

31 October 2023

**Reference number: IC-261971-T6Y2**

**Request**

You asked us: *"You issued an enforcement notice to CYC [City of York Council] on the 13th September 2023... May I please therefore have the following recorded information*

- 1. All copies of correspondence between the ICO and CYC that led up to you issuing this notice.*
- 2. Dates, agendas and notes of meetings/calls held on this matter...*
- 3. Please provide in particular the correspondence where the risk of issuing of the enforcement notice was first written to the Council or when you first informed them you may have to do this.*
- 4. My understanding is that you issue advance notice to the Council when you will be publishing the notice. What date did you do that please, please provide the correspondence.*
- 5. Can you confirm if the Council, by email, in person, or phone asked that you publish the notice on or after a particular date. Please provide this."*

We received your request on 4 October 2023.

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

**Our response**

We will now respond to your requests individually below.

1. We can confirm that we hold information in the scope of this part of your request. This information is withheld in accordance with the exemption provided by Section 44 of the FOIA. This exemption is explained in more detail below.
2. We can confirm that there were two meetings/calls with CYC on 8 June 2023 and 31 August 2023. We do not hold any meeting agendas. The notes of these meetings/calls are withheld under Section 44 of the FOIA.

3. This information has already been considered under request 1.
4. CYC were advised on 31 August 2023 that an enforcement notice was going to be issued. This was completed verbally so no correspondence between the ICO and CYC is held. We can advise that a note of the conversation is held. While not technically correspondence, we have decided to scope this in as it would provide the details you seem to be requesting. This note is withheld in accordance with the exemption provided by Section 44 of the FOIA.
5. The ICO is refusing this part of your request as we neither confirm nor deny (NCND) whether we hold information falling within the description specified in your request. The duty at section 1(1)(a) of the Freedom of Information Act 2000 (FOIA) does not apply by virtue of the exemption found in Section 31(3).

Section 31(3) 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)."*

In this case we find that the matters described in subsection Section 31(1)(g) would be prejudiced. Section 31(1)(g) states:

*"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)."*

The relevant purpose contained in subsection 31(2) is 31(2)(c) which states:

*(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. 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, for the following reasons:

- To either confirm or deny if we hold the information you have requested would prejudice the ICO's ability to conduct our regulatory functions in an appropriate manner.
- To either confirm or deny could jeopardise the ICO's ability to discuss similar matters with other data controllers in the future as it could see other public authorities, and data controllers, refuse to engage with the ICO. This lack of engagement inhibits our ability to complete our regulatory

functions which, in turn, affects our ability to improve the data protection landscape.

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 enquiries, investigations, regulatory actions 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.

Combining the above with the public interest arguments specific to this request, we 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.

Having considered these factors, we are satisfied that it is appropriate to refuse this part of your request. For the avoidance of doubt, nothing in the above should be taken either confirmation or denial that the information you requested is or is not held by the ICO.

### **FOIA Section 44 and DPA section 132**

Some information has been 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.

## **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