

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2010

Public Authority: The Office of Fair Trading
Address: Fleetbank House
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London
EC4Y 8JX

Summary

The complainant requested information about the content of any communications from the Department for Business, Enterprise and Regulatory Reform (BERR) to the Office of Fair Trading (OFT) in relation to an article in *The Independent* newspaper about credit card companies and the cost of borrowing. The OFT confirmed it held the requested information but refused to disclose it citing the exemptions in sections 31(1)(g), 31(2)(c) (law enforcement) and 35(1)(a) (formulation / development of government policy) of the Freedom of Information Act 2000. Some information was disclosed during the course of the Commissioner's investigation. However, the OFT refused to provide the remainder on the basis that it was exempt from disclosure by virtue of sections 31(1)(g), 31(2)(a) and (c), 35(1)(a) and additionally section 44 (prohibitions on disclosure). The Commissioner has found that the exemptions were applied correctly but that procedural breaches occurred.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Office of Fair Trading (OFT) is a non-ministerial government department established by the Fair Trading Act in 1973. It enforces both consumer protection and competition law. It is the UK's consumer and competition authority.
3. Businesses that offer goods or services on credit or lend money or are involved in activities relating to credit or hire must be licensed by the OFT.
4. The department referred to in the request for information, the Department for Business, Enterprise and Regulatory Reform (BERR), was a government department created in June 2007 on the disbanding of the Department of Trade and Industry. It was itself disbanded in June 2009 on the creation of the Department for Business Innovation and Skills (BIS). In line with the terminology used in the request for information, this Decision Notice will refer to the department as it was known at the time of the request, namely BERR.
5. On 9 December 2008, *The Independent* newspaper contained an article entitled "*The great credit card scandal*". The article said that analysis by the newspaper had found that the cost of borrowing had risen despite cuts to the Bank of England base rate.
6. *The Independent* reported:

"Credit card companies are facing an investigation by competition watchdogs after defying government warnings to improve their lending practices".

and

"One government source said last night 'We are not backing off. If the companies don't move, if necessary, we will go down the OFT route'".

The Request

7. The complainant wrote to the OFT on 9 December 2008 in connection with an article in *The Independent* newspaper concerning credit card companies charging a higher average interest rate than 12 months earlier. In his correspondence, he referred to the fact that the article

said that card providers could be investigated by the OFT. In this respect, the complainant made the following request:

"Please disclose to me what is in any communications from DBERR to the OFT relating to these matters (the matters referred to in the Independent article). I am primarily wanting to know whether DBERR has already contacted you about proposing to go down, or about going down, the OFT route about the card providers. I want to know what DBERR has told you. I would also like to know the contents of any OFT response to the DBERR's communications".

8. The OFT responded to the complainant on 23 January 2009, answering his question about whether BERR had contacted the OFT and confirming that it held information relevant to his request. The letter also stated that the OFT was withholding the information under sections 31(1)(g), 31(2)(c), 35(1)(a) and 35(1)(b) of the Act on the basis that it related to the possible exercise of the OFT's enforcement actions and the formulation of government policy. Although not specifically citing section 35(1)(d), reference was also made to the operation of a Ministerial private office.
9. The complainant requested an internal review on 13 March 2009. As well as querying the OFT's application of exemptions in this case, he particularly commented on the paucity of the public interest arguments put forward by the OFT.
10. The OFT upheld its decision in relation to sections 31(1)(g), 31(2)(c) and 35(1)(a) in an internal review which was sent to the complainant on 17 April 2009. It also confirmed that it was no longer citing sections 35(1)(b) or (d).
11. In this correspondence, the OFT told the complainant that:

"some documents are exempt under section 31(1)(g)/31(2)(c) alone, other documents are exempt under section 35(1)(a) and some under both section 31(1)(g)/31(2)(c) and 35(1)(a)".

The Investigation

Scope of the case

12. The complainant contacted the Commissioner on 7 June 2009 to complain about the way his request for information had been handled. The complainant told the Commissioner that he considered the OFT

had incorrectly assessed the public interest balance and that, in his view, stronger interests in increasing public understanding and enabling government policy to be scrutinised meant that the balance was in favour of disclosure.

13. Given the wide range of matters dealt with by *The Independent* article, in its internal review correspondence of 17 April 2009, and with reference to his correspondence of 9 December 2008, the OFT told the complainant:

"your request was interpreted by the OFT as narrowed to a request for information in categories 1 to 3 above regarding the matter lettered D above".

