

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2012

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainants requested information relating to investigations carried out by Derbyshire Trading Standards in connection with choking incidents and complaints regarding Swizzels Matlow products. The Commissioner's decision is that Derbyshire County Council has correctly applied the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct. The Commissioner does not require any steps to be taken.

Request and response

2. On 2 August 2011, the complainants wrote to Derbyshire County Council ('the council') and requested information in the following terms:

"We represent the family of the deceased in connection with claims against Swizzels Matlow arising out of the death of the deceased as a result of choking on a Swizzels Matlow lollipop.

We are aware that you carried out an investigation in connection with the matter.

We...should be obliged to receive from you all records held by you pertaining to this matter, including the exchange of documents as between you and Swizzels, as well as any other parties.

Please also let us have disclosure of records relating to any investigations you have carried out in connection with other similar choking incidents/complaints regarding Swizzels Matlow products."

3. The council responded on 23 August 2011. It stated that the records held by Derbyshire County Council Trading Standards were collected in the course of an investigation which the authority had the power to conduct and, as the purpose of the investigation was to provide information which would have been the basis of a decision as to whether or not to institute criminal proceedings, the information is exempt under s30(1)(b) of the Freedom of Information Act 2000. In relation to the public interest, the council stated that in order for Trading Standards to be effective in its role as an enforcement agency, officers need to have access to all aspects of commercial organisations and to achieve that, a certain level of trust from businesses is necessary. Divulging commercially sensitive information, particularly if collected in the course of an investigation is likely to degrade that trust.
4. An internal review was requested on 2 November 2011. This correspondence enclosed the complainants' letter to the Commissioner of 23 September 2012 which contained the following information request:

"We also request you to provide documentation relating to the advice given by Derbyshire Trading Standards to Swizzels in 2007 and also, disclosure of records relating to any other similar choking incidents/complaints investigated by you regarding Swizzels Matlow products."
5. On 25 November 2011, the complainants also made the following request to the council:

"...it has come to our attention that a report was prepared in December 2006 following an inspection at Swizzels by [named individual].

We also seek disclosure of the report and any relevant records as these are material to the matters which are under consideration in respect of our request and the claim which we are pursuing."
6. An internal review was provided on 12 January 2012. It stated that the authority has power to conduct investigations under the Consumer Protection Act 1987, the General Product Safety Regulations 2005 and the Food Safety Act 1990 and the information requested was for the purposes of an investigation which may have led to the initiation of criminal proceedings therefore 30(1)(b) was correctly engaged. It further stated that disclosure is likely to prejudice the council's ability to conduct investigations with cooperation from commercial organisations

in the area and it is in the public interest to safeguard a co-operative investigatory process.

Scope of the case

7. The complainants contacted the Commissioner on 17 January 2012 to complain about the way the requests for information had been handled. They stated that they wished to challenge the decision further as they were not satisfied that the response or review was satisfactory, or that the council dealt adequately with the letters of 23 September 2011 and 25 November 2011.
8. During the course of the Commissioner's investigation, the council confirmed that the requests for information of 23 September 2011 and 25 November 2011 fell within the scope of the original request and within the ambit of the internal review response of 12 January 2012. It categorised this information as 'enclosure A' and stated that the information held was the same for both of these requests. It sought to rely upon the exemption at section 30(1)(b) and stated that, in the alternative, it is information to which section 31(1)(g) applies to the extent that the information is not covered by section 30(1)(b). It also submitted that the duty to confirm or deny whether any advice was given or whether any records are held should not arise as doing so would prejudice the working relationship Derbyshire Trading Standards has with all companies. However, when the Commissioner questioned the application of the provision to neither confirm nor deny the existence of this information, the council stated it can confirm that this information exists. Therefore, the duty to confirm or deny is not considered in this decision notice.
9. The Commissioner identified that one of the documents within 'enclosure B' is the personal data of the person on whose behalf the request was made. However, as this document is a witness statement signed by that person, the Commissioner considers that it is outside the scope of this decision notice as it is information already known to the requester.
10. The Commissioner considered whether the council were correct to apply the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct to both the information categorised as 'Enclosure A' and 'Enclosure B'.

