

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2017

Public Authority: Lancashire County Council
Address: Information Governance Team
PO Box
County Hall
Preston
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information from the trading standards section of Lancashire County Council (the Council) about a complaint made by him relating to a specific business enterprise (the company). The Council has applied section 44(1)(a) of the FOIA (statutory prohibition), on the grounds that section 237 of the Enterprise Act 2002 (EA 2002) provides a statutory prohibition on disclosure, and section 30(1) (investigations and proceedings conducted by public authorities).
2. The Commissioner's decision is that the Council has correctly applied section 44(1)(a) to the information and has not therefore gone on to consider section 30(1).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 13 May 2017, the complainant wrote to the Council and requested information in the following terms:

"...I do believe that as a government body I can make a freedom of information request [to the Council] for the paperwork that you hold on file. I wish to go ahead and request again all copies of correspondence before I will assess my next step forward."
5. The Council responded on 22 May 2017. It withheld the information it holds, citing sections 30(1) and 44(1) of the FOIA.
6. Remaining dissatisfied with the outcome of the response to his initial request, on 1 August 2017 the complainant requested from the Council an internal review.
7. Following an internal review the Council wrote to the complainant on an unknown date to the Commissioner. It maintained its position that the information is exempt under sections 30(1) and 44(1).

Scope of the case

8. The complainant contacted the Commissioner on 1 August 2017 to complain about the way his request for information had been handled. He considers that the information should have been disclosed to him.
9. The Commissioner considers the scope of this investigation to be to determine whether the Council correctly applied section 44(1) to withhold the information. If section 44(1) is not engaged then the Commissioner will consider the application of section 30(1).

Reasons for decision

Section 44 – prohibitions on disclosure

10. 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 argues that section 237 of the EA 2002 provides a statutory bar to a disclosure of the requested information.
11. Section 237 of the EA 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 EA 2002.

Applying the prohibition:

Is the information specified?

12. Section 238 of the EA 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 EA 2002;
 - b) an enactment listed in Schedule 14 of the EA 2002; or
 - c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.
13. The Council explained that the information request followed a lengthy period of correspondence with the complainant in relation to a complaint regarding an allegedly unfit product that had been purchased from a specific company in 2014. Consequently, the Council addressed the issue with the company.
14. The requested information came into the Council's possession with a view to undertaking its function under Part 8 of the EA 2002 (domestic infringements). The information relates to a trading standards complaint against the company concerned under The Consumer Rights Act 2015 Part 1.
15. Part 1 of the Consumer Rights Act 2015 is specified for the purposes of section 211(2) of the EA 2002 by the EA 2002 (Part 8 Domestic Infringements) Order 2015 (S.I. No. 1727). Section 2 of this Order states:

"2. Acts or omissions in respect of any provision of Parts 1 and 2 and Chapter 5 of Part 3 of the Consumer Rights Act 2015 are specified for the purposes of section 211(2) of the Enterprise Act 2002."
16. It therefore falls within Section 238(1)(a) EA 2002.

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 Commissioner considers that it 'came to' the Council as part of its functions under the EA 2002,

essentially through a complaint made by the complainant to the Council. Further, she accepts that the specified information relates to the affairs of an individual or business. The Commissioner therefore considers that the information falls within the information caught by section 237.

17. Section 245 of the EA 2002 creates a statutory bar on disclosure by making it an offence to disclose information that falls within section 237.
18. However, sections 239 to 243 of the EA 2002 provide various circumstances or 'gateways' for disclosure of 'specified information' without breaching the statutory prohibition. These gateways do not compel the Council to disclose information but do allow it to disclose information for the purpose set out in these sections. In broad terms these include where the business undertaking or individual that the information relates to has given their consent, where a European Community obligation requires the disclosure, or where the disclosure is necessary for certain civil or criminal proceedings.
19. The Commissioner considers that the only gateways which could apply are sections 239 and section 241.
20. Section 239 allows for disclosure if a public authority has obtained consent and 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 EA 2002 or any other enactment.
21. The Council has confirmed that, regarding the application of section 239 of the EA 2002, in the course of its correspondence with the complainant, prior to submitting his information request, he was provided with the "...majority of correspondence relating to the Trading Standards investigations in the form of various emails." This correspondence included a response from the company that was originally sent to Lancashire Trading Standards as "**for TS info only**" (the Council's emphasis), but later was released to the complainant with the company's consent. The Council has not however agreed to the release of all the information requested by the complainant.
22. The Commissioner notes that the gateways to disclosure under the EA 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 disclosure applies. This 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 EA 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 facilitate 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."

23. The Commissioner has therefore concluded that section 44(1)(a) of the FOIA is engaged, through the provisions of section 237 of the EA 2002, and that the Council was correct to withhold the requested information. As section 44 is an absolute exemption the Commissioner is not required to carry out a public interest test.
24. Having in mind that the Commissioner's finding is that the Council correctly applied section 44(1), she does not deem it necessary to consider the application of section 30(1).

Right of appeal

25. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF