

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2011

Public Authority: Monmouthshire County Council

Address: County Hall
Cwmbran
NP44 2XH

Decision (including any steps ordered)

1. The complainant requested seven food hygiene inspection reports from Monmouthshire County Council (the "Council"). Four reports were disclosed but three were withheld because the information was gathered using the Council's powers and there was potential for an ongoing investigation to lead to a prosecution. The Council applied sections 30(1) and 30(2) of the Freedom of Information Act 2000 (the "Act") and said that it considered the public interest to favour maintaining the exemptions to disclosure. During the course of the Information Commissioner's (the "Commissioner") investigation the withheld information was disclosed but the complainant asked for a formal decision on whether the exemption had been correctly applied by the Council. The Commissioner has investigated and found that the information was correctly withheld at the time of the request. He found a procedural breach of the Act but requires no steps to be taken.
2. The Commissioner's decision is that:
 - Section 30(1)(a)(i) of the Act is engaged and that the public interest favours maintaining the exemption.
 - The Council breached section 17(1)(b) of the Act by failing to specify the relevant subsections of the Act on which it was relying. The Commissioner considers this is necessary in order that the applicant for information is clear about the reason a request is refused.
3. There are no practical steps the Commissioner can order the Council to take in relation to this complaint.

Request and response

4. On 5 January 2011, the complainant wrote to the Council with the following request for information:

"Hello,

I'd like to make a request under the Freedom of Information Act 2000 for the latest food hygiene inspection reports for the following seven businesses in Monmouthshire:

[list of names and addresses of seven businesses]."

5. The Council responded on 2 February 2011. It disclosed four of the reports in their entirety, apart from a small amount of personal data. The Council withheld three of the requested reports. It said that the businesses in question remained under consideration (subject to revisits) for further legal action based on the findings of the initial inspection.
6. Following an internal review the Council emailed the complainant on 11 April 2011. It stated that it was relying on the exemptions provided by section 30(1) and (2) of the Act. It also considered the public interest test and said that its key consideration had been public health. It was the Council's view that disclosure of the reports would be likely to "jeopardise the Council's ability to enforce actions by bringing prosecutions and securing convictions where appropriate, and would also lead to a risk of public reaction disproportionate to the circumstances". The Council found that this outweighed the general public interest in openness.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant stated that she considered the refusal to disclose all of the requested information to be of significant importance in light of the fact that a number of Councils in England had moved to more proactive disclosure of such reports. The complainant was also concerned that there was a lack of consistency in the way local authorities were assessing requests for the disclosure of food hygiene inspection reports and the legal basis under which request were refused; ie whether the Act or the Environmental Information Regulations 2004 (the "EIR") was the relevant legislation.

8. During the course of the Commissioner's investigation the complainant clarified that she was not pursuing the personal data that had been redacted from the reports by the Council.
9. The Commissioner's investigation has therefore focused on the following issues:
 - The relevant legislation; whether the Act or the EIR is the relevant legislation under which the request should have been considered.
 - The application of section 30 of the Act; although in this case the withheld information has now been disclosed the complainant asked the Commissioner to determine whether the exemption had been correctly applied at the time of the request.

Reasons for decision

The relevant legislation

10. The Commissioner's view is that the Act, rather than the EIR, is the relevant legislation under which the request should have been considered. In order for the EIR to apply, the requested information would need to fall under the definition of environmental information set out in regulation 2(1) of that legislation.
11. The key point is that for information to be environmental there must be a link back to the elements of the environment. Even under regulation 2(1)(f) of the EIR, which says that environmental information is information on "the state of human health and safety, including the contamination of the food chain", those factors must be affected by the state of the elements of the environment referred to in regulation 2(1)(a) or by any of the matters referred to in regulation 2(1)(b) and 2(1)(c).
12. The Commissioner's position is that no such link can be made in relation to the withheld information in this case.

Information held for the purposes of investigations

13. The Act states that information is exempt from disclosure if at any time it has been held for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether any person should be charged with an offence (section 30(1)(a)(i)) or whether any person charged with an offence is guilty of it (section 30(1)(a)(ii)).