11. As the Commissioner finds that the exemption at section 30(1)(b) applies, he has not considered whether the exemption at section 31(1)(g), where information which is not exempt information by virtue of section 30 is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2), applies to the information categorised as 'enclosure A'.

Reasons for decision

Section 30 - Investigations and proceedings conducted by public authorities

12. Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –
(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...”

13. The withheld information within 'Enclosure B' is held by the council for the purposes of its Trading Standards investigation into the incident. The Trading Standards department has powers under the Consumer Protection Act 1987, the Food Safety Act 1990 and the General Product Safety Regulations 2005 to undertake necessary investigations to ascertain if there has been any contravention of the legislation. Depending upon the outcome of the investigation, criminal charges may have been brought under regulations 5 and 7(1) of the General Product Safety Regulations 2005.
14. Some of the information within 'Enclosure B' was created by Manchester Trading Standards who undertook an investigation locally to where the incident took place. This information was supplied to Derbyshire Trading Standards for information and further investigation as the lollipops are made in Derbyshire. The Commissioner notes that Manchester Trading Standards would have had the power to institute criminal proceedings under regulations 5 of the General Product Safety Regulations 2005 if the results of their investigation deemed it appropriate.
15. However, as the phrase 'at any time' (see paragraph 12) means that section 30(1)(b) extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose, and the council has confirmed that the information supplied by Manchester Trading Standards was used as part of Derbyshire's

investigation, the fact that the information existed prior to Derbyshire's investigation does not preclude the application of the exemption.

16. The council informed the Commissioner that Manchester Trading Standards did not take action as a result of their investigation and, as the business demonstrated a robust operation and had clearly followed advice given to them by Trading Standards Officer as a result of previous visits, Derbyshire Trading Standards did not deem the institution of criminal proceedings appropriate and the investigation was completed in February 2010.
17. The council stated that the withheld information within 'Enclosure A' constitutes records of 'any other similar choking complaints investigated'. It explained that the information was held for the purpose of an enforcement visit, conducted in December 2006, which constituted an investigation which, if an infringement was identified, may have lead to a decision to institute criminal proceedings as described for 'Enclosure B' in paragraph 13. The council also explained that cautions can be issued during such enforcement visits.
18. The Commissioner noted that the withheld information contained a reference to another complaint which could fall within the scope of the requests. This information was supplied to the Commissioner upon his request and the council stated that the information was held for the purpose of an enforcement visit, conducted in January 2006, which constituted an investigation which, if an infringement was identified, may have lead to a decision to institute criminal proceedings as described for 'Enclosure B' in paragraph 13.
19. Due to the phrase 'at any time', the Commissioner considers that is irrelevant for the application of section 30(1)(b) that the investigations were complete at the time of the request, merely whether the information was held at some point for the purposes of the investigations. Additionally, the fact that no prosecutions materialised does not affect the applicability of the exemption.
20. As section 30(1)(b) is a class-based exemption it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage the exemption.
21. Taking the above into consideration, the Commissioner is satisfied that that the information requested was held as part of investigations being conducted by the council, with the potential for criminal proceedings to be instituted which the council has to the power to conduct. He therefore considers the section 30(1)(b) exemption to be engaged in respect of all the withheld information.

The public interest test

22. As section 30(1)(b) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the FOIA. This favours disclosure unless;

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

23. The starting point is to focus on the purpose of the relevant exemption. With section 30(1)(b) this involves weighing the prejudice that may be caused to an investigation or prosecution, or more generally to the investigatory and prosecution processes of the public authority, against the public interest in disclosure. There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters.

