

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 21 May 2013

Public Authority: Northamptonshire County Council
Address: John Dryden House
8-10 The Lakes
Bedford Road
Northampton
NN4 7YD

Decision (including any steps ordered)

1. The complainant has requested information from Northamptonshire County Council ('the council') relating to Equita Ltd and Northamptonshire Trading Standards. The council cited section 237 of the Enterprise Act 2002 as a statutory bar on disclosure. The Commissioner's decision is that the council has correctly applied the exemption at section 44 of the FOIA and does not require any steps to be taken.

Background

2. The council explained that the complainant wrote to Northamptonshire Police alleging that Equita Ltd were committing fraud. Northamptonshire Police replied to the complainant advising that the material had been assessed and it had been concluded that the material received does not provide evidence of a crime. However, they considered that some of the actions of Equita Ltd could potentially be covered by civil law and therefore they forwarded it to Trading Standards. Trading Standards received this information and made enquiries into it, including seeking any additional evidence that may exist to substantiate the claims of fraud or other offending falling with Trading Standards remit. This included any offending that may have been committed under the Consumer Protection from Unfair Trading Regulations 2008. Further enquiries were made to see whether the allegations, other offending or civil breaches of legislation could be substantiated. Such evidence was not forthcoming and therefore it was decided to ask Equita Ltd for a

meeting to discuss the issues as part of the ongoing 'Home Authority' relationship with them. It is routine practice for Trading Standards to act as 'Home Authority' for businesses whose decision making mind is based within Northamptonshire and to have regular contact with them to discuss issues that arise and informally resolve them where appropriate. For such a relationship to be open and frank the exact contents of it are not divulged to the public as this would undermine the ongoing relationship and be likely to result in less meaningful engagement and lesser compliance which would not be in the public interest. The council explained that by being able to resolve issues informally it reduces the resources needed to ensure compliance which is also in the public interest.

Request and response

3. On 20 July 2012, the complainant wrote to the council and requested information in the following terms:

"I would be most grateful for copies of the following:

1. Copies of all correspondence (including e-mails) between Equita Ltd and Northamptonshire Trading Standards along with the notes of any telephone conversations
2. Minutes and notes of any meetings between Northamptonshire Trading Standards and Equita Ltd in the last 12 months
3. The record of the decision (with reasons) that Equita has not breached the Consumer Protection from Unfair Trading Regulations 2008 or Fraud Act 2006.

Electronic copies are preferred."

4. The council responded on 9 August 2012 and refused to provide the requested information citing the exemption at section 44 of the FOIA by virtue of section 237 of the Enterprise Act 2002.
5. The complainant requested an internal review on 23 August 2012. The council responded on 21 September 2012 maintaining its original position. It stated that the Enterprise Act 2002 prohibits the council from disclosing the requested information unless the business concerned consents to the disclosure. It explained that it had approached Equita Ltd who were not willing to consent to disclosure and therefore the council are not permitted by law to provide the information.

Scope of the case

6. The complainant contacted the Commissioner on 8 November 2012 to complain about the way his request for information had been handled.
7. The Commissioner has considered the council's application of the exemption at section 44 of the FOIA.

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 stated that section 237(2) of the Enterprise Act 2002 provided a statutory bar to disclosure.
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 EA02 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 Commissioner is satisfied that in this instance the requested information relates to the affairs of a business. The council explained that the information was provided to Trading Standards in connection with its functions under Part 8 of the Enterprise Act 2002 and the Consumer Protection from Unfair Trading Regulations 2008. Part 8 of the Enterprise Act 2002 is specified in s238(1)(a) of that Act. The Consumer Protection from Unfair Trading Regulations 2008 are listed in Schedule 3 of the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003 as amended. It therefore falls within s238(1)(c) Enterprise Act 2002.
12. 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 council explained that the withheld information consists of notes taken by Trading Standards staff of discussions between Trading Standards and Equita Ltd. Although the information was created by Trading Standards, the Commissioner considers that it 'came to' the council as part of its functions under the Enterprise Act 2002. The Commissioner is therefore satisfied that disclosure is prohibited under section 237 of the EA02.

13. 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.
14. 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.
15. The Commissioner considers that the only gateways which could apply are sections 239 and section 241.
16. Section 239 allows for disclosure if a public authority has obtained consent. The council sought consent from Equita in this case but it was declined.
17. 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.
18. 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*¹ where the Tribunal stated in respect of the gateway provided by section 241 of the EA02 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

¹ Appeal number EA/2006/0057

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.”

19. 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 there is no need to consider the public interest test.

Right of appeal

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

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