14. The categories specified by the OFT were:

- *1) whether BERR had contacted the OFT about "proposing to go down, or going down the OFT route about the credit card providers";*
- *2) the contents of communications from BERR to the OFT in relation to 1 above; and*
- *3) the OFT's response to communications referred to in 1 above.*

15. The matter at "D" was described as:

"statements by unnamed sources indicating that credit card providers faced some form of investigation by the OFT".

16. The OFT provided a response to the information requested in the category it defined as (1), confirming to the complainant that BERR had contacted the OFT about the subject at issue. The focus of the Commissioner's investigation has therefore been to determine whether or not the OFT was correct to withhold the information that falls within categories (2) and (3). In this respect, and taking account of developments during his investigation, his investigation has focussed on the OFT's citing of sections 44, which the OFT claimed during the course of the Commissioner's investigation, 31(1)(g) by way of 31(2)(a) and (c), and (35)(1)(a).

Chronology

17. Unfortunately, due to a backlog of complaints at the Commissioner's office about compliance with the Act, there was a delay of several months before his investigation into this complaint got underway.

18. The Commissioner wrote to the OFT on 8 December 2009, asking whether, given the passage of time since the request was made, the information could now be disclosed to the complainant. He also asked for a copy of the withheld information and an explanation of the OFT's citing of the exemptions at sections 31 and 35.
19. Following requests for an extension to the deadline for providing a response, the OFT responded on 31 March 2010. It advised the Commissioner that, following a review of the information within the scope of the request and given the passage of time, "*a substantial amount of the information within the scope of [the complainant's] request can now be disclosed*".
20. The OFT provided the Commissioner with a copy of the correspondence sent to the complainant on 31 March 2010 together with the information disclosed to him at that stage. It also provided the Commissioner with confirmation of the remaining withheld information. In respect of this, the OFT told the Commissioner that it now considered that the exemption in section 44 of the Act (prohibitions on disclosure) also applied to some of the withheld information. The relevant prohibitory enactment cited by the OFT is the Enterprise Act 2002 (EA02).
21. The complainant contacted the Commissioner on 5 April 2010 confirming that he had received "*a folder of information*" from the OFT. He told the Commissioner that he wished to pursue his complaint in respect of the OFT's application of the exemptions in sections 31, 35 and 44 to the information still being withheld.
22. The Commissioner wrote to the OFT on 14 April 2010 in relation to its citing of section 44, asking to be provided with an unredacted copy of the information withheld under this exemption.
23. The OFT responded on 6 May 2010, providing a copy of some of the information previously withheld under section 44. In respect of this information, the OFT told the Commissioner that it was now being withheld under section 31(1)(g). However, the OFT maintained that the remainder of the information withheld under section 44 was still subject to the restriction on disclosure by virtue of section 237(1) of the EA02 and could not therefore be provided to the Commissioner.
24. In accordance with his powers under section 51 of the Freedom of Information Act 2000, and in order to continue with his investigation, the Commissioner issued an Information Notice on 18 May 2010 requiring the OFT to provide him with a copy of the information withheld under section 44.

25. The OFT provided this information on 25 May 2010.

Analysis

Exemptions

Section 44 Prohibitions on disclosure

26. In this case, the Commissioner recognises that the OFT applied the exemption at section 44 of the Act at a late stage in the process and after a formal complaint had been submitted to the Commissioner.
27. Factors which the Information Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:
- i. where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;
 - ii. where the authority has correctly identified the harm likely to arise from disclosure but applies these facts and reasoning to the wrong exemption; and
 - iii. where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution.
28. As some of the information in this case falls into the criteria described at paragraph 28(iii) above, the Commissioner decided to accept the late application of the section 44 exemption.
29. Section 44(1) provides that:
- "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."*

30. The relevant sub-paragraph in this case is section 44(1)(a) of the Act which provides that information is exempt information if its disclosure is prohibited by or under any enactment. This is commonly known as a statutory bar to disclosure. In this case, the OFT stated that section 237 of the Enterprise Act 2002 (EA02) provided a statutory bar to disclosure, as the withheld information constituted 'specified information' as defined by that Act.
31. Section 237 of the EA02 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 243 of the EA02.
32. It follows that, in order for the public authority to rely on the statutory prohibition, it would need to demonstrate that the requested information is "*specified information*" that relates to the affairs of an individual or any business of an undertaking. An "undertaking" refers to a business or economic entity that continues to exist.

