

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information from the trading standards section of the council about a complaint made by him about a specific company. The council has applied section 44 of the Act (statutory prohibition), on the grounds that section 237 of the Enterprise Act 2002 provides a statutory prohibition on it disclosing the information it holds to him.
2. The Commissioner's decision is that the council has correctly applied section 44 to the information.
3. The Commissioner does not require the council to take any steps.

Request and response

On 12 July 2016, the complainant wrote to the council and requested information in the following terms:

"As a first step, I request, under the provisions of the Freedom of Information legislation, the disclosure of all documents held by Kent Trading Standards relating to my complaint that pair of shoes, sold by [name of business redacted], were not of the quality required. This information should include all documents received from Citizen's Advice or others, any internal memos or e-mails relating to my complaint and any letters or e-mails sent to third parties relating to my complaint. Any e-mails received from [redacted] e-mail addresses can be excluded."

4. The council responded on 4 August 2016. It applied section 44(1) (statutory prohibition) and withheld the information it holds.
5. In subsequent correspondence the complainant sought to narrow his request to exclude any information received by the council from the Citizens advice and Consumer Service ('CACS').
6. Following an internal review the council wrote to the complainant on 24 August 2016. It maintained its position that the information is exempt under section 44.

Scope of the case

7. The complainant contacted the Commissioner on 3 October 2016 to complain about the way his request for information had been handled. He considers that the information should have been disclosed to him.

Reasons for decision

8. Section 44(1)(a) of the FOIA provides that information is exempt information if its disclosure is prohibited by or under any enactment. This is commonly known as a statutory bar to disclosure. In this case, the council argues that section 237 of the Enterprise Act 2002 provides a statutory bar to a disclosure of the requested information.
9. Section 237 of the Enterprise Act 2002 prevents the disclosure of 'specified information' that relates to the affairs of an individual or business which a public authority has obtained in connection with the performance of certain functions. Specified information must not be

disclosed during the lifetime of the individual or while the business continues to exist unless the disclosure is permitted under sections 239 to 243 of the Enterprise Act 2002.

10. Section 238 of the Enterprise Act 2002 defines specified information as information that has come to a public authority in connection with the exercise of any function it has under or by virtue of:
 - a) Part 1, 3, 4, 6, 7 or 8 of the Enterprise Act 2002;
 - b) An enactment listed in Schedule 14 of the Enterprise Act 2002; or
 - c) Such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.
11. The council explained that the information came into its possession with a view to undertaking its function under Part 8 of the Enterprise Act 2002 (domestic infringements). The information relates to a trading standards complaint against the business concerned under The Consumer Rights Act 2015 Part 1.
12. The Consumer Rights Act 2015 Part 1 is specified for the purposes of Section 211(2) of the Enterprise Act 2002 by the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (S.I. No. 1727). Section 2 of this Order states:

"2. Acts or omissions in respect of any provision of Parts 1 and 2 and Chapter 5 of Part 3 of the Consumer Rights Act 2015 are specified for the purposes of section 211(2) of the Enterprise Act 2002."
13. It therefore falls within Section 238(1)(a) Enterprise Act 2002.
14. As section 238 of the Enterprise Act 2002 defines specified information as information that "comes to" a public authority, the Commissioner has considered the source of the information. The Commissioner considers that it 'came to' the council as part of its functions under the Enterprise Act 2002, essentially through a complaint made by the complainant to the CACS, which was passed on to the trading standards section of the council in order for it to consider the complaint. The Commissioner therefore considers that the information falls within the information caught by section 237.
15. Section 245 of the Enterprise Act 2002 creates a statutory bar on disclosure by making it an offence to disclose information that falls within section 237.

16. Sections 239 to 243 of the Enterprise Act 2002 set out various circumstances or “gateways” under which a public authority may disclose information despite the general prohibition on the release of information under section 237.
17. The Commissioner considers that the only gateways which could apply are sections 239 and section 241.
18. Section 239 allows for disclosure if a public authority has obtained consent and section 241 provides that a public authority may disclose information for the purpose of facilitating the exercise by it of any function it has under or by virtue of the Enterprise Act 2002 or any other enactment. The council has confirmed that none of the gateways for disclosure under sections 239 to 243 apply in this case.
19. The Commissioner notes that the gateways to disclosure under the Enterprise Act 2002 do not impose a duty on the council to disclose information but enable it to do so in certain circumstances. Therefore, the Commissioner's view is that the council is not under a duty to consider whether a gateway to disclose applies. This point has been confirmed in the Information Tribunal case of *Dey v Information Commissioner EA/2006/0057* where the Tribunal stated in respect of the gateway provided by section 241 of the Enterprise Act 2002 that:

“Section 241 is one of the gateways under which a public authority may disclose information under the Enterprise Act for the purpose of facilitating its functions. It gives the public authority a power to disclose, not a duty. The exercise of that power is a matter for the public authority to consider; it must first decide that it would facilitate the exercise of its functions to disclose the information, and then it must apply the various tests set out in section 244. That process, with its own version of a public interest test, set out in an Act passed two years after the Freedom of Information Act, cannot be short circuited by invoking the Freedom of Information Act provisions.”

20. The Commissioner has therefore concluded that section 44(1)(a) of the FOIA is engaged, through the provisions of section 237 of the Enterprise Act 2002, and that the council was correct to withhold the requested information. As section 44 is an absolute exemption the Commissioner is not required to carry out a public interest test.

The Complainant's narrowed request

21. The complainant made a narrowed request for information, excluding the information which was passed to the council from the CACS. The council said that in excluding that information it considered that the only information which would remain within the scope of the request is a standard letter automatically sent to a complainant who directly

requests a response from Trading Standards. It supplied a copy of this letter to the Commissioner for consideration.

22. The council initially applied section 44 to this following the above arguments. After the Commissioner wrote to the council it reconsidered this and found that that information was not covered by the Enterprise Act as it was not information which had 'come' to the authority.
23. Having considered the terms of the request however the Commissioner considers that the complainant's request is for information and correspondence relating to his personal complaint against the private business. The letter held by the council is a generic template letter sent whenever any complainant requests information from Trading Standards. It does not specifically relate to the complainant's complaint regarding the business.
24. As such the Commissioner has decided that the letter falls outside the scope of the complainant's request for information.
25. As section 44(1) provides an absolute exemption there is no need for the Commissioner to consider the public interest test.

Right of appeal

26. 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

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

27. 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.
28. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF