

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested all documents held by Kent County Council in consequence of the complaints he made regarding the defrosted weight of frozen fish fillets. 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.

Request and response

2. On 7 December 2012, the complainant wrote to Kent County Council ('the council') and requested information in the following terms:

"However, despite my complaints to Trading Standards that as a consumer I have been regularly deceived when buying frozen fish fillets, I have received no information regarding what actions are being taken on my behalf. It may be that as a customer I could take a private action for a breach of the legislation but Trading Standards is the authority charged by parliament to enforce this legislation on behalf of the consumer. I wish to know, therefore, what action has been taken on my behalf in response to my complaints, in order to be able to make a judgement as to whether I feel this action to be, in all the circumstances, appropriate, in accordance with the authority's statutory responsibility and administratively sound.

I ask, therefore, under the provisions of the Freedom of Information legislation for copies of all documents, both internal memoranda and external correspondence, generated and received and electronically or physically stored by the Kent County Council in consequence of my complaints to you.”

3. The council responded on 7 January 2013 and refused to provide the requested information citing the statutory bar exemption at section 44(1)(a) of the FOIA by virtue of Parts 8 and 9 of the Enterprise Act 2002.
4. The complainant requested an internal review on the same day. The council provided its response on 25 January 2013 in which it maintained its original position stating that the requested information is 'specified information' under section 237 of the Enterprise Act 2002. It also confirmed to the complainant, stating that it would not breach the restrictions placed on the council by doing so, that it holds a number of analyst certificates for the products in question and records of correspondence to third parties in relation to the concerns raised. The council also provided the complainant with links to the Commissioner's guidance on the subject.¹

Scope of the case

5. The complainant contacted the Commissioner on 21 February 2013 to complain about the way his request for information had been handled.
6. The Commissioner considers that it is possible that the council hold some personal data of the complainant within the scope of the request. Any such personal data is outside the scope of this decision notice. The council has been asked to consider the request as a subject access request under the Data Protection Act 1998 and provide any personal data it may hold.

¹ The links provided were as follows:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/220609_sec_237_of_the_enterprise_act_2002_v1.pdf

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_27_-_prohibitions_on_disclosure.pdf

7. The Commissioner has considered the council's application of the exemption at section 44(1)(a) 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 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 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.
11. The Commissioner is satisfied that in this instance the requested information relates to the affairs of specific businesses. The council explained that the information came into its possession with a view to undertaking its function under Part 8 of the Enterprise Act 2002 and that failure to declare the presence of added water would constitute an offence under the Consumer Protection from Unfair Trading Regulations 2008.
12. 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.
13. 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. Although some of the information was created by the council, 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 Enterprise Act 2002.

14. 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.
15. 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.
16. The Commissioner considers that the only gateways which could apply are sections 239 and section 241.
17. 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 Enterprise Act 2002 or any other enactment. The council has confirmed that none of the gateways for disclosure under sections 239 to 243 apply in this case.
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*² 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 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

² Appeal number EA/2006/0057

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
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