Is the request for "specified information"?

Does the information relate to the affairs of an individual or a business?

Is the individual alive or is the business still in existence?

33. Section 238 of the EA02 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:

- i. Part 1, 3, 4, 6, 7 or 8 of the EA02,
- ii. an enactment listed in Schedule 14 of the EA02, or
- iii. any secondary legislation specified by the Secretary of State.

34. In this respect, the Commissioner understands that the OFT has the general function of acquiring, compiling and keeping under review information about matters relating to the carrying out of its functions under section 5 Part 1 of the EA02. This is to ensure that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively (section 5(2) EA02).
35. Specifically with regard to consumer credit matters, the issue in question in this case, the OFT has told the Commissioner that its general functions of administering and enforcing the Consumer Credit Act 1974 are described in section 1 of that Act.

36. Given the nature and context of the withheld information in this case, the Commissioner is satisfied that it "came to" the OFT in the exercise of its statutory functions. The Commissioner is also satisfied that the information relates to a business which is still in existence.

Has the information requested previously been legitimately disclosed to the public?

Is there any other statutory power or duty to disclose the information?

Do any of the gateways in sections 239 - 243 of the EA02 apply

37. The Commissioner is not aware that the information in question has previously been legitimately disclosed to the public or of any other statutory power or duty to disclose it. Furthermore, he is satisfied there is nothing to suggest that any of the gateways in section 239 – 243 are relevant or apply to the information requested.

Conclusion

38. The Commissioner has therefore concluded that it is appropriate for the OFT to withhold that part of the information to which this exemption has been applied. Since section 44 is an absolute exemption, no public interest applies.

Section 35 Formulation of government policy

39. The Commissioner has next considered the OFT's arguments in relation to the information withheld under section 35(1)(a). This section provides a class-based exemption from disclosure for information that relates to the formulation or development of government policy.

40. Section 35(1) of the Act provides that:

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office."

41. In this case, the OFT is citing section 351(a), arguing that the withheld information relates to the formulation of government policy.

42. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

43. In citing this exemption, the OFT explained to the complainant:

"It is clear that both BERR and the OFT are public bodies that are involved in the formulation of government policy".

44. In describing the nature of the information withheld under this section, the OFT told the complainant:

"the content of these communications includes but is not limited to recommendations, proposals for action and criteria for action which are relevant to the development of the policy."

45. It told him that the OFT considers the policy at issue is:

"the policy relating to the practice of credit card providers using risk based pricing leading to re-pricing of interest rates for consumers".

In correspondence with the Commissioner, the OFT referred to it more succinctly as *"the government's policy on credit"*.

46. The OFT has argued that the formulation/development of the policy was ongoing at the time of the request (December 2008). In support of this argument, it referred the Commissioner to the Government White Paper *"A Better Deal for Consumers"*, July 2009, which announced a review of the regulation of credit cards and store cards. The OFT explained that the fact that the issue of risk-based pricing is considered within this review demonstrates the ongoing nature of the development of the government's policy in this area.

47. Section 35(1)(a) is a class-based exemption, which means that there is no need to consider whether any prejudice might be caused by the disclosure of the requested information. To engage the exemption, the information in question must simply relate to that which falls within the definition of the formulation or development of government policy.

48. In considering this matter, the Commissioner has referred to the report "*Understanding the formulation and development of government policy in the context of FOI*" which quotes the civil service's definition of policy in the *Modernising Government* White Paper 1999, namely:

"policy making is the process by which governments translate their political vision into programmes and actions to deliver "outcomes", desired changes in the real world".

49. In light of this, the Commissioner's view is that consideration of the following can be informative when determining what constitutes the formulation or development of government policy:

- the intention of the government to make changes in the real world;
- the need for the political judgement of Ministers when making the final decision as to the approach to be taken;
- the consequences of the decision; and
- the political sensitivity of the decision.

50. The Commissioner has had sight of the withheld information in this case and is satisfied that it constitutes information which relates to the formulation or development of government policy. The Commissioner therefore finds the exemption engaged.

