

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2023

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant requested information relating to a health and safety complaint. East Riding of Yorkshire Council (the "council") refused the request under the exemption for law enforcement (section 31).
2. The Information Commissioner's decision is that the information requested is exempt from disclosure under section 31(1)(g) by virtue of section 31(2)(c), and the public interest favours maintaining the exemption.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 10 May 2023 the complainant submitted the following request to East Riding of Yorkshire Council (the "council"):

"Please can you provide me with the complete information in relation to safety visits to [redacted]. Both the initial visit you made when the site opened and the most recent one I think you did in March 2023. I would like to see all the information you have and not a summary."

5. On 2 June 2023 the council confirmed to the complainant that it was withholding the information under the exemption for law enforcement (section 31 of the FOIA).
6. On 2 June 2023 the complainant asked the council to review its handling of the request. The council's internal review response, which maintained its original position, was issued on 30 June 2023.

Scope of the case

7. On 30 June 2023 the complainant contacted the Commissioner to complain about the council's handling of their request.
8. The Commissioner has considered whether the council was correct to withhold the requested information.

Reasons for decision

Section 31 – Law Enforcement

9. The council withheld the contents of the investigation referred to in the request.
10. Section 31(1)(g) of the FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

11. Section 31(2)(c) of the FOIA states:

“(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise”

12. To engage the exemption a public authority must:

- identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
- confirm that the function has been specifically designed to fulfil that purpose, and
- explain how the disclosure would prejudice that function.

13. The council confirmed that it is relying on section 31(1)(g) as disclosure of the information would be likely to prejudice the exercising of its public authority duties.

14. The council confirmed that the information requested would specifically fall under exemption 31(2)(c) – that is, the information is used for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of any enactment, specifically, whether any person has failed to comply within the law, specifically the Health and Safety Act 1974.

15. The council explained that all documents that form the requested case file, are held as part of its public function of ensuring that health and safety legislation in the UK is enforced. The council confirmed that, as a local authority, it is the main enforcing authority for retail, wholesale distribution and warehousing, hotel and catering premises, offices, and the consumer/leisure industries. The site identified in the request, therefore, falls under the council's remit to investigate and take any enforceable activities as required.

16. The council further explained that case files are created to show evidence of a complaint, the investigation(s) that have taken place, and conversations had with relevant members of staff at a site in question, and also internal documentation as to why thresholds have or have not been met.

17. The council has argued that disclosure of this information would assist the complainant and others to identify the thresholds at which enforcement would be undertaken. This would be likely to prompt the submission of complaints which are (fraudulently) tailored to meet such

thresholds, which in turn would prejudice the council's ability to carry out this function.

18. The council has also expressed concerns about the risk of disclosing information provided by third parties on a voluntary basis. Investigations, particularly those protected by section 31(1)(g) via 31(2), can be aided by either individuals, or organisations providing information to the investigating authority. The Commissioner's guidance uses the following example, which is pertinent to the consideration of this complaint:

"For example, an investigation by the Health and Safety Executive may be triggered by information from someone who wants to remain anonymous."¹

19. Where information is volunteered by a confidential source, that is, someone who has provided information on the understanding that they will not be identified, the information and identity of its source will fall within the scope of section 30(2). However, even where the provider of the information is not a confidential source, there is still a public interest in not discouraging others from cooperating with public authorities and supplying them with the information they need on a voluntary basis.
20. In relation to any prejudice which disclosure would cause, the Commissioner's guidance confirms that prejudice does not need to be caused to a specific investigation by an authority:

"The exemption will also protect the ability of a public authority to carry out the function generally. For example... (an authority could) withhold manuals on how to conduct its investigations, if their disclosure would prejudice those investigations."²

21. Having considered the relevant factors, the Commissioner accepts that the potential prejudice described by the council clearly relates to the purpose which the exemption contained at section 31(2)(c) is designed to protect. This is because one of the functions of the council includes investigating complaints about compliance with the Health and Safety Act 1974. Consequently, the Commissioner is satisfied that any infringement on the council's function to conduct investigations could interfere with its ability to ascertain whether regulatory action is required in individual circumstances.

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

² Ibid.

