

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 May 2013

Public Authority: Office of Fair Trading
Address: Fleetbank House
2-6 Salisbury Square
London
EC4 8JX

Decision (including any steps ordered)

1. The complainant has requested a number of pieces of information relating to the Office of Fair Trading's ("OFT") decision to approve changes to an OFT approved consumer protection code which Renewable Energy Assurance Limited ("REAL") operates. The request was made up of several parts and the information identified by the OFT as within the scope of the request was withheld on the basis of section 44(1)(a), section 31(1)(g) leading to 31(2)(c) and section 21, section 42 and section 43 of the FOIA.
2. The Commissioner's decision is that section 31 is not engaged but that section 44(1)(a) is applicable and the OFT has therefore correctly refused the request.

Request and response

3. The request in this case followed on from previous correspondence with the OFT and contact from both the complainant directly and his solicitors. On 19 July and 23 July 2012 requests were made for information to the OFT. The OFT then responded to these requests on 30 August 2012.
4. The OFT established that all of the information requested in the letter of the 19 July was then reiterated in the letter of the 23 July and it was therefore the requests as listed in the latter that were responded to by the OFT on 30 August 2012.
5. The requests and initial responses were as follows:

"1. Was any reason identified to or by the OFT as to why the requirement to act "quickly and fairly" has been removed from the altered Code. Please provide us with a detailed explanation of the process and criteria that the OFT applies in relation to proposed amendments to an approved Code."

The OFT responded to (1) by informing the complainant that this information had already been provided in a letter dated 1 August 2012. As such the OFT considered the section 21(1) exemption applied.

6. *"2. We understand that REAL sought approval for changes to the Code on 16 March 2012. Please provide us with (i) the proposed changes submitted by REAL; (ii) the reasons given to the OFT by REAL for the proposed changes."*

The OFT explained that it held recorded information received in the course of the exercise of its functions under the Enterprise Act 2002 ("EA2002") and the information was therefore exempt under section 44(1)(a) of the FOIA.

7. *"3. Please can you also confirm that alterations to the Code were to be made with your approval, by the Scheme sponsor and detail what steps you took to ensure that it was the Scheme sponsor that was submitting these changes for approval."*

With regards to the first part of this request, the OFT stated it had provided the information to the complainant in its letter dated 1 August 2012 and it was therefore applying section 21(1) of the FOIA. The OFT confirmed no information was held in relation to the second part of this request.

8. *"4. Please explain and provide evidence for what issues the OFT raised in relation to REAL's proposed changes to the Code. Please explain what these issues were, and any questions or concerns raised by the OFT, and give details of the changes you proposed."*

The OFT explained it held recorded information received in the exercise of its functions under the EA2002 and section 44(1)(a) of the FOIA was therefore engaged.

9. *"5. We are concerned that the 12 July decision was procedurally flawed, in light of the circumstances outlined above, not least in light of the inevitable conclusion that the OFT acted swiftly on 12 July in the face of pressure from a third party. We would, therefore, ask you to explain in detail the process by which the OFT arrived at its decision to approve the changes on 12 July and how it applied its approval criteria in this instance."*

The OFT informed the complainant that it held recorded information received in the exercise of its functions under the EA2002 and section 44(1)(a) was therefore engaged. In addition to this, the OFT also identified some information which engaged section 31(1)(g) for the purpose set out at 31(2)(c).

10. *"6. REAL has told us in writing that "The proposed changes were provided to the OFT on 16 March 2012 and comments were received from the OFT at a meeting on 24 April 2012." Please set out what these "comments" from the OFT consisted of and provide us with documentary evidence for the same."*

The OFT stated no information was held and no comments were made about revisions to the Code at the meeting on 24 April 2012.

11. *"7. Our client [redacted name of complainant] drew his concerns to your attention on 26 June 2012. Please let us know (with documentary proof of the same) whether this contact from [redacted name of complainant] resulted in any consideration of the problems REAL's unilateral approval of the Code may cause."*

The OFT stated some recorded information was held in relation to this part of the request and it had been provided to the complainant and was therefore exempt under section 21(1). The OFT also explained it held other recorded information received in the exercise of its functions under the EA2002 and section 44(1)(a) was therefore engaged. The OFT also applied section 31(1)(g) leading to 31(2)(c) and sections 42 and 43 to the information held with respect to this part of the request.

12. *"8. Hearing nothing from OFT, [redacted name of complainant] again called OFT on 12 July to be told on the telephone that the altered Code had that very day obtained OFT "approval". Please provide us with documentary evidence of how this decision was reached, on what basis and whether and when it was recorded as having been made."*

The OFT responded to this question by confirming that as the request repeated part (5) the information held was the same and therefore exempt for the same reasons.

13. *"9. In your letter of 19 July you accept the need for a "review" to be carried out to the Code which REAL unilaterally altered in Mid-June. Please provide us with documentary evidence of how the decision to launch the "review" was taken, for what reasons and when the decision was taken."*

The OFT stated some recorded information held in relation to this part of the request had been provided to the OFT by the complainant and was therefore exempt under section 21. The OFT explained it held other

recorded information received in the exercise of its functions under the EA2002 and section 44(1)(a) was therefore engaged. For the remaining information the OFT considered section 31(1)(g) leading to 31(2)(c) and section 42 to be applicable.

14. *"10. What communications has the OFT had with REAL since the OFT understood [redacted name of complainant] was querying the lawfulness of the Code alterations which have occurred. Please provide a copy of these communications and any notes.*

11. What discussions or correspondence have taken place with REAL regarding the OFT's confirmation on 19 July that the altered Code was not approved by the OFT when it was introduced by REAL in Mid June."

The OFT explained it held recorded information in relation to (10) and (11) received in the exercise of its functions under the EA2002 and section 44(1)(a) was therefore engaged. Other recorded information held in relation to these requests engaged the section 31(1)(g) and section 42 exemption.

15. *"12. A number of customers have been asking the question: is any system installed after 18 June actually going to be lawfully registered for FITs payments since REAL is operating under an unlawful consumer code?"*

The OFT did not consider this to be a valid request for information under the FOIA.

16. Following the OFT's response the complainant requested an internal review on 31 August 2012. The OFT conducted an internal review and communicated the outcome to the complainant on 8 October 2012 upholding its original response.

Scope of the case

17. The complainant contacted the Commissioner on 8 October 2012 to complain about the way his request for information had been handled. The complainant raised a number of concerns about the refusal by the OFT to provide any information; particularly that the level of secrecy between the OFT and REAL is harmful to business and consumers especially where there is a suggestion that REAL made changes to a consumer code without OFT approval.
18. The Commissioner considers the scope of his investigation to be to determine if the exemptions applied by the OFT are engaged in relation

to the requested information and if so, where the balance of the public interest lies.

Background

19. The requests made in this case concern the OFT's decision to approve changes to an OFT approved consumer protection code which REAL operates. The OFT approves consumer codes under section 8 of the EA2002 for the purpose of safeguarding and promoting the interests of consumers. Consumer codes, such as the code REAL operates, are administered on a voluntary basis by commercial organisations or trade associations and are intended to demonstrate a commitment to meet certain standards of behaviour when dealing with consumers.
20. REAL is a limited company established by the Renewable Energy Association (REA) to develop and administer the code. The OFT is not involved in the administration of these codes but does monitor the operation of approved codes and can withdraw approval if it does not consider the code is operating in the best interests of the consumer.
21. In this case, the code administered by REAL was approved by the OFT in November 2011. Changes were then proposed by REAL on 16 March 2012 and all of the proposed changes were in place by 18 June 2012.
22. The main concern from the complainant following these changes is that the code no longer contains a commitment to "act quickly and fairly" if a member is suspected of not following the code. The OFT maintains that this commitment still exists but has been moved from the code and can now be found in other bye-laws. As such the OFT still considers that REAL is committed to ensuring prompt and fair action against members and therefore the protection of consumers.

Reasons for decision

23. The OFT has provided the Commissioner with several large bundles of information falling within the scope of the complainant's request. Due to the scope and the overlapping nature of the various parts of the request the OFT has not identified which documents correspond with each of the different parts of the request. Having reviewed the information the Commissioner notes that the OFT appears to have applied section 31(1)(g) and 44(1)(a) to all of the information.
24. However, the OFT also maintains that some of the information is additionally exempt under section 43(2), section 42 and section 21

where the information is information that was supplied to the OFT by the complainant.

25. Given that sections 31(1)(g) and 44(1)(a) has been applied to all of the withheld information the Commissioner has decided whether these exemptions would apply in the first instance.

Section 31 – law enforcement

26. Section 31(1)(g) provides that information is exempt if disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

27. The purpose specified in section 31(2) which the OFT argues would be prejudiced as a result of disclosure is:

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

28. The Commissioner finds that the use of the work “ascertaining”, i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority has the power to formally ascertain compliance with the law.
29. Therefore, for section 31 to be engaged the Commissioner requires the function identified by the OFT for the purposes of section 31(1)(g) to be a function which is designed to fulfil the purposes specified in 31(2)(c), imposed by statute and specifically entrusted to the OFT to fulfil.
30. The OFT has said that disclosure would prejudice its regulatory functions. Part 1, section 8 of the EA2002 sets out the OFT’s functions in relation to promoting good consumer practice. In particular section 8(2) states that:

“ ... the OFT may make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code.”

31. The Commissioner is satisfied that the OFT’s has a function in relation to approving consumer codes. However, in order for 31(1)(g) with 31(2)(c) to be engaged a public authority must be able to identify the specific function it has been given by statute or the Crown which corresponds with a 31(2) purpose. In other words the OFT must be able to point to a provision which imposes upon them a specific function of ascertaining whether circumstances arise or may exist that justify regulatory action.