The public interest test

51. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test as set out at section 2(2) of the Act. The Commissioner must consider where the balance of the public interest lies, and must decide if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

52. The complainant put forward arguments in favour of disclosing the requested information, arguing that disclosure could increase understanding and debate of issues which in turn "*might help develop policy rather than hinder it*".

53. In this respect, the OFT acknowledged there is a general public interest in promoting the accountability of government, allowing greater participation in decision making and promoting the quality of decisions. It told the complainant that it recognised the public interest:

"in there being as much transparency and accountability as possible between public officials, whose activities involve public expenditure, and the public, allowing the public to understand what professional responsibilities the officials have and how they are used".

54. Although not claiming it to be relevant as a public interest consideration at the time of the request, on the subject of transparency and accountability the OFT told the complainant in correspondence dated 17 April 2009, that the practice of risk-based pricing by credit card providers is one of the issues on which it proposed to consult as part of a review of unsecured credit markets, announced on 7 April 2009. In the OFT's opinion, the review process *"is likely to provide a suitable opportunity for transparency and accountability in this area"*.

55. In correspondence with the Commissioner, the complainant also argued that the fact that the article in *The Independent* quoted a government source increases the public interest in this matter:

"It is in the public interest to know whether the OFT had already been consulted or whether the statement was made without involving the OFT".

56. The Commissioner notes that the *"one government source"* referred to in the newspaper article is not named. Nor is any indication given as to which element of government the source represented.

57. The complainant also argued that there is public interest in finding out what has been shared and in increasing the accountability of both BERR and the OFT:

"The request would find out whether BERR has already gone down the OFT route, which cannot possibly impact on whether or not BERR chooses to do so in future as that information is not being requested";

and

"It is in the public interest ... to know how much the Government is, or is not, protecting the interests of credit card consumers (a large part of the population) in the face of increased charges despite cuts to the base rate".

Public interest arguments in favour of maintaining the exemption

58. The OFT identified a number of arguments in favour of withholding the requested information:

"...

- *The nature of the information itself, particularly the commercial and market sensitivity of the information and the controversial nature of the subject matter being discussed;*
 - *the timing of the request and the fact that the policy was in the process of formulation/development; and*
 - *the fact that disclosure could compromise public servants' willingness to provide honest, frank and candid advice, particularly given the commercial sensitivity of these issues and the further policy making in this area that may be necessary".*
59. In correspondence with the Commissioner, the OFT reiterated these arguments, and, referring to an earlier Information Tribunal decision in the case of *DfES v Information Commissioner and the Evening Standard* (EA2006/0006), emphasised the need for "*time and space... to hammer out policy*".
60. In that decision, the Tribunal recognised the importance of the need for a safe space whilst formulating policy. Even if there was no suggestion that those involved in policy formulation might be less frank and candid in putting forward their views, there would still be a need for a "safe space" for them to debate policy and reach decisions without being hindered by external comment. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process.
61. In the Commissioner's view, this need for a "safe space" exists separately to, and regardless of, any potential "chilling effect" on the frankness and candour of debate that might flow from disclosure under the Act. He considers "safe space" arguments are about the need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement.
62. The term "chilling effect" refers to an adverse effect on the frankness and candour of participants in the policy-making process. In the Commissioner's view, arguments about "safe space" are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure.
63. In this respect, the OFT also put forward the argument that disclosure is not in the public interest as it would inhibit frank and candid

discussions, critical to the formulation and development of policy, in the future.

64. Additionally, the OFT maintained that there would be a "*significant indirect and wider consequence of disclosure*" in that disclosure may damage the working relationship between the OFT and the other party concerned. The OFT provided the Commissioner with its arguments in support of this stance.

65. In relation to this claim, the complainant told the Commissioner:

"the OFT uses an argument that BERR might be inhibited from providing information to the OFT in future or sharing knowledge and that this would prejudice the OFT's ability to carry out its functions. I consider this unlikely".

Balance of the public interest arguments

66. Having considered all the arguments put forward, the Commissioner has addressed those he considers to be significant in this case.

67. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure resulting in inhibition to participants in the policy-making process are relevant to two factors highlighted by the Tribunal: "safe space" and "chilling effect".

68. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information in question. For example, an argument that disclosure would result in a chilling effect to policy making in general would usually carry less weight than an argument that a chilling effect would result to the specific policy area to which the information relates. Also key is the stage reached in the policy-making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy-making process, this will generally carry more weight than an argument suggesting that harm would result to future policy making in general through disclosure of information relating to policy that was complete at the time of the request.