24. When considering the application of the public interest test under section 30(1)(b) the following are some of the factors which should be considered:

- the stage or stages reached in any particular investigation or criminal proceedings
- whether and to what extent the information has already been released into the public domain
- the significance or sensitivity of the information
- the age of the information

Public interest arguments in favour of disclosing the requested information

25. The complainants have commented that the Trading Standards investigation was completed at the beginning of 2010.

26. They have also submitted that as Swizzels Matlow say that there is and was no problem with the lollies then upon what basis it is contended that disclosure might cause damage? They commented that conversely, and as is their position, if there was a problem with the lollies, then this represents such an elementary public safety concern that failure to disclose would invite problems for Trading Standards.

27. Although not specifically stated by the complainants, the Commissioner considers that as they are representing the family of the deceased in connection with claims against Swizzels Matlow, they appear to be submitting that disclosure is necessary to ensure that the family can pursue a claim. Indeed, the individual who the complainants are representing has stated in the 'form of authority' that disclosure is required in respect of investigating a claim.
28. However, when determining whether a public authority should disclose information in response to a request, the issue is whether it is in the public interest to disclose that information to the public at large. The Commissioner does not consider an argument in relation to pursuing a claim to be relevant because it relates to the private interests of the deceased's family as opposed to the public interest in disclosure. It should be made clear that the Commissioner's concern is not with the private interest of individuals, however understandable that interest might be or however sympathetic he may feel towards it. Whilst the requested information is clearly of interest to the complainants, this does not necessarily mean that there is a wider public interest that would be served by its release.
29. In relation to the complainants point regarding an elementary public safety concern, the Commissioner considers that there would be public interest in disclosing evidence which may show that the health and safety of an individual has been endangered. However, the council have stated that the business demonstrated a robust operation and having examined the withheld information the Commissioner finds nothing to dispute that.
30. The Commissioner is mindful of the public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the requested information may enable the public to understand why a particular investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. In this case, the Commissioner is aware that information relating to the specific investigation is not in the public domain, however, the public interest in respect of the discharge of a public authority's statutory functions is somewhat mitigated by the publication of information by the council as to the methods engaged by Derbyshire Trading Standards in seeking compliance with relevant legislation. This takes the form of a 'Compliance Policy' which is available on the council's website.
31. In relation to the complainants' submission that the investigation was completed in early 2010, the Commissioner notes the Tribunal's comments in the case of *Guardian v The Information Commissioner* and

Avon and Somerset Police case¹. In that case the Tribunal took into account the age of the information stating that;

“The passage of time was a double-edged argument, whichever side wielded the sword. It probably reduced the risks of prejudice to future investigations but it similarly weakened the legitimate public interest in knowing more of the background facts.”

32. Although the argument in relation to the age of the information has some merit, the Commissioner does not believe that in all circumstances the older the information is the less risk of prejudice there is. There is always the possibility that the status of an investigation can change over time and that information has the potential of becoming relevant again. The Commissioner notes that at the time of the request the specific investigation had been closed for 18 months. However, as the arguments in favour of maintaining the exemption (detailed below) focus on the protection of the investigatory and prosecution processes of the council, the Commissioner does not consider the age of the information to be particularly relevant in this case.

Public interest arguments in favour of maintaining the exemption

33. The council stated that in order for Trading Standards to be effective in its role as an enforcement agency, officers need to have access to all aspects of commercial organisations and to achieve that, a certain level of trust from businesses is necessary. Divulging information collected in the course of an investigation is likely to degrade that trust which would prejudice the council's ability to conduct investigations and it is in the public interest to safeguard a co-operative investigatory process.
34. The council considers that disclosure of the requested information would have wide ranging implications for the work carried out by Trading Standards which would not be in the public interest. It submitted that if the effective enforcement of food standards is jeopardised this has a clear public interest implication in terms of serious harm caused by breaches of food standards legislation. It explained that Trading Standards role would be undermined as its enforcement and investigatory powers would be prejudiced by disclosure given the importance of having effective working relationships with local companies. Whilst Trading Standards have significant enforcement powers, much investigatory and enforcement work is more successfully completed with the co-operation of the companies involved and the

¹ Appeal no. EA/2006/0017

disclosure of the requested information would erode working relationships. The council further explained that in this instance, the visit to Swizzles Matlow was not a scheduled visit and was conducted with an "open door approach" meaning that with the co-operation of the company, Trading Standards were granted unrestricted access to production areas and records.