32. The Commissioner notes that the EA2002 does provide the OFT with powers to take enforcement action in a range of circumstances but the OFT has not made it clear if there are specific powers to take regulatory action that are entrusted to it in relation to consumer codes. The Commissioner understands that these consumer codes are administered on a voluntary basis and the OFT is not involved in this administration but does have a role in approving the codes and can take action to have codes withdrawn if they are not serving the best interests of the consumer.
33. Clearly then the OFT does have some powers in relation to these consumer codes as it can withdraw its approval in certain circumstances. However the Commissioner does not consider that withdrawing approval constitutes taking regulatory action for the purposes of subsection 2(c). Therefore, he does not consider that the OFT has demonstrated that a function that corresponds with the specified section 31(2)(c) purpose has been entrusted to it and he has concluded the section 31 exemption is not engaged in relation to the withheld information.
34. Before considering the application of the other exemptions cited by the OFT the Commissioner would like to state that should the section 31 exemption have been engaged the Commissioner considers the public interest arguments in favour of disclosure in this case would have been particularly strong. Consumer codes are intended to protect consumers and any changes made to these codes are likely to be of interest, specifically in cases such as this where there is evidence that some consumers and a large number of traders consider the changes to the code have been detrimental and made without the proper approval. Therefore, the Commissioner considers that any information which can provide greater clarity on the decision to make the changes and the process by which the changes were approved would be likely to carry significant weight.
35. That being said, the Commissioner has not found the section 31 exemption to be engaged and instead has gone on to consider the other exemptions cited by the OFT.

Section 44 – prohibitions on disclosure

36. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under enactment.
37. The OFT states that it is prohibited under Part 9 section 237 of the EA2002 from disclosure of “specified information” as defined in section

238 of the EA2002. The Information Tribunal has previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and has concluded it can be used in this way¹.

38. However, in order for the prohibition to be applicable the Commissioner must first consider if the information would be "specified information". Section 238 of the EA2002 defines specified information as information that:

"comes to a public authority in connection with 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"

39. The Tribunal has also previously established that if information is received by a public authority in connection with the performance of any of its functions under the EA2002 it will constitute "specified information". In this case the information that is being withheld can be categorised as:

- Emails sent to the OFT by REAL about changes to the consumer code;
- Internal emails within the OFT about changes to the consumer code;
- Emails from the OFT to REAL about changes to the consumer code;
- Annotated copies of the consumer code with track changes and comments;
- Notes of meetings between the OFT and REAL discussing the code, some of which are handwritten records;
- Letters of concern to the OFT from traders about the changes to the code.

40. In this case the information sent to the OFT about the changes to the code i.e. the emails, letters and draft revisions to the code, would have been received by the OFT in the exercise of its functions under Part 1

¹ *Dey v ICO and OFT (EA/2006/0057)*

Section 8 of the EA2002 which relates to the approval of consumer codes.

41. It is less clear if the emails sent *by* the OFT and the notes of meeting would be considered specified information for the purposes of section 237 of the EA2002 as the information has not “come to” the public authority. However, when considering other statutory bars with similar wording the Commissioner has found that the prohibition on disclosure can extend to the views of the public authority, consideration and other internally-created information where the ‘created’ information incorporates information received by the public authority from an external party. In cases such as these the Commissioner would accept that disclosure of the ‘created’ information would disclose the content or nature of the information which has been received by the public authority given the inextricable link between these types of information.
42. The information held by the OFT relates to REAL’s business as an undertaking, particularly as the trade association sponsoring, administering and enforcing an approved code. The content of the code, REAL’s proposals for amending it and the rationale for doing so is information relating to REAL’s business that has come to the OFT in the course of performing its code approval functions under section 8 of the EA2002. The notes of meetings and emails sent by the OFT is also specified information by virtue of the fact that it discusses or refers to the other information and is inextricably linked to it.
43. Whilst the Commissioner has accepted complaints information would be “specified information” he has also considered section 237(2) of the EA2002. This sets out that such information cannot be disclosed during the lifetime of the individual or while the undertaking continues in existence. There is no suggestion from the complainant that the undertaking is no longer in existence and the Commissioner has received no evidence to suggest this is the case so is content that section 237(2) is applicable.
44. Sections 239-243 of the EA2002 provide certain ‘gateways’ for disclosure of specified information. These gateways do not compel the OFT to disclose information but do allow the OFT to disclose information for the purposes set out in these sections. In the *Dey* case the Tribunal commented on the gateways and stated that “*it gives a power to disclose, not a duty*”. The Commissioner therefore accepts that the OFT has discretion as to whether to use the gateways to disclose specified information and in this case the OFT has stated they do not consider any of the gateways to be applicable.
45. The complainant has provided substantial evidence to support his view that there is a strong public interest in disclosure. The Commissioner

has already indicated that he considers these arguments to carry significant weight however he is unable to consider these arguments as the public interest test would only be relevant if a gateway applied.

46. The Commissioner's decision is that the OFT has correctly applied section 44(1)(a) to withhold all the requested information in this case and he has therefore not gone on to consider the application of the other exemptions.

Right of appeal

47. 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

48. 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.

49. 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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