69. In considering the balance of the public interest arguments in this case, the Commissioner has considered the overall purpose and nature of the information requested. In this regard, the Commissioner notes that the information in question relates to a specific policy area and

that the detriment argued was to the formulation and development of this same policy area. He gives it weight accordingly.

70. In relation to the stage reached in the policy-making process at the time of the request, the Commissioner gives weight to the argument that the policy was still in the formulation/ development stage at the time of the request and continued to be so for some time.
71. The Commissioner has also taken into account the wide consequences of any decision taken with regard to credit card companies. He therefore gives weight to the complainant's argument that the activities of credit card companies "*impact on the lives of many of the public*". The complainant argues that this increases the public interest in knowing about government action and the policy-making process.
72. However, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst the Commissioner has recognised a significant public interest in disclosure he believes that this public interest is outweighed by the public interest in avoiding the harm that the public authority has predicted as a result of disclosure.
73. In his view, the key factor here is that the policy-making process in question was ongoing at the time of the request. Had it been the case that this process had been complete by the time of the request, the factors in favour of maintenance of the exemption relating to 'chilling effect' and 'safe space' would have carried less weight. As this policy-making process was ongoing at the time of this request, these factors outweigh the public interest in disclosure.

Section 31 Law enforcement

74. Section 31 creates an exemption from the right to know if the release of information would prejudice the purpose of law enforcement, taxation, and various types of regulatory activity as defined in the section.
75. Section 31(1) provides 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)".*

76. Subsection (2) essentially protects the conduct of investigations and proceedings which may lead to prosecutions. The OFT indicated that the relevant parts of subsection (2) were paragraphs (a) and (c), which state:

- “(a) the purpose of ascertaining whether any person has failed to comply with the law,*
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise”.*

The relevant applicable interests

77. In relation to section 31(1)(g), the Commissioner considers that in order for a public authority to have a “function” for one of the purposes listed under section 31(2), that public authority must have sufficient legal basis for the specified purpose they wish to cite.
78. The role of the OFT is that of the primary regulator in the credit area. In this respect, it has told the Commissioner that it carries out functions in accordance with the Enterprise Act 2002 (EA02) and the Consumer Credit Act 1974 (CCA74).
79. Of relevance to section 31(2)(a) and 31(2)(c) of the Act, its functions include:

“administering the licensing system set up by the CCA74 (section 1(1)(a) CCA74) and monitoring, as it sees fit, businesses being carried on under licences”.

The OFT has also told the Commissioner that it is able to acquire information under section 36B CCA74 and under section 224 of the EA02. The Commissioner understands that these sections give the OFT the power to require a person to provide it with information for the purpose of enabling it to consider whether to exercise its functions.

The nature of the prejudice

80. When considering the nature of the prejudice, the Commissioner has noted the Tribunal’s comments in *Hogan v the ICO and Oxford City Council* (EA/2005/0026 and 0030) (paragraph 30):

“An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, “real, actual or of substance” (Hansard HL, Vol.

162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."

81. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
82. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemptions *and* he concludes that the prejudice that could arise is not insignificant and is not trivial, the Commissioner will then consider the question of likelihood. In doing so, he will consider the information itself and the arguments put forward by the public authority in this regard.
83. The OFT has argued that, in this case, releasing the withheld information could prejudice investigations into whether credit card providers and their businesses comply with the law. In support of this, it argued that if the information was disclosed, a trader may "*as a consequence of disclosure be able to anticipate steps the OFT would make*".
84. The OFT has also argued that its ability to carry out its functions is likely to be prejudiced by disclosure of the withheld information which was provided by BERR on the basis that it would remain "confidential". It argued that disclosure would not only damage its relationship with BERR but also its relations with other government departments and public bodies. The Commissioner gives little weight to this argument in relation to government departments and public bodies, which are themselves subject to the Act as he would expect them to recognise that the OFT also has obligations under the Act and act accordingly. He also considers relevant the OFT's powers to require a person or business to provide it with information.
85. On balance however, in this case, the Commissioner accepts that disclosure of the withheld information could prejudice the ability of the OFT to ascertain whether any person has failed to comply with the law and whether regulatory action is justified in the circumstances. He has therefore gone on to consider the likelihood of the prejudice. In reaching this decision, he has taken into account the timing of the request in relation to the stage of the investigation.

