considered at the discretion of the Commissioner.

If having exhausted the review process you are not content that your request or review has been dealt with correctly, you have a further right of appeal to this office in our capacity as the statutory complaint handler under the legislation. To make such an application, please write to our FOI Complaints & Appeals Department at the address below or visit our website if you wish to make a complaint under the Freedom of Information Act.

A copy of our review procedure can be accessed from our website [here](#).

### **Your rights**

Our [privacy notice](#) explains what we do with the personal data you provide to us and what your rights are, with a specific entry, for example, for [an information requester](#). Our retention policy can be found [here](#).

Yours sincerely

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