

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 5 February 2007

**Public Authority:** East Sussex County Council  
**Address:** C6F  
County Hall  
St Anne's Crescent  
Lewes  
East Sussex  
BN7 1SW

### Summary

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The complainant requested information from the public authority about its dealings with a named company. The public authority refused to disclose relying upon section 44 of the Freedom of Information Act 2000 (section 44). As this is an absolute exemption the public authority did not have to consider the public interest. The Commissioner has considered the exempt information in question and is satisfied that the public authority has applied section 44 correctly.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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2. On 11 May 2005 the complainant requested the public authority to provide, in accordance with section 8(1) of the Act, all correspondence and information:  
*(a) between and East Sussex County Council Trading Standards Service and [a named company], (b) received and/or concerning the [named company], (c) relating to any complaints received about the [named company].*
3. On 9 June 2005 the public authority responded declining to disclose the information, relying upon the section 44 exemption.

4. On 20 June 2005 the complainant requested an internal review.
5. On 6 July 2005 the public authority confirmed that the internal review had taken place and that the original decision had been upheld on the same ground.

## **The Investigation**

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### **Scope of the case**

6. In a letter dated 1 July 2005 (received by the Commissioner on 11 July 2005), the complainant complained about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - a) Restrictions on disclosure of information under section 237 Enterprise Act 2002 do not apply when a request under FOI is made because an FOI request imposes a duty to release requested information and the FOI Act exists apart from Part 9.
  - b) When the complainant submitted the exact same request to Kent County Council it disclosed the requested information having decided the Enterprise Act 2002 did not apply in these circumstances.

### **Chronology**

7. On 9 August 2006 the Commissioner asked the public authority to justify its use of the section 44 exemption. The public authority provided the information on the 29 August 2006.
8. On 6 October 2006 the Commissioner sought further clarification from the public authority about its application of the section 44 exemption. The public authority provided clarification on the 16 October 2006.
9. The Commissioner has considered all the documentation and arguments submitted by both parties including copies of the exempt information.

### **Analysis**

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10. The Commissioner now deals with this case by considering the public authority's use of the section 44 exemption. A full text of the relevant statutes referred to is contained in the legal annex.

## Exemption

11. The section 44 (1) exemption applied by the public authority (which is an absolute exemption) relates to information that is prohibited from disclosure by or under another enactment. The public authority has claimed that Part 9 of the Enterprise Act 2002 acts as a prohibition on disclosure. Sections 237-245 of that Act fall within Part 9.
12. Section 237 of the Enterprise Act 2002 acts as a statutory bar if two conditions are met:
  - (1) the information must relate to the affairs of an individual or any business of an undertaking; and
  - (2) the information must be 'specified information' under s238.
13. Section 238 of the Enterprise Act defines 'specified information' as
  - (1) Information is specified information if it comes 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;
    - (b) an enactment specified in Schedule 14
    - (c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection
14. The Commissioner is satisfied that in this instance the requested information relates to the business of an undertaking. In addition, the information must be "specified information" as defined by section 238 of the Enterprise Act 2002 (in this instance under an enactment specified in Schedule 14). The public authority claimed that it had obtained the requested information in connection with an investigation about a possible offence of charging more than advertised, in contravention of the Consumer Protection Act 1987 Part III.
15. The Consumer Protection Act 1987 is a specified enactment in Schedule 14 of the Enterprise Act 2002 therefore the requested information is "specified information". The Consumer Protection Act 1987 also confirms that Trading Standards do have the function of investigating and enforcing offences under Part III relating to misleading pricing.
16. Section 245 of the Enterprise Act 2002 creates a statutory bar on disclosure by making an offence to disclose information that falls within section 237.
17. The Commissioner considered the point raised by the complainant that section 237(6) of the Enterprise Act 2002 does not affect any power or duty to disclose that exists apart from Part 9 of the Enterprise Act. The complainant argued that: *'restrictions on disclosure of information under s. 237 of the Enterprise Act do not apply when a request under FOI is made ... because an FOI request imposes a duty ... to release the requested information ... FOI Act exists apart from Part 9 of the Enterprise Act'*.

18. The Act provides access to information held by public authorities. However it does not impose an unlimited duty of disclosure upon public authorities. If information falls within an exemption a public authority does not have to disclose it and section 44 makes clear that the Act does not override prohibitions found in other legislation. The Act must therefore be read in conjunction with Part 9 of the Enterprise Act 2002.
19. Section 237(6) of the Enterprise Act 2002 states that section 237 does not affect any power or duty to disclose information which exists apart from Part 9 [of that Act]. The Commissioner is of the view that section 237(6) does not remove the statutory bar as the Freedom of Information Act 2000 does not impose a duty to disclose information which is exempt.
20. Moreover, section 44 of the Freedom of Information Act 2000 requires the public authority to consider whether disclosure “otherwise than under this Act” is prohibited by enactment. Therefore, when considering the application of this exemption the Act cannot be cited as the enactment imposing the obligation to disclose. Therefore, a public authority must consider whether disclosure would be prohibited by enactment if the Freedom of Information Act was not in force. If so, section 44 is engaged and the information is exempt.
21. The Commissioner’s approach here adopts and follows that of the Information Tribunal in *The Corporate Officer of the House of Commons v. Information Commissioner and Norman Baker MP (EA/2006/0015 and 0016)*. In that case the Tribunal construed the same words - “otherwise than under this Act” – where they appear in section 40(3)(a).
22. The complainant also pointed out that he had made the same request for information to another authority who had disclosed the information. Although not strictly relevant given the above conclusion, it is the Commissioner’s view that each authority should deal with requests for information on a case by case basis. Therefore a disclosure of information by one authority (which may have related to information obtained in other circumstances) does not create any sort of precedent for other public authorities to follow.

## The Decision

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23. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the Act.

## Right of Appeal

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24. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 5th day of February 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

**Section 44(1)** provides 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.”

## Enterprise Act 2002

**Section 237(1)** provides that –

This section applies to specified information which relates to –

- (a) the affairs of an individual;
- (b) any business of an undertaking

**Section 237(6)** provides that-

This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

**Section 238(1)** provides that-

Information is specified information if it comes 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;
- (b) an enactment specified in Schedule 14
- (c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection

## SCHEDULE 14 - Specified Functions

### Sections 238 and 243

[Parts 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973 (c 41).]

Trade Descriptions Act 1968 (c 29).[Hallmarking Act 1973 (c 43).]

Prices Act 1974 (c 24).

Consumer Credit Act 1974 (c 39).

[Customs and Excise Management Act 1979 (c 12).]

Estate Agents Act 1979 (c 38).

Competition Act 1980 (c 21).

[Video Recordings Act 1984 (c 39).]

Consumer Protection Act 1987 (c 43).

Consumer Protection (Northern Ireland) Order 1987 (SI 1987/2049 (NI 20)).

Copyright, Designs and Patents Act 1988 (c 48).]

Property Misdescriptions Act 1991 (c 29).

Timeshare Act 1992 (c 35).

[Clean Air Act 1993 (c 11).

[Value Added Tax Act 1994 (c 23).]

Trade Marks Act 1994 (c 26).]

Competition Act 1998 (c 41).

Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000 (c 8).

An order made under section 95 of that Act.[Fireworks Act 2003.]