Likelihood of prejudice

86. The OFT argued that there is a real and significant risk that disclosing the requested information would be likely to prejudice its ability to exercise its functions for the purpose set out in section 31(2)(a).
87. The Commissioner's interpretation of "likely to prejudice" is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there "may very well" be prejudice to those interests.
88. In relation to the small amount of information to which it is applying this exemption, the OFT told the complainant that it "*relates to circumstances in which the OFT may seek to ascertain whether credit card providers and their businesses comply with the law*".
89. The OFT has told the Commissioner that its investigations are assisted by the co-operation of those being investigated. It has argued that in general, and in this case in particular, it considers disclosure of information about an investigation and the underlying concerns is likely adversely to prejudice the investigation. It has also provided the Commissioner with further arguments in support of its argument about the likelihood which the Commissioner is unable to rehearse here without disclosing the nature of the withheld information.
90. The Commissioner is satisfied with the explanation provided by the OFT as to why it considers the prejudice is likely to occur.

The public interest test

91. Since section 31 is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, '*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information*'.

Public interest arguments in favour of disclosing the requested information

92. In addition to general arguments around openness and accountability, the OFT acknowledged the public interest in it being transparent in its functions, "*accountable to the public in ensuring that law enforcement purposes are pursued appropriately*" and increasing public trust.

Public interest arguments in favour of maintaining the exemption

93. In favour of maintaining the exemption, the OFT has argued that there is a strong public interest *"in ensuring that the OFT is able to carry out its statutory functions effectively"*.
94. The OFT told the complainant that, in order to protect the interests of consumers, it *"needs to be able to consider and conduct investigations effectively"*.
95. In correspondence to the OFT dated 13 March 2009, the complainant took issue with the fact that the requested information was being withheld on the basis of *"the possible exercise of the OFT's enforcement actions"*. He argued that, in his view, this lessened the public interest in maintaining the exemption.
96. In this respect, the OFT argued that, in certain circumstances:

"The possibility of enforcement action, (whether or not the possibility is high or low) will promote equally valid public interest considerations in favour of maintaining an exemption as when enforcement action is actually occurring".
97. The Commissioner notes that in the *"Explanatory Notes Freedom of Information Act 2000"* the explanation of subsection (1)(g) of section 31 is that it *"essentially protects the conduct of investigations and proceedings which may lead to proceedings"*.

Balance of the public interest arguments

98. In considering the balance of the public interest arguments in this case, the Commissioner has considered the stage reached in the investigation process. He has also has considered both the significance and the sensitivity of the information.
99. Having weighed the public interest arguments, the Commissioner has concluded that in this case the public interest is weighted in favour of maintaining the application of the exemption and therefore the withheld information should not be disclosed. In reaching this conclusion, the Commissioner has been particularly persuaded by the very strong public interest in not undermining the possibility of regulatory action in order to protect the interests of credit card customers.

Procedural Requirements

100. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

101. The Commissioner considers the OFT to be in breach of section 10(1) by failing to inform the complainant whether it held the requested information within the statutory timescale.

102. Section 17(1) provides that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

103. The OFT failed to specify an exemption (section 44(1)(a)) that it was later to rely on. Therefore the Commissioner finds that the public authority breached sections 17(1)(b) and 17(1)(c). He also finds that section 17(1) was breached as the public authority failed to issue its refusal notice within the statutory time limit for complying with section 1(1).

The Decision

104. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it applied the exemptions at sections 44(1)(a), 35(1)(a) and 31(1)(g) [as connected to 31(2)(c)] correctly.

105. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
- it breached section 17(1) by failing to issue the refusal notice within the statutory time limit;
- it breached sections 17(1)(b) and (c) as it failed to apply section 44(1)(a) prior to the Commissioner's involvement; and
- it also breached section 17(1) in failing to apply section 44(1)(a) within the statutory time period for complying with section 1(1).

Steps Required

106. The Commissioner requires no steps to be taken.

Right of Appeal

107. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 29th day of June 2010

Signed

**Lisa Adshead
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Law Enforcement

Section 31(1) provides 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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that: –

"The purposes referred to in subsection (1)(g) to (i) are:

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies

- corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications."

Prohibitions on disclosure.

Section 44(1) provides that:

"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."

