

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 September 2021

Public Authority: North East Lincolnshire Council

Address: Municipal Offices
Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested information from North East Lincolnshire Council ("the Council") about warnings sent to food establishments. In a previous response, the Council disclosed some information to the requester, and refused the remainder of the request under section 12(1) of the FOIA – cost of compliance exceeds appropriate limit. The Council was subsequently ordered by the Commissioner to issue a fresh response. In its fresh response, it refused to provide the outstanding information, stating it was exempt under section 30(1)(b) of the FOIA: investigations and proceedings.
2. The Commissioner's decision is that, while the information falls within the exemption at section 30(1)(b) of the FOIA, the balance of the public interests favours disclosure.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Subject to the redaction of third party personal data, as described in this notice, disclose the information to the complainant.
4. The Council must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 October 2019, the complainant wrote to the Council via the website What Do They Know to request information of the following description:

"I would like to make a request under the Freedom of Information Act:

1) According to LAEMS¹ data in the public domain for 2018/19, there were 80 written warnings sent to food establishments by North East Lincolnshire Council. Could you please provide copies of the 80 written warnings sent.

2) Could you please provide a list of the establishments that received written warnings in 2018/19 from North East Lincolnshire Council?

3) According to LAEMS data in the public domain, there were 2 prosecutions recorded by North East Lincolnshire Council in 2018/19 could you provide disclosure on the parties that were prosecuted and what was the ruling made by the judge?"

6. After some correspondence, and the involvement of the Commissioner, the Council disclosed the information requested at point 3) but refused the remainder of the request under section 12(1) of the FOIA, its position being that compliance would exceed the appropriate cost limit.
7. This was investigated by the Commissioner under case reference IC-48163-H7D7.
8. The Commissioner's decision in that case was that compliance would not exceed the appropriate cost limit, and she ordered the Council to issue a fresh response in respect of points 1) and 2) of the request, to the complainant.
9. On 20 October 2020, the Council issued its fresh response to the complainant. It refused to provide the information, stating that it was exempt under section 30(1)(b) of the FOIA: Investigations relating to criminal proceedings which the authority has power to conduct.

¹ This refers to the Local Authority Enforcement Monitoring System issued by the Food Standards Agency

Scope of the case

10. The complainant contacted the Commissioner on 20 October 2020 to complain about the way his request for information had been handled, with regard to the fresh response. The Commissioner contacted the Council for details and supporting evidence of its position.
11. In its submissions to the Commissioner, the Council stated that it considered that section 30(1)(b) of the FOIA was engaged, in respect of all of the withheld information.
12. It also stated that it "*wished to identify that section 30(1)(a) [of the FOIA] may also apply to the withholding of some of the 80 Written Warnings requested*".
13. Section 30(1)(a) of the FOIA covers investigations which the relevant authority has a duty to conduct.
14. However, the Council did not identify which, if any, of the written warnings it considered may be covered by section 30(1)(a).
15. In the absence of any indication as to which of the information the Council was referring to, and no clear conclusion that it considered section 30(1)(a) was engaged, the Commissioner has focused her analysis on section 30(1)(b).
16. This notice covers whether the information requested at points 1) and 2) of the request is exempt under section 30(1)(b): Investigations relating to criminal proceedings that the authority has power to conduct.

Reasons for decision

Section 30 of the FOIA: Investigations and proceedings conducted by public authorities

17. Section 30 of the FOIA sets out classes of information which is exempt from disclosure if it is held for certain purposes relating to investigations.
18. In this case, the Council explained that it considered section 30(1)(b) was engaged. This states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the

circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct."

19. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(b) if it relates to a specific ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
20. It is a qualified exemption, and therefore, if it is engaged, it must then be determined whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

21. The first step is to address whether the requested information falls within the class specified in section 30(1)(b).
22. The Commissioner has issued guidance² on section 30(1)(b) which clarifies that the exemption "... *applies to investigations but the public authority only needs to have the power to conduct those investigations rather than a duty. Importantly, the public authority must also have the power to institute and conduct any criminal proceedings that result from its investigation.*"
23. The Council explained that it is a "food authority" as defined by section 5(1)(a) of the Food Safety Act 1990. Section 6(2) of the Food Safety Act states that every food authority shall enforce and execute the provisions of that Act, and section 6(5) states that an "enforcement authority" (that is, the food authority enforcing the provisions of the Act) "*may institute proceedings under any provisions of this Act or any regulations or orders made under it*".
24. The Commissioner notes that the Food Safety Act, and other food legislation, create a number of criminal offences.
25. It is not in doubt that the Council, in this case, has the power to conduct investigations into food standards, food hygiene and food safety, nor that these investigations may result in criminal proceedings.
26. The Commissioner has considered whether the withheld information is held for the purposes of any investigation, as is required by section

² <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

30(1)b). She has been provided with a sample of the withheld information.

