

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 July 2013

**Public Authority:** Hertfordshire County Council  
**Address:** County Hall  
Pegs Lane  
Hertford  
Hertfordshire  
SG13 8DQ

#### Decision (including any steps ordered)

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1. The complainant requested information from the public authority's Trading Standards Department in relation to Beko, Leisure and Flavel cookers manufactured by BEKO PLC.
2. The Commissioner's decision is that the public authority was entitled to rely on section 44(2) to neither confirm nor deny it held the requested information.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 10 December 2012, the complainant wrote to the public authority and requested information in the following terms:
  1. *Please provide copies of all correspondence (including emails) with other trading standard departments since 1 Jan [January] 2009 relating to Beko, Leisure and Flavel cookers manufactured by BEKO PLC*
  2. *Please provide copies of all correspondence (including emails) with BEKO PLC since 1 Jan 2009 relating to Beko, Leisure and Flavel cookers.*

3. *Please provide copies of all other information dating from 1 Jan 2009 or later relating to Beko, Leisure and Flavel cookers manufactured by BEKO PLC.'*
5. The public authority responded on 8 January 2013. Although it erroneously relied on the exemption at section 44(1)(a) FOIA, the public authority explained that it could neither confirm or deny whether it held the requested information.<sup>1</sup>
6. Following an internal review the public authority wrote to the complainant on 5 February 2013. It upheld the original decision and clarified that it was relying on section 44(2) FOIA.

### **Scope of the case**

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7. On 7 February 2013 the complainant contacted the Commissioner to appeal the public authority's decision on the following grounds:
  - '(a) We don't accept that all the information relevant to the request is specified information.*
  - (b) In particular we don't accept that correspondence which has originated from the council can be considered specified information.*
  - (c) Under the Enterprise Act information can be released if expressly permitted by the individual or business, so I request that we should be made aware if BEKO PLC's permission has been sought to request disclose [sic] of this information.*
  - (d) A number of people have died as a result of a defect in Beko cooker grills including [Named Persons] who died from carbon monoxide poisoning according to an inquest in December 2012. Disclosure would bring to light information affecting public health and public safety and ensure transparency and accountability in the public authority's role in protecting consumers and ensuring businesses comply with regulations.'*

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<sup>1</sup> The public authority should have cited section 44(2) FOIA instead.

8. Although the complainant's grounds of appeal suggest that the requested information is held, the public authority clearly does not wish to confirm or deny whether that is the case hence why it relied on section 44(2).
9. The Commissioner therefore considers that the scope of investigation is to determine whether the public authority was entitled to refuse to confirm or deny if it held the requested information on the basis of section 44(2).

## **Reasons for decision**

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### Section 44(2)

10. Information is exempt from disclosure on the basis of section 44(1) if its disclosure is;
  - (a) is prohibited by or under any enactment,
  - (b) is incompatible with any Community obligation, or
  - (c) would constitute or be punishable as a contempt of court.
11. A public authority is however excluded by virtue of section 44(2) from confirming or denying<sup>2</sup> whether information is held if to do so would fall within any of paragraphs (a) to (c) above in section 44(1).
12. The public authority's position is that it is excluded from the duty in section 1(1)(a) because it considers that confirming or denying whether the requested information is held would reveal information that is prohibited from disclosure under section 237(1)(b) of the Enterprise Act 2002 (Enterprise Act).
13. Sections 237(1)(b) and 237(2) of the Enterprise Act state that *specified information* which relates to any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence unless the disclosure is permitted under Part 9 (i.e. sections 239-243).

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<sup>2</sup> The duty to confirm or deny whether requested information is held is imposed on public authorities by section 1(1)(a) FOIA.

14. The prohibition in section 237 clearly only applies to specified information. Therefore, the Commissioner must first consider whether the requested information, if held, would be specified information.
15. Section 238 of the Enterprise Act defines specified information as information that:

*'comes 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*
  - (b) *an enactment specified in Schedule 14*
  - (c) *such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.'*
16. The public authority explained that the requested information, if held, would be held by its Trading Standards Service. The sections of the Fair Trading Act 1973 and the Consumer Protection Act 1987 listed in Schedule 14 of the Enterprise Act are among the legislation enforced by Trading Standards.
17. The Commissioner accepts that the requested information, if held, would be held by the public authority in connection with its functions under the Fair Trading Act 1973 and Consumer Protection Act 1987. He therefore also finds that the requested information, if held, would be specified information within the meaning in section 238 of the Enterprise Act.
18. It is quite possible as the complainant has pointed out, that if held, some of the requested information could have originated from the public authority and therefore unlikely to be specified information. However, as the public authority has not confirmed or denied whether it held the requested information, it is not possible for the Commissioner to make a finding on that point. To do otherwise would risk defeating the purpose of relying on section 44(2) in the first place. Nevertheless, the Commissioner believes it is more likely than not that if held, any information relating to the request would be specified information because it would have come to the public authority in connection with the exercise of its functions. Any correspondence that originated from the public authority in that regard would be in the context of the information which came to its Trading Standards Service.
19. The complainant also specifically asked the Commissioner to consider whether consent had been sought from BEKO. Sections 239-243 provide possible gateways for disclosure of specified information. Section 239 broadly states that a public authority is not prohibited from disclosing specified information if it has obtained the consent of the relevant

undertaking. The public authority explained that section 239 does not actually require it to seek consent.

20. The Commissioner accepts that section 239 does not impose a duty on a public authority to seek consent. He finds that none of the gateways at 239-243 apply as the public authority was under no duty to consider them.
21. The Commissioner finds support for his position in the Information Tribunal's decision in *Dey v ICO and OFT (EA/2006/0057)*. In commenting on the effect of the gateway in section 241 of the Enterprise Act, the Tribunal took the view that '*It gives the public authority a power to disclose, not a duty.*' The Commissioner believes that this equally applies to the other gateways.
22. The Commissioner's finding is simply that the public authority was not under a duty to consider the gateways at sections 239-243 of the Enterprise Act in response to the request. It should not be taken to mean that the public authority did, or did not hold, the requested information.
23. The Commissioner accepts that to confirm or deny if the requested information is held would result in the disclosure of specified information and the public authority is therefore exempt from the duty to confirm or deny by virtue of section 44(2).

## Right of appeal

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24. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.
26. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**