Section 44(2) provides that:

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

The Enterprise Act 2002

General functions of OFT

Section 5: Acquisition of information etc.

(1) The OFT has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.

(2) That function is to be carried out with a view to (among other things) ensuring that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively.

(3) In carrying out that function the OFT may carry out, commission or support (financially or otherwise) research.

Restrictions on disclosure

Section 237: General restriction

(1) This section applies to specified information which relates to—

- (a) the affairs of an individual;
- (b) any business of an undertaking.

(2) Such information must not be disclosed—

- (a) during the lifetime of the individual, or
 - (b) while the undertaking continues in existence,
- unless the disclosure is permitted under this Part.

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene—

- (a) that subsection;
- (b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.

(4) Nothing in this Part authorises a disclosure of information which contravenes the Data Protection Act [1998 \(c. 29\)](#).

(5) Nothing in this Part affects the Competition Appeal Tribunal.

(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

Permitted disclosure

Section 239: Consent

602. *Subsection (1)* provides that disclosure will be permitted where the authority wishing to disclose the information obtains the necessary consent(s) that are detailed in the following subsections.

603. *Subsection (2)* requires the consent to disclosure by the provider of the information, but applies only where the authority knows the identity of the person from whom it obtained the information. This recognises the possibility that it may not always be possible to identify the provider of particular pieces of information. Where the identity of the provider is known, the authority must satisfy itself that the provider was legally in possession of the information and that the provider consents to further disclosure before releasing the information.

604. *Subsections (3), (4) and (5)* require the consent by the subject of the information. Where the information concerns the affairs of an individual, that individual must consent to further disclosure by the authority. Where the information relates to the business of an undertaking, *subsection (5)* requires consent to be given by a senior representative of the undertaking: for example, the company secretary or other director; a partner; or, in the case of an unincorporated body, a person in a position of management or control.

Section 240: Community obligations

605. This section sets out the principle that disclosure may be made where it is necessary for the authority to disclose the information for the purpose of fulfilling any obligation under European Community law.

Section 241: Statutory functions

606. This section enables public authorities holding information to disclose specified information to persons exercising specified statutory functions.

607. *Subsection (1)* provides that a public authority that holds information to which the disclosure provisions in this Part apply may disclose that information for the purpose of facilitating the exercise by that public authority of any of its statutory functions.

608. *Subsection (2)* provides that if information is disclosed under subsection (1) in circumstances in which it is not put into the public domain (for example where it is not published in the press), such information must not be further disclosed by the recipient of the information without the agreement of the public authority that disclosed the information to it, and disclosure may only be for the

purpose of facilitating the exercise by the public authority that made the original disclosure of its statutory functions.

609. *Subsection (3)* provides that specified information held by public authorities can be disclosed to any person for the purpose of facilitating the exercise of any function that that person has under this Act, any of the Acts specified in Schedule 15 or any secondary legislation specified by the Secretary of State by an order made for the purpose of this subsection.

610. *Subsection (4)* provides that information disclosed to a person exercising a function under one of the Acts or pieces of legislation specified in subsection (3) can only be used for a purpose relating to that function.

611. *Subsection (5)* provides that the term 'enactment' will be taken to refer to both primary and secondary legislation, including Scottish and Northern Ireland legislation.

612. *Subsection (6)* empowers the Secretary of State to amend the lists of enactments in Schedule 15.

613. *Subsection (8)* provides that statutory instruments made under *subsection (6)* will be subject to the negative Parliamentary procedure.

Section 242: Criminal proceedings

614. This section permits disclosure for the purposes of criminal proceedings.

615. *Subsection (1)* permits a public authority to disclose specified information to any person for the purposes of investigating whether there have been breaches of UK criminal law; assisting in the bringing or conducting of UK criminal proceedings; or deciding whether to commence or terminate such investigations or proceedings. Disclosure is not required to be for the purposes of specified statutory functions - information may be disclosed for the purpose of the enforcement of any enactment by way of criminal proceedings.

616. *Subsection (2)* provides that information disclosed under this section can only be used for the purpose for which it is disclosed.

617. *Subsection (3)* provides that a public authority may only make a disclosure under section 242 if it is satisfied that the disclosure is proportionate to what is sought to be achieved by it.