27. She notes that each page of the withheld information is headed "Trading Standards Visit Report Sheet". Each one provides the name and address of a food businesses, and in each case, a box is ticked on the sheet, to show that a Council visit had taken place.
28. Each document includes handwritten requirements for the food businesses to follow. It is also noted, on each sheet, that a return visit will be carried out after 28 days.
29. It has not been explained to the Commissioner whether the written warnings relate to any specific piece of food legislation.
30. However, the Commissioner's guidance states that the exemption applies to information *"held at any time for certain investigations or proceedings... even if it was not originally obtained or generated for one of those purposes... [the exemption] will continue to protect information even if it is no longer being used for the specified investigation or proceeding"*.
31. The Commissioner has considered whether it has been demonstrated, in this case, that the written warnings were held for certain investigations or proceedings.
32. The Council explained as follows:

"As a Food Authority we are duty bound to undertake inspections to identify instances of non-compliance with food law and take appropriate action to ensure compliance. At the conclusion of every inspection, the inspecting officer will discuss any contraventions of food law discovered and set out in a Written Warning any corrective action necessary; the timescale for the corrective action; and any further action the officer intends to take and any recommendations of good practice that the officer considers appropriate. A Written Warning is the first stage of an intervention in accordance with Food Law, which if not complied with can lead to a person or a business being charged with an offence. The information contained within the Written Warning therefore specifically details the contraventions identified and being investigated. It is an integral part of a graduated approach to enforcement. As a Food Authority we continuously monitor levels of compliance with food law in our district, this includes following up Written Warnings with further interventions or inspections to monitor that compliance is being maintained. There is therefore the potential that any case where a written warning has been issued can be

reopened at a future point as a result of an intervention and / or inspection."

33. The Commissioner's guidance sets out that: *"As with section 30(1)(a) there may be an initial investigation, or vetting process, to determine whether a full investigation is warranted. These initial investigations will be protected by section 30(1)(b) provided that the public authority can explain why any full investigation may, in the circumstances, lead to criminal proceedings."*
34. The Commissioner is satisfied from the Council's explanations that the information recorded on the written warnings sets out corrective action required by each of the food businesses. She is satisfied that, where a written warning has been issued, the Council follows up on the written warnings and, if the corrective action has not been taken, it uses the information on the warnings in considering whether a full investigation, and the instigation of proceedings, is necessary. Information on the warnings may then be utilised and referred to in the subsequent investigation.
35. In this case, the Commissioner is satisfied that the inspections which led to the warnings being issued, comprised "initial investigations" and that the information is held for the purposes of investigations.
36. The Commissioner has determined that the requested information falls within the class of information covered by section 30(1)(b) of the FOIA, and that the exemption is therefore engaged.

The balance of the public interest

37. Section 30(1)(b) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. In accordance with the Commissioner's guidance, when considering the public interest in maintaining exemptions, it is necessary to be clear what the specific exemptions are designed to protect. The purpose of section 30 is to preserve the ability of applicable public authorities to carry out effective investigations.
39. Key to the balance of the public interest, in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the authority to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of authorities to investigate crimes effectively.

Public interest arguments in favour of disclosing the information

40. The Council considered that the public interest arguments in disclosing the withheld information included general interests in the transparency and accountability of the Council as a public body. More specifically, it acknowledged that disclosure of the withheld information would: *"aid public knowledge and understanding of food standards, allowing individuals to make informed decisions about which businesses they use or do not use, based on increased knowledge of why a Written Warning was issued; providing public confidence in and understanding of the Council's activities for food enforcement, enabling their effectiveness and value for money to be evaluated; and that disclosure could result in improved compliance by food businesses"*.
41. They acknowledged the public interest in: *"promoting transparency, accountability, understanding and involvement in food standards, and more specifically that individuals will use this information to inform their choice, and making it available could provide an impetus for food businesses to increase their food standards compliance"*.
42. In addition, the Council considered that disclosure may *"provide public confidence in and understanding of the Council's activities for food enforcement, enabling their effectiveness and value for money to be evaluated"*.
43. The complainant commented simply that there is a clear public interest in knowing *"which parties have been warned due to having poor food standards"*.