22. The Commissioner also accepts that there is a clear causal link between the disclosure of the withheld information and the council's ability to effectively investigate and ascertain where regulatory action is appropriate. This is because the withheld information would provide the public with a clear insight into the specific situations in which the council is willing to take action. The Commissioner accepts that disclosure of this information could assist an individual in engineering situations which wrongly direct a council's investigation to follow a specific route. It follows that disclosure would be likely to inhibit the effectiveness of this specific council function.
23. The Commissioner is satisfied that there is a real and significant risk of this prejudice occurring. He has reached this conclusion on the basis that the withheld information relates to specific situations and would therefore provide an insight into the circumstances in which the council would or would not take action. In the Commissioner's view, the significant number of people who could potentially use the information to undermine the council's investigations, combined with the insight into these situations the withheld information would provide such individuals, persuades him that disclosure presents more than a hypothetical risk of prejudice occurring.
24. Section 31(1)(g) is therefore engaged and the information is exempt from disclosure.

Public interest in disclosure

25. The council has confirmed that there is a general public interest in transparency in these matters.
26. The complainant has argued that the council failed to provide them with any update in relation to their complaint about health and safety concerns. Disclosure of the information would provide reassurance that the matter had been given appropriate consideration. In addition, where a complaint about safety is upheld, there is a clear public interest in making the complainant and the broader public aware of this.

Public interest in maintaining the exemption

27. In relation to the public interest in making potentially affected people aware of any issues at a site, the council has stated that, as part of section 28 of the Health and Safety Act 1974, it is able to share concerns with the employees of an affected business. Therefore, the public interest has been served by existing procedures for informing employees/members of the public of any concerns that would affect them and there is no need for disclosures to be made under the FOIA.

28. The council has argued that disclosing the information would be likely to prejudice further investigations of the same nature, as the requestor would have knowledge of what information had been investigated, and what thresholds needed to be met for any enforcement action. This would likely prejudice the council's ability to investigate possible health and safety breaches, particularly for this site, and this in turn could impact on its ability to ascertaining whether any person has failed to comply with the law.
29. The council has confirmed that whilst its investigation is not currently live, to disclose case findings and reasons to/not to take enforcement actions would prejudice further investigations, particularly for sites that have had individual targeted complaints/allegations.

The balance of the public interest arguments

30. The Commissioner considers that there is a public interest in understanding how the council carries out its investigative work and how it makes decisions as to whether a health and safety concern should be upheld.
31. However, key to the consideration of any section 31 case is to determine whether disclosure could in some way compromise a public authority's ability to carry out its investigative work effectively. Clearly, it is not in the public interest to jeopardise the ability of the council to regulate and enforce compliance with health and safety legislation.
32. The council acknowledged to the complainant in its internal review that, as part of its investigation of their health and safety complaint, it should have provided them with an update and a summary of findings. The council's review provided this update and confirmed that the responsible service area had been informed of this oversight. Whilst this was a separate route of access to information to their FOIA request the Commissioner considers that it addresses the complainant's public interest arguments.
33. More broadly than the specifics of this particular case, the Commissioner must also bear in mind that although an investigation may decide that there has been no breach by a business or by individuals, the information gathered as part of investigations remains recorded and may subsequently be used to inform decisions in any future investigations. A disclosure of that information may negate, weaken or affect the possibility of that information being used as evidence in future proceedings. This is a central purpose behind the exemption in the first instance. There is therefore a strong public interest in protecting intelligence which has been obtained in order that this can be used if this becomes necessary in the future. A disclosure which leads to media publication of the details of the investigations which were carried out

may prevent such information being used as supporting evidence in future proceedings.

34. The Commissioner also accepts the council's argument that the cooperation of those being investigated plays an important part in the effectiveness of investigations of this sort. If information gathered as part of investigations of this sort are disclosed on a more general basis, there is a real and significant possibility that the cooperation of business owners might be withdrawn in future investigations.
35. Ultimately this might lead to more formal action, and potentially legal action being required to ensure that investigators are able to gather the information which they need. This would be likely to require further time and add to the costs of such investigations, making it far more difficult for the council to obtain information necessary to either clear or confirm allegations. Ultimately this would be likely to affect the ability of the council to conduct investigations. Investigations would cost more and take longer. Given that the resources of public authorities are limited it would be possible that fewer complaints could be investigated properly, and as a result the scope of council's functions in the protection of health and safety could be lessened compared to the work it is currently able to undertake.
36. Having considered the relevant factors the Commissioner has, therefore, decided that the public interest in the exemption being maintained in this case outweighs that in the information being disclosed. The council was, therefore, correct to withhold the information under section 31(1)(g).

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF