

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 July 2021

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a potential Trading Standards investigation. In relation to parts 1-6 of the request Kent County Council refused to confirm or deny whether the information was held, relying on section 44(2) of the FOIA (the exemption from disclosure for any information whose disclosure would be otherwise prohibited by another piece of legislation). In relation to part 7 of the request, it directed the complainant to information on its website.
2. The Commissioner's decision is that Kent County Council correctly applied section 44(2) to parts 1-6 of the request and that its response to part 7 of the request complied with section 1(1).
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 19 May 2020, the complainant wrote to Kent County Council (the "council") and requested information in the following terms:

*"(in relation to sale of Toyota IQ registration mark [specific registration number] )*

*1 Has there been any contact or discussion between Trading Standards and the trader in relation to the vehicle?*

*2 If so, has Trading Standards investigated the sale of the vehicle?*

*3 If so, has Trading Standards concluded their consideration or investigation of the matter?*

*4 If so, has Trading Standards expressed to the trader or his legal adviser their views or any conclusion regarding the sale of the vehicle?*

*5 Is it the recommended or required practice and procedure of Trading Standards to inform a trader (in respect of whom a complaint from a member of the public has been made) of Trading Standards views or conclusion regarding a matter without Trading Standards having made any contact with the person who made the complaint?*

*6 If not, please explain the reasons and justification for doing so.*

*7 Please provide a copy of the Trading Standards recommended or required practice and procedure in relation to complaints from the public regarding breach of contract, contravention of the Consumer Rights Act 2015 or offences under the Fraud Act 2006."*

5. The council responded on 18 June 2020 and, in relation to parts 1-6 of the request, confirmed that it was refusing to confirm or deny whether the information was held. It confirmed that, in so doing, it was relying on section 44(1)(a) of the FOIA which provides an exemption from disclosure for any information whose disclosure would be otherwise prohibited by another piece of legislation. In relation to part 7 of the request the council directed the complainant to information on its website.
6. Following an internal review the council wrote to the complainant on 7 August 2020. It stated that it was maintaining its position.

## Scope of the case

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7. On 30 September 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council has, in relation to its application of section 44(1)(a), correctly refused to confirm or deny whether the information in parts 1-6 of the request is held. She confirmed that her investigation will also consider whether the council has disclosed all the relevant information it holds that falls within the scope of part 7 of the request.

## Reasons for decision

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### Section 1 – information held

9. Section 1 of the FOIA says:

*"(1) Any person making a request for information to a public authority is entitled—*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him".*

10. Part 7 of the complainant's request asked for the following information:

*"Please provide a copy of the Trading Standards recommended or required practice and procedure in relation to complaints from the public regarding breach of contract, contravention of the Consumer Rights Act 2015 or offences under the Fraud Act 2006"*

11. The councils response to this part of the request directed the complainant to a document on its website. The complainant disputes the council's position that this represents all the relevant information it holds in relation to this part of the request.
12. Where there is dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held the Commissioner, following the lead of a number of First-Tier Tribunal decisions must decide whether or not, on the civil standard of the balance of probabilities, the public authority holds any information within the scope of the request (or if any was held at the time of the request).

13. The Commissioner is not expected to prove categorically whether information is held, she is only required to make a judgement on whether information is held on the civil standard of probabilities.
14. In deciding where the balance of probabilities lies, the Commissioner considers the complainant's evidence and arguments. She also considers any other information or explanation offered by the public authority which is relevant to her determination.
15. To assist with this determination the Commissioner approached the council with a range of questions she routinely asks in such cases. The questions (in bold) and a summary of the council's responses are set out below.

16. **What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?**

The council confirmed that a search was carried out of the Kent County Council Intranet (KNET) and the council website to see if any further policy documents could be relevant to this request. It explained that, apart from the Trading Standards Enforcement Policy, which details how Trading Standards work with and advise businesses, no further relevant documents were found.

