

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 November 2017

**Public Authority:** The Pensions Regulator  
**Address:** Napier House  
Trafalgar Place  
Brighton  
BN1 4DW

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the contents of any proceedings or action taken by the Pensions Regulator (the Regulator) against a named hotel (the hotel). The Pensions Regulator refused to confirm or deny if it held the information, citing section 44(2) (prohibitions on disclosure) of the FOIA, on the grounds that section 82 of the Pensions Act 2004 provides a statutory prohibition on the disclosure of 'restricted information'.
2. The Commissioner has investigated the Regulator's application of section 44(2). Her decision is that the Regulator has correctly applied the exemption on the basis that confirmation or denial was prohibited by section 82 of the Pensions Act 2004 (PA).
3. The Commissioner does not require the Regulator to take any steps.

#### Request and response

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4. On 20 June 2017, the complainant wrote to the Regulator and requested information in the following terms:

*"I would like to see the contents of any proceedings or action taken by the regulator related to the [name redacted] hotel at [address redacted]"*

*I would like this to include anything related to the breaking of rules and a failure to comply related to the auto enrolment of employees on pensions with the said hotel-company.*

*I would like this to include all findings related to such incidences and to include details of penalties with the said hotel-company."*

5. The Regulator responded on 12 July 2017. It stated that it was unable to confirm or deny whether they held such information subject to the exemption at section 44(2) of the FOIA.
6. Following an internal review the Regulator wrote to the complainant on 20 July 2017. It stated that it upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 26 July 2017 to complain about the way his request for information had been handled. He disputes the Regulator's refusal to confirm or deny holding information within the scope of his request.

8. He told the Commissioner:

*"It seems entirely unreasonable to me to refuse to state whether you hold the information or not and I consider that this is an unreasonable response to the request for the information I made.*

*To refuse to state whether proceedings or sanctions have been pursued against a party one way or another seems to be unreasonably secretive and deliberately evasive.*

*It also seems unreasonable to withhold information about a potential breach of auto enrolment law when the regulator routinely publishes information about breaches and sanctions.*

*In the event that the law/regulations have been broken and a substantial fine has been issued (if that is the case) to withhold the identity of the offender and protect them seems to me to be against the public interest as surely people have a right to know such things.*

*It also strikes me that as you routinely publish the names of transgressors, there is a tacit acceptance of this principle.*

*Therefore this decision also strikes me as inconsistent with standard practice."*

9. The Commissioner considers the scope of the investigation to be to determine whether the Regulator correctly applied section 44(2) to neither confirm nor deny holding information within the scope of the request.

## Reasons for decision

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### Section 44 prohibitions on disclosure

10. Section 44(1) of the 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".*

11. 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)".*

12. Section 44 is an absolute exemption, there is no requirement to consider the public interest test. In this case, the Regulator considers that the confirmation or denial that would have to be given falls within paragraph (a) of subsection (1).

13. Section 82 of the Pensions Act 2004 prevents the disclosure of 'restricted information' by the Regulator. 'Restricted information' is defined as any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person.

14. During the course of the Commissioner's investigation, and in support of its citing of section 44(2), the Regulator confirmed that section 82 of the Pensions Act 2004 prohibits it from confirming or denying whether it holds the requested information. The Regulator stated that it:

*"...felt it had no option but to apply s44(2) FoIA which allows the Regulator to decline to confirm or deny whether it holds information, which in other circumstances it may be able to do. In confirming we have made any findings or issued any penalties if we have, that would supply information that the named person has breached certain legislative requirements and the nature of it (given how the request is phrased) which we would only know through information we would have obtained in the exercise of our statutory function."*

15. The Commissioner is satisfied that the information, if held, would have been obtained by the Regulator in the exercise of its functions which

relate to the organisation mentioned in the request. She therefore considers that the information, if held, would be 'restricted information'.

16. Section 82(4) of the Pension Act 2004 states that restricted information will not include information which (a) at the time of the disclosure is or has already been made available to the public from other sources, or (b) 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. The information is not publicly available and the anonymisation of any information that may or may not be held by the Regulator would not be possible in the circumstances because the request specifically names the organisation in question.
17. The Regulator informed the Commissioner that in order to provide transparency around the use of its powers the Regulator does publish compliance and enforcement bulletins which do include information on certain fines further to section 89 of the Pensions Act 2004. It clarified however that section 89 is a discretionary power given to the Regulator and that information relating to the exercising of its functions would only be published when the risk of prejudice to any action by the Regulator had been reduced.
18. Finally, section 82(3) of the Pensions Act 2004 allows information to be disclosed if consent has been obtained from the person that would have provided the Regulator with the information (if that was to be the case) and, if different, the person from whom the Regulator obtained it. There is no evidence that consent has been provided in this case.
19. The Commissioner finds that for the Regulator to confirm or deny whether it holds the requested information would itself reveal information, if it existed, that would be exempt from disclosure on the basis of section 44(1)(a). Accordingly the Regulator was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA to refuse to confirm or deny whether the requested information is held.

## Right of appeal

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20. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**