Section 243: Overseas disclosures

618. This section specifies the circumstances under which information may be disclosed to overseas authorities.

619. *Subsections (1), (2) and (12)* permit a public authority to disclose specified information to any overseas public authority (as defined in *subsection (11)*) for the purpose of any criminal investigations or proceedings, or for civil investigations or proceedings that relate to competition or consumer matters. *Subsection (12)* specifically provides that disclosure may be made for the purposes of

overseas civil proceedings under legislation that is equivalent to the domestic infringements and Community infringements set out in Part 8 of the Act.

620. *Subsection (3)* prevents the disclosure to any overseas authority of information that is held by any person or body that has been designated as an enforcer by the Secretary of State for the purposes of Part 8 of this Act under *subsection 213(4)*. It also prevents the disclosure to any overseas authority of any competition information obtained under the Financial Services and Markets Act 2000 and certain sensitive commercial information (for example, information connected to market and merger investigations).

621. *Subsection (4)* provides that the Secretary of State can prevent disclosure of information overseas if she thinks the proceedings or investigation for which the information has been requested would be more appropriately carried out by authorities in the UK or in another country. *Subsection (5)* requires the Secretary of State to take appropriate steps to bring any decision made by him under *subsection (4)* to the attention of persons likely to be affected by it.

622. *Subsection (6)* sets out the considerations that a public authority must take into account when deciding whether to disclose information overseas, namely whether the reason for the request is sufficiently serious to justify disclosure; the existence of appropriate protection against self-incrimination in criminal proceedings and for personal data in the requesting country; and the existence of any mutual assistance agreements covering the information concerned with the requesting country.

623. *Subsection (7)* states that protection against self-incrimination and of personal data will be appropriate if it corresponds to that provided in any part of the UK.

624. *Subsections (8) and (9)* give the Secretary of State the power, by order (subject to the negative resolution procedure) to modify, add to, or remove any of the considerations in *subsection (6)*.

625. *Subsection (10)* prevents information that is disclosed to overseas authorities from being further disclosed (without the permission of the UK authority from whom the information came). This prevents the overseas authority from using the information for any purpose other than the purpose for which it is disclosed by the UK public authority and from further disclosing it to other bodies or authorities. Should they wish to use it for a different purpose than that originally specified, a further request to the UK authority would have to be made.

626. It is accepted that *subsection (10)(a) and (b)* are essentially unenforceable as there are no sanctions that could be taken against an overseas authority that contravenes these conditions. However, it is envisaged that should an overseas authority breach these provisions it is unlikely that a UK authority would disclose any further information.

627. *Subsection (11)* defines an overseas public authority. For the purpose of this Part, an overseas public authority is any organisation involved in the conduct of criminal investigations or proceedings, and also those organisations involved in the conduct of any civil investigations or proceedings related to the enforcement of competition or consumer legislation. In reality, this will probably include police and security forces together with national competition authorities and organisations with powers linked to consumer legislation (these could be public or private bodies).

Section 244: Specified information: considerations relevant to disclosure

628. This section sets out further considerations to which public authorities must have regard before disclosing any specified information (whether under a power in Part 9 or elsewhere).

629. *Subsections (2) and (3)* provide that, before disclosing the relevant information, a public authority must consider whether disclosure would be contrary to the public interest, and whether disclosure would cause significant harm to the interests of the business or individual to which it relates.

630. *Subsection (4)* provides that, should the public authority consider that disclosure of particular information could significantly harm the interests of an individual or a business, then they must make a judgement as to the extent to which disclosure of that information is necessary.

The Consumer Credit Act 1974

1. General functions of Director

(1) It is the duty of the Director General of Fair Trading ("the Director")—

(a) to administer the licensing system set up by this Act,

(b) to exercise the adjudicating functions conferred on him by this Act in relation to the issue, renewal, variation, suspension and revocation of licences, and other matters,

(c) generally to superintend the working and enforcement of this Act, and regulations made under it, and

(d) where necessary or expedient, himself to take steps to enforce this Act, and regulations so made.

(2) It is the duty of the Director, so far as appears to him to be practicable and having regard both to the national interest and the interests of persons carrying on businesses to which this Act applies and their customers, to keep under review and from time to time advise the Secretary of State about—

(a) social and commercial developments in the United Kingdom and elsewhere relating to the provision of credit or bailment or (in Scotland) hiring of goods to individuals, and related activities; and

(b) the working and enforcement of this Act and orders and regulations made under it.