17. **Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.**

The council confirmed that a consultation was carried out with a Kent County Council Trading Standards intelligence analyst. The consultation clarified that the trading standards team do not refer to any additional policy documents as part of their triage process to determine if a referral meets the priority threshold for passing to a Trading Standards officer to review as to whether an investigation or intervention should commence. The council confirmed that, when making an assessment as to whether to commence an intervention or investigation, Trading Standards do not refer to any procedural or policy document but rely upon previous knowledge and the strategic priorities and circumstances of the department capacity at the time.

18. **If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.**

The council confirmed that all policy documents are held electronically and that there are no other policies or procedural documents that Trading Standards refers to in relation to handling consumer complaints. It explained that search terms used were "Trading Standards", "Enforcement", "Consumer Rights Act" and "Consumer complaints".

19. **Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?**

The council confirmed that no relevant recorded information had been deleted or destroyed.

20. In reaching her conclusions in this matter the Commissioner has also referred to the document to which the complainant was directed, titled "Enforcement Policy Kent County Council Trading Standards". She is satisfied that this document contains information which is directly relevant to the scope of part 7 of the request.

21. The Commissioner is mindful that the complainant considers that the information might not cover every possible investigatory scenario they had in mind, however, she has not been provided with any direct evidence or arguments which suggest this should be the case. Moreover, the council's explanation (above) that investigations rely upon previous knowledge and the strategic priorities and circumstances of the department capacity at the time rather than on specific policy documents, confirms that such exhaustive documents are not needed.

22. Having considered the available evidence the Commissioner considers that, on the balance of probabilities, it is likely that the council has correctly confirmed that no additional relevant information is held. She has concluded, therefore, that the council's response to part 7 of the request complies with section 1(1).

**Section 44 – Prohibitions on disclosure**

23. Section 44(1)(a) of the FOIA provides an exemption from disclosure for any information whose disclosure would be otherwise prohibited by another piece of legislation.

24. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether the information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited by another enactment.

*Background*

25. The council explained that a consumer does not complain to Kent County Council Trading Standards directly but is directed through the

council website to report a scam or problem with a trader or product to the Citizens Advice Consumer Service (CACS). CACS are a national organisation and a partner agency of the council. The council clarified that once the complaint is uploaded onto the CACS data management system a copy is automatically sent to the complainant's local Trading Standards service where it is added to their intelligence database. A copy is also sent to the local Trading Standards service where the business is based should it be a different local authority to that of the complainant.

### *Legislative Background*

26. The council explained that Kent County Council Trading Standards is a general enforcer under part 8 of the Enterprise Act 2002 (EA02) with relevance to various pieces of consumer protection legislation, such as the Consumer Rights Act 2015 and The Fraud Act 2006. It confirmed that all records received as part of this general enforcement are kept for intelligence purposes and/or passed to TS officers for further action if necessary.
27. The council confirmed that section 237 of the EA02 prohibits 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, it clarified, 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 EA02.
28. The council confirmed that a Google search of the named sole trader revealed that the trader's business address was active.
29. Under section 245 of the EA02 it is an offence punishable by up to 2 years imprisonment to disclose information in breach of Section 237 of the same act. Section 238 of the EA02 defines specified information as information that has been submitted 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 EA02;
  - b) An enactment listed in schedule 14 of the EA02; or
  - c) Such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.
30. The council explained that the information in request parts 1-4 relate to information that, if held by TS, would be held in relation to contact or discussions with the trader in relation to the sale of the vehicle. The information requested would be initially submitted in the form of a

complaint to CACS and subsequently forwarded to the TS intelligence team with a view to the council undertaking its function under Part 8 of the EA02 (domestic infringements).

31. The council explained that the request relates to a complaint made in relation to the sale of a vehicle purchased from a specific vendor. The complaint alleges that the vehicle was fraudulently missold by way of the description given to them by the trader as to the repair to the front end of the vehicle prior to sale. The council explained that any complaint about any individual or organisation is by definition in relation to the exercise of the council's functions as listed in section 238 of the EA02.

