

11 July 2023

IC-242510-R7K7

## Request

*In March, there were two incidents in relation to Capita.*

- *How were you notified of the breach?*
- *Is there an ongoing investigation?*
- *Have Capita submitted their representation, and can I request a copy?*
- *At what stage is the investigation?*

Your request, received on 4 July 2023, has been handled under the Freedom of Information Act 2000 (the FOIA).

We do not consider your final question to be a request for recorded information. The FOIA does not require us to provide progress updates on investigations we are conducting.

## Response

I can confirm that, in response to your request:

- Some of the information is held.
- We can neither confirm nor deny whether Capita have submitted representations.

Capita reported a data breach incident to us and we are currently investigating the matter.

We have issued a statement about this here: <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/05/ico-statement-on-capita-incident/>

We can neither confirm nor deny whether Capita have submitted representations. This is in accordance with the provisions of section 31(3) of FOIA, which we explain in further detail below.

## **NCND - section 31 FOIA**

Section 31(1)(g) exempts information if its 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),"*

With the relevant subsections to this request being 2(a) and 2(c):

*"(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 ..."*

These purposes apply in relation to the information you have requested, given that there is currently an open investigation into the breach reported by Capita.

Section 31(3) provides that:

*"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)."*

We find that, as the investigation into Capita is still open, confirming or denying whether representations had yet been made would be premature at this stage and would interfere with the open investigation.

Section 31 is not an absolute exemption, however. 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 if the ICO were to reveal whether representations had yet been made – or indeed, were to disclose any specific detail about the status of an open investigation - this would be likely to harm the investigation process and could lead to Capita being reluctant to cooperate with us. Further, revealing the status of an open investigation could lead to other parties being reluctant to engage with the ICO in future 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.

There is a risk 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. In such circumstances, that deduction could itself prejudice open investigations and proceedings undertaken by the ICO.

It is therefore 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 arguments specific to this request 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 has received representations from Capita in relation to the current open investigation.

This concludes our response to your request.

### **FOI review procedure**

If you are dissatisfied and wish to request a review of our decision or make a complaint about how your request has been handled you should write to the Information Access Team at the address below or e-mail [icoaccessinformation@ico.org.uk](mailto:icoaccessinformation@ico.org.uk).

Your 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 Customer Contact Team at the address given or visit our website if you wish to make a complaint under the FOIA.

## 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



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Risk and Governance Department, Corporate Strategy and  
Planning Service  
Information Commissioner's Office, Wycliffe House, Water  
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