

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2025

Public Authority: The Pensions Regulator
Address: Telecom House
125-135 Preston Road
Brighton
BN1 6AF

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific pension fund. The Pensions Regulator ("the public authority") refused to either confirm or deny that some of the requested information is held, citing section 44 (prohibitions on disclosure), and confirmed that the remaining information wasn't held.
2. The Commissioner's decision is that, under section 44(2) of FOIA, the public authority was correct to refuse to either confirm or deny that some of the requested information was held. On the balance of probabilities, the public authority also doesn't hold the information it denied holding so has fully complied with its obligations under section 1 (general right of access to information).
3. However, the Commissioner has recorded a procedural breach of section 17 (refusal notice), since the public authority failed to cite, at refusal stage, the appropriate exemption it came to rely upon.
4. The Commissioner does not require further steps.

Request and response

5. On 15 September 2024, the complainant wrote to the public authority and requested information in the following terms:
 - “1. “Please inform me how many meetings has senior civil servants from the Pensions Regulator held with the West Midlands Pensions Fund in order to resolve this issue?
 2. Please inform me how many meetings has Board members from the Pensions Regulator held with the West Midlands Pension Fund in order to resolve this issue?
 3. What action or investigation has the Pensions Regulator undertaken regarding the West Midlands Pension Fund performance on long delays and backlog?
 4. What assurances have you been provided by WMPF on clearing the backlog and how have you monitored this in your function as the Pensions Regulator?”
6. The public authority responded on 14 October 2024. It refused to either confirm or deny that information was held in response to parts 1, 3 and 4 and denied holding the requested information at part 2.
7. The public authority offered to conduct an internal review, but the complainant didn’t request one before raising a complaint with the Commissioner. The Commissioner accepted this complaint without an internal review.

Reasons for decision

Neither confirm nor deny – (‘NCND’)

8. When it receives a request for information under FOIA, a public authority must do two things. It must first confirm whether or not it holds the requested information; this is commonly known as ‘the duty to either confirm or deny.’ If the public authority confirms it holds the requested information, it must then disclose it unless an exemption under FOIA applies.
9. However, there are exemptions from the duty to either confirm or deny. In these instances, the public authority must issue a NCND response, leaving it ambiguous as to whether the requested information is held.

10. NCND responses are used in circumstances when even confirming or denying if information is held, would, in itself, give away exempt information.
11. The decision to use a NCND response will not be affected by whether a public authority actually does, or doesn't, hold the requested information.
12. The main focus for the Commissioner when considering NCND is theoretical; he needs to consider the consequences of confirming or denying whether the information is held. A public authority will need to use NCND responses consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an inference as to whether information is, or isn't, held.

Section 44(2) – prohibitions on disclosure

13. Section 44(1) of FOIA states that:

"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,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court."

14. Section 44(2) of FOIA states that:

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)"

15. In its response to the complainant, the public authority explained that, in response to parts 1, 3 and 4 of the request:

"We neither confirm nor deny that we hold information falling within the description specified in your request. Section 44(1)(a) of the Freedom of Information Act 2000 (FOIA – restricted information under section 82 Pensions Act 2004 (PA 04).

The reason that we cannot confirm or deny that we hold the information is because disclosure of the sort of information requested is prohibited under an enactment, save in certain circumstances which do not apply here."

16. The public authority has issued an NCND response because it believes that confirming or denying whether it holds the information requested at parts 1, 3 and 5 of the request would, in itself, disclose information that it's prohibited to disclose by an enactment – in this case, section 82 of the Pensions Act 2004.¹
17. Section 82 of the Pensions Act 2004 states:

“Restricted information must not be disclosed—

 - (1) (a) by the Regulator, or
 - (b) by any person who receives the information directly or indirectly from the Regulator...

(4) For the purposes of this section and sections 83 to 87, “restricted information” means any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except for information—

 - (a) which at the time of the disclosure is or has already been made available to the public from other sources, or
 - (b) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.”
18. So, for information to be restricted according to section 82 of the Pensions Act 2004, it must be obtained by the public authority in exercising its functions as the regulator. Only if the information has been made publicly available, or an individual can't be identified from it, can such information be disclosed and it not represent a breach according to section 82.
19. The pension provider, which is a legal person, is clearly named in the request. Furthermore, the Commissioner can see no evidence that the subject matter of the request has been put into the public domain.
20. So, in either confirming or denying that the information requested in parts 1, 3 and 4 of the request is held, the public authority would be revealing something about an identifiable legal person, obtained in its function as a regulator, which is otherwise not known. Therefore, confirming or denying that the information is held, in this case, would be a breach of section 82.

¹ [Section 82 of the Pensions Act 2004](#)

21. Section 44(1)(a) comes into play when another enactment such as section 82 prohibits disclosure and so the Commissioner is satisfied that, were the information held, it would be exempt from disclosure under section 44(1)(a).
22. In its refusal notice, the public authority refused to confirm or deny that the requested information was held, which it was correct to do, but cited section 44(1)(a) when it should have cited section 44(2). The Commissioner has considered this further in the procedural matters section of this notice.

Section 1 – held/not held

23. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
24. The public authority denied holding the information requested at part 2 of the request, which asks how many meetings board members had with the specific pension provider named in the request.
25. In response, the public authority confirmed:

"The information requested is not held as no Board members have held meetings with the West Midlands Pension Fund in the course of their TPR role. The key responsibilities of the Board are:

 - overseeing TPR's strategic direction and making key decisions on policy
 - ensuring TPR is properly run as a public body and has effective internal controls
 - ensuring that statutory and administrative requirements for the use of public funds are complied with."
26. Denying this information isn't held doesn't give away any information obtained by the public authority during its function as a regulator. This is because the public authority has explained that it's not the role of the board members to meet individual pension providers in a regulatory capacity. Even if the public authority were confirming it had taken, or considered, any regulatory action against the pension provider (which it isn't), its board members wouldn't have been involved in such activity.

27. Since the complainant has offered no arguments as to why board members would have undertaken an activity outside of their job role in this instance, or offered any other form of evidence or rationale as to why the public authority's explanation is incorrect, on the balance of probabilities, the Commissioner is satisfied that this information isn't held.

Procedural matters

28. Section 17 of FOIA states that, when applying an exemption, or refusing to confirm or deny that information is held, it must specify the exemption in question.
29. In failing to cite section 44(2) when it should have done, the public authority has breached section 17.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
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Water Lane
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