

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2013

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
Bedfordshire
LU1 2BQ

Decision (including any steps ordered)

1. The complainant made a request for information through his solicitors for information concerning trading standards investigations conducted by Luton Borough Council (the council) which were similar to the investigation the council conducted into his business. The council refused to provide the requested information stating it was exempt from disclosure under section 44 of the FOIA as it was prohibited from disclosure under section 237 of the Enterprise Act 2002.
2. The Commissioner's decision is that the council has correctly applied the exemption to the requested information. The Commissioner does not require the council to take any steps.

Request and response

3. On 11 October 2011 the complainant's solicitors contacted the council on his behalf to enquire about making a freedom of information request for statistical information about trading standards actions taken by the council and specifically by a named trading standards officer.
4. On 10 January 2012 the complainant's solicitors then made the following request for information to the council:

"Generally our client's query relates to the manner in which your organisation treated him in the execution of your statutory duties as Trading Standards officers and in particular, the manner in which [named trading standards officer] conducted his enquiries of our client

during his investigations of our client specifically in comparison to other similar enquiries and investigations conducted by Luton Borough council Trading Standards or [named trading standards officer]."

5. The council responded on 16 January 2013. It stated that the requested information was exempt from disclosure under section 44 of the FOIA as the information was prohibited from disclosure under section 237 of the Enterprise Act 2002. It also stated that section 40 applied where the information related to complainant's personal data, and that section 30 applied as the information was on an investigation which the council had a duty to conduct.
6. The complainant asked for an internal review which the council provided on 13 February 2012. The council maintained its position that section 44 applied by virtue of section 237 of the Enterprise Act 2002, and that information relating to the complainant was exempt under section 40(1) as it was his personal data.

Scope of the case

7. The complainant contacted the Commissioner on 26 June 2012 to complain about the way his request for information had been handled. The Commissioner initially considered a complaint under the Data Protection Act 1998 (the DPA) in relation to the part of the request which was for the complainant's own personal data. The Commissioner made an assessment under section 42 of the DPA in respect of the complainant's personal data. The complainant then asked the Commissioner to consider the freedom of information aspect of his request on 21 November 2012.
8. The Commissioner considers the scope of this case to be to determine whether the information which is not the complainant's personal data has been correctly withheld under the FOIA.

Reasons for decision

9. Section 44(1)(a) of the FOIA states that information is exempt 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 provides a statutory bar to disclosure of the information requested.
10. 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.
11. 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.
12. Trading Standards Service is a general enforcer under part 8 of the Enterprise Act 2002 in relation to various pieces of consumer protection legislation. The requested information in this case is information which came to Luton Trading Standards in the course of an investigation conducted into a business under the consumer protection legislation referred to in schedule 14 of the Enterprise Act 2002.
13. The Commissioner therefore accepts that the information would be specified information and has gone on to consider section 237(2) of the Enterprise Act 2002 which sets out that specified information cannot be disclosed during the lifetime of the individual or while the undertaking, i.e. the business, continues in existence.
14. Sections 239-243 of the Enterprise Act 2002 provide 'gateways' for disclosure of specified information. Section 239 states that disclosure is not prohibited when consent to disclose has been obtained from the individual or business. However, there is no requirement for the council to seek consent to disclose specified information. Section 240 states that

disclosure is not prohibited if it is required for the purpose of a Community obligation. The information in this case has not been requested for a Community obligation

15. In addition to this, Sections 241 to 243 provide that specified information *may* be disclosed in certain circumstances. 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 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."

16. The council has chosen not to apply a gateway to disclosure in this case and therefore the Commissioner finds that there is no gateway to allow for the disclosure of the requested information in this case.
17. The Commissioner has 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

18. 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

19. 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.
20. 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
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