Public interest arguments in favour of maintaining the exemption

44. The Council argued that the balance of the public interest lies in ensuring that: *"the manner, effectiveness and independence of the Council's enforcement activities (inspections, interventions, investigations and prosecutions) are protected and preserved, allowing the Council to operate in a safe space, without external pressure, which could result from disclosure; in its enforcement activities the Council tries to work with and support business to ensure compliance with legal requirements, and disclosure may inhibit this co-operation; and the information would form part of any prosecution file and premature disclosure of the information could compromise the proceedings and prejudice the right to a fair trial"*.
45. It summarised this by saying that, in withholding the information, it aimed to *"ensure the effective conduct and independence of the Council's food standards enforcement activities"*.

46. The Council also argued that some of the public interest, in this case, is met by the fact that information about food standards is already published. It referred the complainant, and the Commissioner, to its own website, and also to the website of the Food Standards Agency; specifically, food hygiene ratings. The relevant page on the Food Standards Agency website allows the public to search for a food business and view its hygiene rating.

Balance of the public interest arguments

47. The Commissioner has considered the public interest in the Council disclosing the requested information. She has also considered whether disclosure would be likely to harm investigations, which would be counter to the public interest, and what weight to give to these competing public interest factors.
48. The Commissioner considers that there is a strong public interest in openness and transparency, particularly in relation to information about food businesses, and how the Council is carrying out its functions under the food legislation.
49. She notes that, while the Council pointed out that food hygiene information is available online, the withheld information in this case does not appear to relate specifically to food hygiene. The warnings relate to other issues. Indeed, there are cases where a business which recorded a top rating for hygiene (five stars) on the Food Standards Agency website, was also issued with a warning about a different issue, following on from the same Council visit. This would not be apparent from the published information.
50. Although the public can see from published information that the Council issued 80 written warnings during the relevant period (which, indeed, led to the complainant's request), the Commissioner is not aware of the information that is recorded on the written warnings being available for public inspection.
51. The Commissioner considers that there is a strong public interest in the disclosure of information about food businesses, which are legally required to comply with a number of different standards (not just hygiene), including relating to labelling, and other matters.
52. The Commissioner also recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. She considers that confidence would be increased by allowing scrutiny of their performance, and this may involve examining their procedures in relation to investigations.

53. However, as set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. It is in the public interest to protect the ability of the Council to investigate potential offences, to gather evidence, and to prosecute offences successfully.
54. In this case, the Commissioner has considered whether disclosure of the withheld information would be likely to reduce or inhibit the chances of the Council bringing a successful prosecution against businesses (or any particular business), and whether, as the Council argued, it would prejudice its ability to carry out its investigations effectively, or prevent businesses from receiving a fair hearing.
55. She asked the Council whether any of the written warnings related to ongoing matters that were "live" at the date of the request. The Council stated that "*a number of the 80 interventions / investigations*" would still have been open, and "*further*" could have been re-opened subsequently.
56. It did not indicate, however, which of the written warnings these comments applied to, and the Commissioner notes that all of the affected businesses would already have received a copy of the warnings in any event.
57. The Commissioner has considered whether local food businesses may lose trust and confidence in the Council, if hitherto unpublished information about their businesses was made public. She accepts that it is in the public interest for the Council to have a good relationship, and be trusted by, local businesses. However, she considers that food businesses are well aware that they are regularly scrutinised, publicly, and rated in a number of ways. There has been no suggestion that the written warnings were recorded, or provided, in confidence.
58. The Commissioner is not persuaded from the content of the withheld information, nor from the Council's arguments, that disclosure would prejudice the Council's ability to bring a successful prosecution in the event of further investigation being carried out, following on from the warnings. Nor would it lead to a damaging loss of trust.
59. Whilst it may be the case that publication of the warnings would attract some public attention, she does not consider that this would be such that it would prevent from the Council carrying out its obligations as a food authority, effectively.
60. The Commissioner has decided that while the exemption under section 30(1)(b) of the FOIA is engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosure, in the circumstances of this case.

The Commissioner's decision

61. The Commissioner is satisfied in this case that the balance of the public interests favours the disclosure of the information. The Council is therefore ordered to disclose the withheld information to the complainant, subject to the paragraphs which follow.
62. The Commissioner notes that the withheld information includes some third party personal data. Specifically, it includes the handwritten name and email address of the visiting council officer, and the handwritten name of an individual at the relevant food business. It also includes both parties' signatures.
63. The Commissioner is satisfied that this information identifies and relates to living individuals, and therefore comprises personal data within the definition of personal data at section 3(2) of the Data Protection Act 2018. She is also satisfied that it would not be lawful to disclose this information.
64. The Commissioner instructs the Council that, prior to disclosing the information, this personal data should be redacted.

Right of appeal

65. 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

66. 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.
67. 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
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