

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2011

Public Authority: The Office of Fair Trading
Address: Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Decision (including any steps ordered)

1. The complainant has requested complaints information held on the Consumer Direct database about ICUT Ltd and its Director, Dr Vincent McKee.
2. The OFT refused this request, neither confirming nor denying whether it held such information, under section 44 of the FOIA in reliance on Part 9 of the Enterprise Act 2002 ("EA02").
3. The Commissioner's decision is that the OFT has correctly applied section 44 to neither confirm nor deny whether it held the requested information.

Request and response

4. On 17 January 2011, the complainant wrote to the OFT and requested information in the following terms:

"information from the Consumer Direct database held about a company called ICUT and its Director Dr Vincent McKee. In particular:

- *How many complaints Consumer Direct have received*
- *The nature of the complaints*
- *The date the complaint was received*

- *The action taken by Consumer Direct when the action was taken and the subsequent outcome (for instance, if advice was given or the matter was referred to Trading Standards)*
 - *If the complaints pertained to fraud or money taken from bank accounts or credit cards, the amounts that were allegedly taken*
 - *Full copies of complaint reports from the database (with personal or potentially legally sensitive information redacted)"*
5. The OFT responded on 24 January 2011 refusing the request. It stated that any information it might hold was restricted from disclosure by sections 237 and 238 of Part 9 of the EA02 and therefore it was exempt as there was a statutory prohibition on disclosure (section 44 of the FOIA).
 6. The complainant wrote to the OFT on 7 February 2011 to ask whether disclosure had been considered under section 42 of the EA02. The OFT responded on 2 March 2011 to explain they assumed the complainant had meant section 242 of the EA02 but that this section could only be relied on where a request had been received from the police or relevant law enforcement agency for the purpose of investigating criminal proceedings or deciding whether to initiate an investigation.
 7. Following this the complainant made a formal complaint to the Commissioner on 11 March 2011. The Commissioner wrote to the OFT stating that the correspondence of the 7 February 2011 should have been considered a request for an internal review as it expressed dissatisfaction at the refusal of 24 January.
 8. The OFT conducted an internal review and wrote to the complainant on 19 April with the outcome of this review. The OFT clarified that information of the type sought was prohibited from disclosure under Part 9 of the EA02. The OFT specifically cited sections 237 and 238 of the EA02 in support, stating that the information requested would be "specified information" and any information would therefore be exempt under section 44 of the FOIA. The OFT, however, neither confirmed nor denied whether it held the requested information.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- The OFT can disclose “specified information” under section 242 of the EA02 and have not considered the public interest in disclosure.
 - ICUT have undergone a change of name and are now known as UAT therefore releasing the information will not affect the business of ICUT.
10. The Commissioner considers the scope of the case to be the use of the statutory prohibitions on disclosure exemption (by virtue of Part 9 EA02) to neither confirm nor deny that the requested information is held.

Reasons for decision

11. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under any enactment. Section 44(2) provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of the provisions of 44(1).
12. The OFT states it is prohibited under Part 9 section 237 of the EA02 from disclosure of “specified information” as defined by section 238. The OFT also explained that to confirm or deny whether it held information on complaints about a company would be to reveal “specified information” and therefore section 44(2) exempts the OFT from the duty to confirm or deny in this case.
13. In the case of *Dey v ICO and OFT (EA/2006/0057)* the Information Tribunal considered whether section 237 of the EA02 could act as a statutory prohibition on disclosure for the purposes of section 44 of the FOIA. The Tribunal concluded that section 237 could act as a prohibition on disclosure.
14. The Commissioner, when considering this complaint, has taken into account the Tribunal’s ruling in the above case but must first establish whether the requested information would be “specified information” in order for section 237 to apply.
15. Section 237 of the EA02 states that “specified information” must not be disclosed unless the disclosure is permitted under Part 9. Section 238 defines “specified information” as information that:

“comes 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;

(b) an enactment specified in Schedule 14”

16. The Tribunal in the Dey case determined that complaints that have been received by the OFT in connection with the performance of some of its functions under the EA02 constitute "specified information". The OFT explained that if information was held it would have been received by it in the exercise of its functions under Part 8 of the EA which relates to the consideration and investigation of complaints under certain consumer legislation.
17. The Commissioner therefore accepts that "specified information" under section 238 of EA02 would have come to the OFT in connection with the exercise of its functions, particularly those functions under Part 8 of EA02 and under other consumer legislation involving "receiving, considering and, where appropriate, investigating complaints".
18. Whilst the Commissioner has accepted complaints information would be "specified information" he has also considered section 237(2) of the EA02. This sets out that such "specified information" cannot be disclosed during the lifetime of the individual or while the undertaking continues in existence.
19. The complainant believes that the undertaking is no longer in existence as ICUT underwent a name change on 17 January 2011. The OFT argued that this was not relevant as ICUT now operated under the name UAT so still continued in existence.
20. The Commissioner has considered both of these arguments and checked the status of both ICUT and UAT with Companies House. This confirms that UAT underwent a change of name but does continue to exist under the same registration number with Companies House. The effect of a name change is detailed in section 81 of the Companies Act 2006 and states that any rights or obligations attached to the company under any of its former names continue to attach to it. The Commissioner has therefore concluded that it remains the same undertaking and section 237 of the EA02 applies.
21. The complainant specifically asked the OFT to consider disclosure under section 242 of the EA02. The OFT explained to the complainant that they would only consider disclosure under this section where the request had been received from the police or relevant law enforcement agencies.
22. Sections 239-243 of the EA02 provide certain 'gateways' for disclosure of specified information. Section 242 in particular states that a public authority to which section 237 applies may disclose that information to any person in connection with the investigation of any criminal offence or for the purposes of any decision whether to start or end such an investigation.

23. The OFT has stated that section 242 does not impose a duty to disclose specified information but does allow the OFT to disclose for the purposes set out in this section. However, the complainant has argued that section 237 does not apply if "*disclosure is permitted under this Part*" (Part 9) and disclosure is "permitted" under section 242 even if the public authority chooses not to disclose.
24. In reaching a view on this, the Commissioner has taken into account paragraph 19 of the *Dey* decision which states that "*the exercise of that power is a matter for the public authority to consider*". Whilst this case related to the gateway in section 241 of the EA02, the Commissioner considers this would equally apply to section 242. On the subject of the gateways in general the Tribunal stated "*it gives a power to disclose, not a duty*", and the OFT therefore has discretion as to whether to use this gateway to disclose specified information.
25. The Commissioner has concluded that none of the gateways for disclosing information, including section 242, apply as the OFT was under no duty to consider them.
26. Whilst the complainant has argued that the public interest in disclosure should have been considered (as set out in section 244 of the EA02) the Commissioner has not gone on to consider this as the public interest would only be relevant if a gateway applied.
27. The Commissioner accepts that to confirm or deny if information is held would result in the disclosure of "specified information" and the OFT is therefore exempt from the duty to confirm or deny by virtue of section 237 of the EA02.
28. The Commissioner's decision is that the OFT dealt with the request in accordance with the FOIA and the OFT were correct to apply section 44 to neither confirm nor deny if information was held.

Right of appeal

29. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.

31. 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

Pamela Clements
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