

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2015

Public Authority: City of Westminster
Address: Westminster City Hall
10th Floor East
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant requested information regarding Marks and Spencer's tilling systems following a complaint to Surrey County Council Trading Standards which was referred to and investigated by the City of Westminster as the Primary Authority.
2. The City of Westminster refused to confirm or deny whether the information requested was held under section 44(2) of the FOIA on the basis that the disclosure of any information, if held, was prohibited by part 9 of the Enterprise Act 2002.
3. The Commissioner's decision is that the City of Westminster has correctly applied section 44(2) of the FOIA.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 10 December 2014, the complainant wrote to the City of Westminster (the Council) and requested information in the following terms:

'I understand from [name redacted] at SCC that you have reached an agreement with M and S in which the fault of the inability to change centralised tilling error has been allocated to an employee in store not

following the correct action and that m and s have systems in place that change centralised tillling errors immediately.

Is this the correct summary?'

6. The Council responded on 11 December 2014. It stated that disclosure of the information requested was exempt under section 44 of the FOIA as it was prohibited by Part 9 of the Enterprise Act 2002.
7. On the same day the complainant submitted a request for an internal review.
8. On 27 January 2015, the Council provided its internal review decision. It upheld its application of section 44 of the FOIA in refusing to confirm or deny whether the information was held.

Scope of the case

9. The complainant contacted the Commissioner on 24 March 2015, to complain about the way his request for information had been handled.
10. The Commissioner is of the view that the request can be interpreted as a request for any information held by the Council regarding the operation of M&S's central till operating system.
11. The Commissioner therefore considers that the scope of this case is to determine whether the Council is correct in applying section 44(2) of the FOIA in refusing to confirm or deny whether it holds the information requested by the complainant.

Reasons for decision

12. Section 44 of the FOIA states that:
 - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - (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.
 - (2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section (1) (a)

would (apart from this Act) fall within any paragraphs (a) to (c) of subsection (1).

13. Under section 1(1)(a) of the FOIA a public authority is required to confirm whether the information that has been requested is held. However, as far as is relevant to this case, section 44(2) means that if another piece of legislation prohibits it from providing such confirmation, the public authority is not required to do so.
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 argued that Part 9 of the Enterprise Act 2002 prohibits it from confirming or denying whether it holds the requested information.
16. 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 242 of the Enterprise Act 2002.
17. The Commissioner is satisfied that in this instance the complainant has requested information which relates to the affairs of a business namely Marks and Spencer (M&S).
18. 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.
19. The Council explained that any information it may hold in relation to M&S tillage system would have come to it as part of its function under the Consumer Protection from Unfair Trading Regulations 2008.

20. 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) of the Enterprise Act 2002.
21. The Council argued that any such information if held, would be 'specified information' as defined in section 238 of the Enterprise Act 2002 and therefore disclosure would be prohibited.
22. The complainant has questioned the Council's relationship with M&S in this case arguing that dealings with Trading Standards under the Consumer Protection from Unfair Trading Regulations 2008 would be the domain of Surrey County Council where he registered his initial complaint.
23. The complainant argues that the Council has investigated this matter as the Primary Authority under the Regulatory Enforcement and Sanctions Act 2008 and as such the information requested is not covered by the Enterprise Act 2002, as it was not obtained by the Council as part of its function under the Consumer Protection from Unfair Trading Regulations 2008.
24. Primary Authority is a statutory scheme, established by the Regulatory Enforcement and Sanctions Act 2008. It allows an eligible business to form a legally recognised partnership with a single local authority in relation to regulatory compliance.
25. The Council advised the Commissioner that Westminster Trading Standards has a Primary Authority agreement with M&S. The Agreement covers the legislative area of fair trading which includes the Consumer Protection from Unfair Trading Regulations 2008.
26. The Council explained that Primary Authority allows for the function of securing compliance with or the enforcement of requirements, restrictions, conditions of relevant legislation which the Consumer Protection for Unfair Trading Regulations 2008 is one.
27. The Commissioner is satisfied that the information requested, if held, would have been obtained by the Council while exercising its functions under the Consumer Protection from Unfair Trading Regulations 2008.
28. Sections 239 to 341A of the Enterprise Act introduces what are commonly referred to as 'gateways'. These are provisions which allow a way through the statutory prohibition on disclosure in that they set out the circumstances under which specified information can be disclosed without breaching the statutory prohibition.

29. The Council advised the Commissioner that it has concluded that the gateways to disclosure or exceptions to the prohibition contained within the enactment are not engaged in respect of the complainant's request for the following reasons:

Section 239 consent – The Council explained that it had approached M&S with regard to the disclosure of the requested information however the organisation declined to give consent to such a disclosure.

Section 240 EU obligations – The Council advised that the disclosure request is not required for the purpose of a Community obligation.

Section 241 Statutory functions – The Council advised that the disclosure request is not to facilitate the exercise by the authority of its functions under statute.

Section 241(3) Statutory functions – The Council advised that the disclosure is not to another person to facilitate the exercise by that person of their functions under the legislation referred to in s241(3) (a) (b) and (c).

Section 241A Civil proceedings – The Council advised that the disclosure request was not made for the purposes of or in connection with prescribed civil proceedings.

Section 242 Criminal proceedings – The Council advised that the disclosure request is not 'to any person' in connection with or for the purposes of as set out in s242(a) (b) or (c).

Section 243 Overseas disclosures – The Council advised that the disclosure request is not to an overseas public authority.

Section 237(3) Public domain – the Council advised that the specified information is not already in the public domain.

30. The complainant has argued that the information he has requested has already been released into the public domain by virtue of Surry County Council advising him that the error in his bill was attributable to a central tilling error.
31. In the Commissioner's view, although the complainant has been provided with information about the circumstances which caused the error in relation to his particular complaint he does not consider that this amounts to a public disclosure of information held by the Council in respect of the operation of M&S's central tilling system.

32. The Commissioner is satisfied that none of the gateways to disclosure or exceptions to the prohibition contained within the enactment are engaged in respect of the complainants request.
33. The Commissioner is therefore of the view that section 44(1) (a) of the FOIA is engaged, through the provisions of section 237 of the Enterprise Act 2002 and the Council is therefore correct in relying on section 44(2) of the FOIA to refuse to confirm or deny whether the requested information is held.
34. As section 44 is an absolute exemption there is no requirement to consider the public interest test.

Right of appeal

35. 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

36. 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.
37. 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

Rachael Cragg
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