14. The Council did not specify the subsection on which it was relying but the but the Commissioner considers section 30(1)(a)(i) to be relevant in this case. The exemption is classed based, meaning that there is no requirement to demonstrate that disclosure would cause prejudice or harm to any interest in order to engage the exemption. If the information falls within the class or category of information set out in the legislation, the exemption is engaged. However, the exemption is subject to the public interest test, which means if the exemption is engaged a public authority can only withhold information if the public interest favours maintaining the exemption.
15. In this case, the relevant information is in the form of three specified food hygiene inspection reports that were prepared following the Council's inspection of three businesses. The Commissioner is satisfied that the exemption was engaged at the time of the request. His reasons are below.
16. The Council is a Food Authority as defined by section 5(1A) of the Food Safety Act 1990¹ and has responsibility for enforcing the Food Hygiene (Wales) Regulations 2006². As such it has responsibility for enforcing the provisions of that legislation and may instigate proceedings where it finds breaches.
17. In this case the Council did not take legal action against the businesses in question but it had the power to do so if it found breaches of the relevant legislation. Based on the evidence that the Commissioner has seen he is satisfied that, at the time of the request, the businesses which were the subject of the three withheld food hygiene inspection reports were subject to ongoing investigations. The Council had issued the findings of its inspections, including legal requirements and recommendations to bring the businesses in line with food hygiene standards. The Council had also stated its intention to re-visit the businesses to check whether the required improvements had been made.
18. The Commissioner is satisfied that, had the Council found continued breaches of food hygiene legislation, it had the power to take legal action against the businesses in question. He is therefore satisfied that section 30(1)(a)(i) of the Act is engaged.

¹ <http://www.legislation.gov.uk/ukpga/1990/16/section/5>

² <http://www.legislation.gov.uk/wsi/2006/31/contents/made>

The public interest test

19. There is clearly a strong public interest in the disclosure of food hygiene inspection reports, which would promote transparency and accountability in this area. It could be argued that such transparency could ultimately drive up food hygiene standards by both promoting good practice and highlighting businesses that need to make improvements. It might also be argued that such transparency could also improve the standards of inspections and decisions taken by Food Authorities, such as the Council. A further argument in favour of disclosure is that it is in the public interest to disclose information about businesses which do not meet the required standards of food hygiene so that the public may decide whether or not to use their services.
20. In arriving at a decision on where the balance lies in this case, the Commissioner referred to his specialist guidance on the public interest test in relation to section 30 of the Act³. He has been mindful of the purpose of the exemption which is to protect information that will allow the effective investigation and prosecution of crime.
21. In this case, at the time of the request the Council had yet to re-visit the businesses in question and its investigation process was therefore ongoing. The Commissioner considers this to be a significant factor in favour of maintaining the exemption; ie he considers that there is a significant public interest in protecting the integrity of ongoing investigations so as not to compromise them or any future legal proceedings.
22. The information in this case is also significant, as it details the findings of the Council's inspection and sets out the alleged breaches of food hygiene. This clearly therefore forms the basis of the further legal action taken by the Council and is not trivial or insignificant information.
23. Neither can it be argued that the passage of time has lessened the likelihood that the investigation or legal proceedings would be prejudiced, as the investigation was still ongoing. While the counter argument is that there is a public interest in accountability and transparency and that the disclosure of 'current' information would assist in this regard, his view is that this is outweighed by the public interest in maintaining the integrity of the ongoing investigation.
24. In summary, the Commissioner acknowledges the significant public interest in the disclosure of food hygiene inspection reports but

³ <http://icoportal/foikb/PolicyLines/FOIPolicyPublicinterestins30.htm> and <http://icoportal/foikb/PolicyLines/FOIPolicyPublicinterestfactorsfor30.htm>

considers that at the time of the request the public interest favoured protecting the Council's ongoing investigation. As such he agrees that, at the time of the request, the public interest favoured maintaining the exemption.

25. As the Commissioner considers that section 30(1)(a)(i) of the Act has been correctly applied to the withheld information, he has not gone on to consider the Council's application of section 30(2).

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Anne Jones
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