*Why would confirming or denying whether the information is held breach the prohibition on disclosure in this case?*

32. Under section 44(2), when considering its response to a request, a public authority must consider whether a confirmation or denial would apart, from under the FOIA be prohibited, by an enactment. This means that the obligations imposed by the FOIA are not overriding when considering the application of a statutory prohibition.
33. The council has argued that to deny that it holds the information would in itself reveal information to the complainant by way of inference due to the specifics of his questions 1-4. If an alternative response of confirming that it held information had been provided, then the council could have inadvertently disclosed information that had come to the council in connection with its functions under s238 of the EA02 and in breach of Section 237 of the EA02.

*"Gateways" to disclosure*

34. In this instance, the council is refusing to confirm or deny whether the information in question is held. The following paragraphs, therefore, consider whether gateways to disclosure would *hypothetically* exist if the information were held and should not be taken to confirm or deny whether information actually is held.
35. Section 239 to 241A of the EA02 introduces what are commonly referred to as "gateways". These are provisions which allow a way through the statutory prohibition on disclosure by setting out the circumstances under which specified information can be disclosed without breaching the statutory prohibition. In broad terms these include where the business undertaking or individual that the information relates to has given their consent, where a European Community obligation requires the disclosure, or where the disclosure is necessary for certain civil or criminal proceedings.

36. The council has stated that the complainant has commenced civil proceedings at Canterbury County Court against the trader. Section 241A of the EA02 states that a public authority which holds prescribed information to which section 237 applies may disclose that information to any person (a) for the purposes of, or in connection with, prescribed civil proceedings (including prospective proceedings) in the United Kingdom or elsewhere, or (b) for the purposes of obtaining legal advice in relation to such proceedings, or (c) otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.
37. The council explained that TS considered whether this gateway could be engaged as part of their internal review deliberations. This is a discretionary power that is also subject to the considerations set out in section 244 of the EA02. The council referred to ICO guidance on section 44 prohibitions, which clarifies that if a particular gateway permitted disclosure for the purpose of legal proceedings, the fact that a requester may be a party to those proceedings would not be relevant when considering whether information should be disclosed to them under FOIA. This is because the FOIA disclosure would in effect be to the world, not solely to the requester. Any disclosure, if made, would therefore be under the EA02 for the named specific purpose. The council confirmed that its internal review invited the complainant to provide more details in relation to these civil proceedings so that the council could consider whether to exercise its discretion, but no further information was received.
38. The complainant has suggested that the council already had sufficient information to consider exercising its discretion to disclose without needing to request further details and that it has failed to consider the exercise of its discretion to disclose.
39. The council advised the Commissioner that at the time of the request it had no reason to believe that any of the gateways were applicable. The Commissioner accepts that, even if the information was held, none of gateway provisions would apply.
40. In relation to parts 5 and 6 of the request, the Commissioner suggested that these appear to relate to general policy/procedural information. However, the council has argued that in this case, disclosing the information would also effectively also answer parts 1-4 of the request which, if held, is prohibited from disclosure. Having considered this the Commissioner is satisfied that the council's position is correct and that confirming or denying whether the information is held in this case would result in the disclosure of information subject to a prohibition.



41. In considering this complaint the Commissioner has referred to previous decisions issued in relation to comparable scenarios, notably, a decision notice relating to a request for similar information made to the council in April 2020<sup>1</sup>. She considers that the facts of that case are transposable to this complaint and sees no reason to depart from the conclusion reached in that decision notice.
42. Therefore, the Commissioner has concluded that, in relation to parts 1-6 of the request, section 237 of the EA02 prohibited the council from confirming or denying whether the requested information was held. Therefore, the council correctly cited section 44(2) of the FOIA and was not obliged to comply with the complainant's request.

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<sup>1</sup> ICO reference: FS50886405, decision notice published on the ICO website here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617603/fs50886405.pdf>

## Right of appeal

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43. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**