

31 October 2023

Reference number: IC-261851-H4Y3

Request

You asked us: *"I have been informed by the above organisation [The Pensions Ombudsman] that they have been the victim of a cyber attack. In correspondence from them they have intimated this occurred between May and August of this year (no exact date given). Under FOI can I ask for confirmation that this has been reported to you...Secondly under FOI, can I have a copy of their referral of the incident to you, along with any reply from the ICO."*

We received your request on 4 October 2023.

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

Our response

Having searched our records we can confirm that this breach has been reported to us on 1 June 2023. This breach is currently under investigation by the ICO.

We are unable to provide a copy of their initial referral to us, as well as our reply, as we do not have the necessary lawful authority to disclose it. As such, it is 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, the information is exempt from disclosure.

As the matter is being investigated by the ICO, there has been further correspondence, or replies, between us and The Pensions Ombudsman. These are withheld under Section 31(1)(g) of the 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...

(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. We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

Our investigation into The Pensions Ombudsman is still ongoing. To release any correspondence between us and them could prejudice the ICO's ability to conduct the investigation in an appropriate manner. Disclosure at this stage would discourage our ongoing discussions between the ICO and The Pensions Ombudsman and may damage our ability to conduct and conclude the investigation fairly and proportionately.

Disclosure could also result in other data controllers being reluctant to engage with the ICO in the future. This is because it will breach the trust and confidence that data controllers have when they contact the ICO.

This breach of trust and confidence may also see data controllers refusing to report data breaches at all. This, and the above paragraph, will create a prejudice to the ICO as it will inhibit our ability to complete our regulatory functions.

Any information released at this stage could be misinterpreted, which in turn could distract from the investigation process. It could also reveal how our investigations are completed which could be used by data controllers to their advantage as they could withhold information, or change how they interact with us, during future investigations. This would create a prejudice to the ICO as it would inhibit our ability to complete future investigations.

With this in mind, we have then considered the public interest test for and against disclosure.

In this case the public interest factors in disclosing the information are:

- Increased transparency in the way in which The Pensions Ombudsman has responded to the ICO's enquiries.
- Increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are:

- The public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public.
- Disclosure could lead to other data controllers not reporting data breaches to us, for fear this will lead to an investigation and the information about this will be disclosed. This is not in the public interest as it will create a prejudice to any affected data subjects.
- The public interest in maintaining the ICO's ability to conduct the investigation into complaints as it thinks fit.
- Our investigation into this breach is ongoing. Disclosure could jeopardise the ICO's ability to obtain information relating to this case from the data controller. This could affect our ability to take regulatory action which is not in the public interest.
- Disclosure could result in this, as well as other data controllers/parties,

being reluctant to engage with the ICO in the future. This would affect our ability to complete our regulatory functions, including enforcement of the law, which is not in the public interest.

Having considered these factors, we are satisfied that it is appropriate to withhold the information.

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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