35. The council stated that due to the lapse of time between the original investigation and the subsequent freedom of information request, consideration was given to effect of that lapse of time but the council maintain that the reasons for withholding the information continue to apply even though the investigation is concluded.
36. In favour of maintaining the exemption, the Commissioner notes that section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct and therefore recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations.
37. The Commissioner has considered the significance of the information in this case. His view is that due the fact that the investigation demonstrated a robust operation and certainly Trading Standards did not deem criminal proceedings appropriate, there is less public interest in its release as compared to a situation where the investigation has found evidence of wrong doing. The Commissioner believes that the fact the information does not contain anything which could lead to the institution of criminal proceedings would reduce the likelihood of harm occurring to the investigatory process through its disclosure. He considers that if the information was of greater significance to the institution of criminal proceedings, the greater the likelihood of harm to the investigatory process, should it be disclosed. However, as stated above, the arguments in favour of maintaining the exemption focus on the protection of the investigatory and prosecution processes of the council rather than the protection of a specific investigation or prosecution.

Balance of the public interest arguments

38. In favour of disclosure, the Commissioner notes that whilst general information relating to the methods engaged by Derbyshire Trading Standards in seeking compliance with relevant legislation is in the public domain, which goes some way to addressing the public interest in ensuring transparency and accountability, no information about the specific investigation is publically available. Therefore, the withheld information would add to the public's understanding of the actions of Derbyshire Trading Standards in respect of this particular investigation.

Disclosure of the information would also ensure that Derbyshire Trading Standards is held to account for this particular investigation. In view of this the Commissioner considers that the arguments in favour of releasing the withheld information deserve some weight.

39. However, in attributing weight to the factors in favour of maintaining the exemption the Commissioner has taken into account the sensitivity of the matter under investigation. There is considerable public interest in a matter such as the death of a child through choking on a publically available product being investigated as thoroughly and efficiently as possible and ensuring that the best evidence is available to Trading Standards to inform its decisions. It is important for public confidence in the activities of Trading Standards that accidents should be thoroughly investigated by it, and that its ability to discharge its statutory functions should be effective and unimpeded. There will be cases where, the balance of public interest will run in favour of disclosure but the Commissioner is not satisfied that this is such a case. In all the circumstances of this case the Commissioner is of the view that, taking full account of Trading Standards need to be able to effectively discharge its investigative functions, the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Commissioner therefore finds that the council was entitled to withhold the requested information under section 30(1)(b).

Procedural requirements

Section 17 - Refusal of Request

40. In correspondence with the Commissioner, the complainants suggested that the council has not fully set out the reasons for claiming that, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosure. They also suggested that it should be made clear whether the council maintain the exemption in respect of all information gained in the course of the investigation or just part and to state the types of information that are held.
41. Section 17(1) provides that –
- “A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

42. Section 17(3) provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

43. The Commissioner has considered these matters and is of the opinion that the following statement in the internal review response complies with section 17(3):

"...the Council considers that the public interest in maintaining the exemption outweighs the public interest in disclosing it because disclosing the information is likely to prejudice the authority's ability to conduct investigations with cooperation from commercial organisations in the area and it is in the public interest to safeguard a co-operative investigatory process."

44. The Commissioner also considers that the council made it clear that it was applying the exemption to all records held in relation to the request.

45. Therefore the Commissioner has not found any breaches of section 17.

Right of appeal

46. 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

47. 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.
48. 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

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