

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2020

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant requested from Kent County Council (the Council) information in relation to complaints submitted to the Council and the Council's Trading Standards office in relation to a specific company. The Council neither confirmed nor denied holding information within the scope of the complainant's request, citing section 44(2) of the FOIA (prohibitions on disclosure) as its basis for doing so.
2. The Commissioner's decision is that the Council correctly applied that exemption on the basis that the confirmation or denial was prohibited by section 237 of the Enterprise Act 2002 (EA02).
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 26 September 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like to know the number of complaints the council has received including the local Trading Standards office regarding Britelite Windows ltd regarding their products and service they provide."

5. On 2 October 2019, the Council informed the complainant that it could neither confirm nor deny whether it held information within the scope of the request on the basis of the provisions in section 44(2) FOIA. It stated that the information requested "*would be classified as 'specified information' under Part 9 of the Enterprise Act 2002. Disclosure of 'specified information' is a criminal offence under the Enterprise Act.*"
6. On the same date the complainant requested an internal review of the Council's decision.
7. On 30 October 2019 the Council wrote to the complainant with details of the outcome of the review. The original decision was upheld.

Scope of the case

8. The complainant contacted the Commissioner on 31 October 2019 to complain about the way his request for information had been handled.
9. The scope of the following analysis is to determine whether or not there is a statutory bar which would prevent the Council from giving a confirmation or a denial as to whether the requested information is held. If there is, then section 44(2) of the FOIA is engaged.
10. For clarity, the Commissioner is not aware of whether the Council holds any information within the scope of the request. Therefore, nothing in this decision notice should be construed as indicating that the Council does or does not hold information relevant to the complainant's request.

Reasons for decision

11. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case to have that information communicated to him.*

12. Section 44(1)(a) of the FOIA provides an exemption from disclosure for any information whose disclosure would be otherwise prohibited by another piece of legislation.

13. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether the information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited by another enactment.
14. When applying section 44(2) a public authority is not restricted to considering only the response it would have to provide, it can also consider whether a hypothetical confirmation or a hypothetical denial would engage the exemption. For example, if the public authority did not hold the information, it should not just consider whether denying the information was held would breach the statutory prohibition, it should also consider the consequence if it had to confirm the information was held.
15. The Council's position is that Part 9 of the EA02¹ prohibits it from confirming or denying whether it holds information within the scope of the request.
16. Section 237 of the EA02 prohibits 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 EA02.
17. Under section 245 of the EA02 it is an offence punishable by up to 2 years imprisonment to disclose information in breach of Section 237 of the same act.
18. The Commissioner is satisfied that in the present case, the complainant has requested information which, if were to be held, would relate to the affairs of a business, namely *Britelite Windows Ltd*. The business's status on the Companies House² website is marked as "Active". Consequently, the Commissioner is satisfied that the business continues to exist.
19. Section 238 of the EA02 defines specified information as information that has been submitted to a public authority in connection with the

¹ https://www.legislation.gov.uk/ukpga/2002/40/pdfs/ukpga_20020040_en.pdf

² <https://beta.companieshouse.gov.uk/company/02891433>

exercise of any function it has under or by virtue of:

- a) Part 1, 3, 4, 6, 7 or 8 of the EA02;
 - b) An enactment listed in schedule 14 of the EA02; or
 - c) Such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.
20. The Council asserted that, if it was held, the information requested by the complainant would have been submitted in the form of a complaint to the Council's Trading Standards with a view to undertaking its function under Part 8 of the EA02 (domestic infringements).
21. The Trading Standards Service is a general enforcer under part 8 of the EA02 with relevance to various pieces of consumer protection legislation, such as the Fair Trading Act 1973 and the Consumer Protection Act 1987.
22. The Council explained that information submitted to the Council's Trading Standards in the form of a complaint about any individual or organisation is by definition in relation to the exercise of its functions and, therefore, it is "specified information".
23. The Commissioner has previously considered similar matters. In a decision notice of 18 August 2008 in case FS50450268³, the Commissioner held that:
- "The Commissioner accepts as a fact that any 'specified information' under section 238 EA02 would have come to the Office of Fair Trading in connection with the exercise of its functions as defined in that section; i.e. those under Section 8 of the EA02 and under other consumer legislation, involving 'receiving, considering and, where appropriate, investigating complaints'. The Commissioner accepts that to confirm or deny if information is held would result in the disclosure of 'specified information' and that the OFT is therefore exempt from the duty to confirm or deny by virtue of section 237 of the EA02."*
24. The Commissioner applied this approach in subsequent cases of similar nature, e.g. in case FS50498896⁴, which involved a request for

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2008/446124/FS_50150268.pdf

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/951732/fs_50498896.pdf

information submitted to the Office of Fair Trading, seeking information related to a complaint regarding Jaguar Land Rover Automotive PLC.

25. Following the above, the Commissioner is therefore satisfied and agrees with the Council that if it held any information on Britelite Windows Ltd, it would be held for one of the functions listed in section 238 of the EA02.
26. In the decision notice quoted above, part of the Commissioner's consideration related to whether specified information had "come to" the public authority in that case. In this case, the Commissioner is further satisfied that if the Council were to confirm that it held information this would in effect reveal information that had "come to it" in connection with the specified functions. The Commissioner accepts that the term "comes to" is broad and that it covers information sourced by the Council from external sources or provided to it by third parties. The Commissioner understands that any activity in connection with the functions specified in section 238 would be as a result of information provided to the Council by third parties or gathered by it from external sources. She, therefore, accepts that in effect confirmation would reveal that information had come to the Council regarding Britelite Windows Ltd in connection with its functions.
27. Section 239 to 241A of the EA02 introduces what are commonly referred to as "gateways". These are provisions which allow a way through the statutory prohibition on disclosure by setting out the circumstances under which specified information can be disclosed without breaching the statutory prohibition. 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.
28. The Council advised the Commissioner that at the time of the request it had no reason to believe that any of the gateways were applicable. The Commissioner accepts that, even if the information was held, none of gateway provisions would apply.
29. In his complaint to the Commissioner, the complainant stated that similar information was requested from other public authorities and they disclosed the information requested. However, the Commissioner stresses that the fact that another public authority handled a similar request for information in a different fashion, does not compel the Council to disregard what it considers applicable provisions of the FOIA to a request received.

30. Section 241 allows information to be disclosed for the purposes of facilitating one of the public authority's statutory functions. However this would not allow specified information to be disclosed in response to a freedom of information request. Dealing with a request may be a statutory duty, but is not one of the Council's functions in that it is not one of the core purposes for which it was established. Even if it was, section 44 of FOIA expressly states that when considering its response to a request, a public authority must consider whether a confirmation or denial would *apart from* under the FOIA be prohibited by an enactment. This means that the obligations imposed by the FOIA are not overriding when considering the application of a statutory prohibition.
31. Therefore, the Commissioner finds that section 237 of the EA02 prohibited the Council from confirming or denying whether the requested information was held. Therefore, the Council correctly cited section 44(2) of the FOIA and was not obliged to comply with the complainant's request.
32. As section 44 of the FOIA provides an absolute exemption there is no need for the Commissioner to consider the public interest test.

Right of appeal

33. 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@justice.gov.uk

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

34. 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.
35. 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

Ben Tomes
Team Manager
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