

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2018

Public Authority: Cheshire East Council
Address: C/O Municipal Buildings
Earle Street
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested information showing authorisation under section 2 of General Products Safety Regulations 2005 for those authorised to assist the authority in carrying out its functions under or for the purposes of the enforcement of these Regulations and safety notices. The council refused to disclose the information citing the exemption under section 31 of the Freedom of Information Act 2000 ("the FOIA") (prevention of prejudice to law enforcement). The Commissioner's decision is that insufficient evidence has been supplied to support the use of this exemption and she therefore does not consider that this exemption was engaged. The Commissioner has found breaches of section 1(1)(b) and 10(1) of the FOIA.
2. The public authority is required to take the following steps to ensure compliance with the FOIA:
 - Disclose the withheld information to the complainant, namely the authorisations requested
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant requested information from the council in the following terms:

"Please provide details of the authority to prosecute, the dates of such authority and the dates and details of the council minutes where in such authority stems for the following trading standards officers –

[names]

[Name and job title]. I require the council minutes authorising her to undertake proceedings on behalf of the Council. The other information I seek is the authorisation in writing as below under section 2 of the General Products Safety Regulations 2005. "Officer", in relation to an enforcement authority, means a person authorised in writing to assist the authority in carrying out its functions under or for the purposes of the enforcement of these Regulations and safety notices, except in relation to an enforcement authority which is a government department where it means an officer of that department".

5. The council replied on 24 August 2017 and confirmed that it held the information, however it said that it was exempt under section 31(1) of the FOIA. It said that the public interest did not favour disclosure.
6. The complainant requested an internal review on 5 September 2017. The review said that the council wished to maintain its position. It also referred to a revised request that the complainant had made subsequently in the following terms (date unknown):

"1. Please provide details of the authority to prosecute, the dates of such authority and the dates and details of the council minutes where in such authority stems for any and all individuals or departments within the council with such authority.

2. The other information I seek is the authorisation in writing as below under section 2 of General Products Safety Regulations 2005 for any and all officers and departments purportedly so authorised under section 2. "Officer", in relation to an enforcement authority, means a person authorised in writing to assist the authority in carrying out its functions under or for the purposes of the enforcement of these Regulations and safety notices, except in relation to an enforcement authority which is a government department where it means an officer of that department".

7. In relation to part 1, the council said that this information could be found in section 9 of the Cheshire East Constitution and it provided a link. Regarding part 2, the council said that this was almost identical in

nature to the complainant's previous request and its reasons for refusal remained the same.

Scope of the case

8. The complainant contacted the Commissioner on 25 October 2017 to complain about the way her request for information had been handled. She asked the Commissioner to consider whether the council had correctly withheld the information she requested in the following terms:

2. The other information I seek is the authorisation in writing as below under section 2 of General Products Safety Regulations 2005 for any and all officers and departments purportedly so authorised under section 2. "Officer", in relation to an enforcement authority, means a person authorised in writing to assist the authority in carrying out its functions under or for the purposes of the enforcement of these Regulations and safety notices, except in relation to an enforcement authority which is a government department where it means an officer of that department".

Reasons for decision

Section 31 – Prejudice to law enforcement

9. This exemption provides that information which is not exempt by virtue of section 30 is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice (specified law enforcement activities at (a) to (i). Subsection 2 lists relevant purposes under (a) to (j) relating to sections 31(1)(g) – (i). The Commissioner's published guidance on this exemption and the closely related exemption provided by section 30 (relating to investigations) is here:

<https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

<https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

10. The exemptions from the duty to communicate information provided by sections 31(1) and (2) can only be applied to information *which is not exempt by virtue of section 30*. Section 30 can only be claimed by public authorities that have particular powers and duties whereas section 31 can be claimed by any public authority.
11. As the council had referred to an ongoing investigation, the Commissioner asked the council to consider carefully whether section 30

was engaged and if not, to explain why. The council did not address this point.

12. Section 31 is subject to a prejudice test. One of the law enforcement interests specified must be harmed by the disclosure. The prejudice must be real, actual or of substance. There must be a causal link between the disclosure and the harm claimed. The public authority must then decide what the likelihood of the harm actually occurring is, i.e. would it occur or would it be likely to occur. "Would be likely" means more probable than not whereas "likely" means that there must be a real risk of prejudice though it need not be more probable than not. "Would prejudice" is therefore a higher threshold to satisfy.
13. The council stated in its refusal notice that sections 31(1)(a), b, c, g and h and sections 31(2)a, b, c and j apply. It said that the exemption applied because the information relates to a current live investigation. It said that disclosure of the information would hinder the efficient running of the investigation and it would prejudice the proceedings. It said that disclosure would hinder the investigation by leading to speculative public debate on the subject. The council added in its internal review that it had taken the identity of the requester into account for the purposes of considering the prejudice.
14. The Commissioner explained to the council that if it wished to continue to rely on the exemption under section 31, it should justify and explain that position fully. She said that she would need to understand precisely why the council considers that these sections apply and what the level of prejudice claimed is. She explained that the council would need to explain thoroughly why and how that prejudice would or would be likely to occur if the specific information in question was disclosed. She referred to her published guidance above.
15. When the council replied to the Commissioner, it outlined in some detail what the background to the case was, however, it provided a very limited response about why the exemption under section 31 was considered to be engaged. It simply said it would wish to withhold the information "to ensure that the integrity of the investigation is preserved". The council did not provide any explanation for why the disclosure would cause harm to either the extent that it "would be likely to" occur or that it "would" occur. Moreover, the council did not provide any justification for the statements made about why harm would occur and did not attempt to link any arguments to the actual withheld information in question and the circumstances of the specific case. There was also no attempt to link any argument to the specific branches of the exemption that have been claimed.
16. It is worth highlighting that by the time a complaint reaches the Commissioner, the public authority has already had at least two

opportunities to consider the request i.e. the initial response and the internal review. By the time a complaint reaches the Commissioner, the Commissioner would generally expect the arguments for withholding the information to be in place but would present a further opportunity for the public authority to reconsider the matter and expand on its case again at that point. The Commissioner considers that the statements made by the council on this occasion are general and speculative in isolation, and she is not prepared to accept that the exemption under section 31 was engaged based on the limited argument and evidence presented by the council.

Procedural issues

17. Section 1 and 10 provide a general right of access to information held by public authorities. These sections together provide that public authorities should communicate information that is held within 20 working days.
18. As the Commissioner was not persuaded that section 31 was correctly engaged in this case, she has found a breach of section 1(1)(b) and 10(1) of the FOIA.

Right of appeal

19. 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

20. 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.
21. 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

Elizabeth Archer
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF