

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2013

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Office of Fair Trading (OFT) for information relating to the issuing of a consumer credit licence. The OFT refused the request under the exemptions in sections 31(1)(g) (Law enforcement), 42 (Legal professional privilege) and 44 (Prohibitions on disclosure) of FOIA. The Commissioner has investigated the complaint and found that all of the requested information is exempt from disclosure under section 31(1)(1)(g) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

2. On 24 August 2012 the complainant made a request to the Office of Fair Trading (OFT) for information relating to an investigation it carried out into the complainant's application for a consumer credit licence and a subsequent claim of maladministration he made against the OFT. The request read as follows:

"...please supply me with copies of any and all of the following:

1. *Correspondence from sources outside the OFT which prompted you to investigate me;*

2. Correspondence, internal memos, emails, letters, etc. generated inside the OFT and/or local Trading Standards offices which prompted you to investigate me or encourage such an investigation;

3. All internal OFT/Trading Standards correspondence relating to your investigation after my Claim of Maladministration was made including up to the time I replied to the second response from your General Counsel;

4. Your estimate of the cost to the taxpayer caused by your pointless investigation of me;

5. The IP addresses of all originating emails sent and received during the events which prompted you to investigate me originally.

For your guidance, officers who were involved in this case (liability for registration and subsequent disastrous amendment of licence) include, but are not limited to:

[named individuals]

I expect to receive copies of internal correspondence to and from the above individuals, and others, as part of your response. Also, [named individual] made reference in one of his early emails to the London Borough of Camden Trading Standards Team. I neither live nor work in Camden. I do not have any connection with Camden. Therefore I can only assume that Camden Trading Standards is involved with this in some other way, and thus I expect to see documentation from them included in your full response."

3. The OFT responded to the request on 25 September 2012 when it refused to confirm or deny if it held information falling within the scopes of parts 1, 2, 3 and 5 by relying on the exemptions in section 44(2) (prohibitions on disclosure) and 31(3) (law enforcement) of FOIA. For part 4 the OFT explained that the operation of the credit licensing regime was not funded by the taxpayer but was instead self funded through the licence fee.

4. The complainant subsequently asked the OFT to carry out an internal review of its handling of the request and it presented its findings on 12 December 2012. The OFT altered its earlier position by now confirming

that it held information falling within the scope of parts 1, 2 and 3 of the request. However it continued to withhold this information under the section 44 and section 31(1)(g) exemptions. It also introduced the section 42 (legal professional privilege) exemption for the first time in

respect of part 3 of the request. The OFT also confirmed that it held no information falling within the scope of part 5 of the request and confirmed that for part 4 of the request it had provided the requested information by explaining that the credit licensing regime was not taxpayer funded.

5. The OFT also informed the complainant that it would consider whether he had a subject access right under the Data Protection Act 1998 to any personal data about him contained within the requested information. It explained that personal data about an applicant is exempt from disclosure under section 40(1) of FOIA and therefore it would consider the subject access request separately.

Scope of the case

6. On 19 December 2012 the complainant contacted the Commissioner to complain about the OFT's decision to refuse his request. The Commissioner agreed that he would consider whether the OFT was correct to refuse the request under FOIA. He confirmed that his investigation would focus on the OFT's decision to withhold the information in parts 1, 2 and 3 of the request by relying on the freedom of information exemptions it cited.
7. The Commissioner noted that the OFT had indicated that it would consider whether the complainant would have a right to any personal data under the Data Protection Act 1998 and that this was being dealt with separately.

Reasons for decision

8. The OFT has provided the Commissioner with a bundle of information falling within the scope of the complainant's request. All of the information is considered to be exempt from disclosure under section 31(1)(g) of FOIA. However it also maintains that the information in part 1 of the request is additionally exempt under section 44 and part 3 exempt under section 42. Given that section 31(1)(g) has been applied to all of the withheld information the Commissioner has decided whether this exemption would apply in the first instance.
9. 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).

10. The purposes specified in section 31(2) which the OFT argues would be prejudiced as a result of disclosure 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,
11. The Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law, and judge whether any person's conduct is improper etc.
12. Therefore, for section 31 to be engaged the Commissioner requires the function identified by the OFT for the purposes of section 31(1)(g) of FOIA to be a function which is: (i) designed to fulfil the purposes specified in section 31(2)(a) – (d); (ii) imposed by statute; and (iii) specifically entrusted to the OFT to fulfil.
13. The OFT has said that disclosure would prejudice its regulatory functions. It explained that it is responsible for administering and enforcing the consumer credit licensing regime as set down in the Consumer Credit Act 1974 (CCA). Most businesses that provide goods and services on credit, lend money or provide debt collecting, debt counselling or debt adjusting services to consumers need to have a credit licence.
14. The credit licensing regime establishes and monitors the fitness of applicants to hold a credit licence. In particular the OFT explained that section 25(2) and 2(A) of the CCA sets out a fitness test for consumer credit licence applicants and obliges the OFT to 'have regard' to certain matters in assessing fitness involving fraud or other dishonesty, or violence; has contravened any provision made by or under the CCA, certain other listed provisions or any other enactment regulating the provision of credit to individuals; or engaged in business practices

appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper.

15. The Commissioner is satisfied that the OFT's consumer credit licensing functions are appropriate to the section 31(1)(g) exemption and meet the test outlined above. Therefore the Commissioner has now gone on to consider the nature of the prejudice claimed by the OFT and the likelihood of the prejudice occurring.
16. The OFT argues that disclosure of the information would prejudice its regulatory functions for several reasons which are summarised below:
 - It is important that those making complaints to the OFT know that information they supply will not be made public through a FOIA request. Otherwise they would be deterred from bringing information to the OFT's attention or be inhibited from expressing their opinions candidly.
 - Receipt of such evidence is fundamental to the OFT's proper, full and fair conduct of the fitness test, without which the OFT would be unable to properly carry out its licensing functions.
 - Disclosure of internal thinking and exchange of views on its fitness assessment and legal compliance would be likely to inhibit open and frank discussions within the OFT because a safe space is needed to discuss and evaluate whether reported suspicions are well founded and justified.
 - Disclosure would provide businesses with information about the basis on which the OFT, in order to make best use of limited resources, makes prioritisation decisions against taking action in particular cases involving apparent breaches of the law or other concerning behaviour.
 - The OFT suggested that disclosure could also harm an applicant or licensee's legitimate interest were competitors or potential customers to become aware that the business was the subject of an investigation.
 - Disclosure has the potential to undermine any licensing activity being taken by the OFT against other credit licence holders because it would give a misleading impression of the OFT's enforcement work. Other licence holders under investigation would be able to compare their own circumstances against this case to question why they are subject to enforcement action.

17. First of all the Commissioner would say that he has rejected the OFT's argument regarding disclosure harming an applicant or licensee's business. Whilst this may well be true it is not relevant to the section 31(1)(g) exemption which only concerns the prejudice caused to certain specified law enforcement matters. Public authorities are reminded that when explaining why an exemption is engaged they must show that the prejudice they are envisaging affects the particular interest that the exemption is designed to protect. Arguments about prejudice to any other interests will not engage the exemption.
18. Of the remaining arguments the Commissioner accepts that the prejudice described above would damage the OFT's ability to carry out its regulatory functions. Clearly people making complaints to the OFT would not expect information they provide to be made public and so it is reasonable to conclude that disclosure could deter future complaints. Similarly it is reasonable to conclude that disclosure may lead to officials feeling more constrained in how they discuss such cases in future because this kind of information is not normally disclosed. Revealing information which discusses how the OFT conducts and prioritises its efforts would provide information to licenced traders which could reduce the effectiveness of the OFT's regulatory activities.
19. As regards the likelihood of prejudice occurring in this particular case, the OFT has said that it relies significantly on people bringing complaints to help it carry out its regulatory activities and target businesses that have breached relevant law or engaged in unfair or improper business practices. Therefore the Commissioner accepts that any deterrent effect on potential complainants or witnesses would seriously prejudice the OFT's abilities to carry out its regulatory responsibilities.
20. For parts 2 and 3 of the request the Commissioner is mindful that the information concerns a particularly complex case which involved candid internal discussions. The information was clearly not intended for an external audience and in the Commissioner's view disclosure of this type of information would lead to officials being more guarded in how they discuss future cases for fear of prejudicing an investigation. Furthermore, having reviewed the information the Commissioner would accept that disclosure would provide businesses with information about how the OFT prioritises its regulatory activities. Some businesses would see this as valuable information and therefore would be encouraged to act in contravention of credit licensing law. This would reduce the deterrent effect of the threat of OFT action in relation to bad practices in the credit sector.
21. For these reasons the Commissioner has decided that disclosure of the information in parts 1 – 3 of the request would prejudice the OFT's

functions for the purposes of section 31(2)(a) – (d). Consequently the Commissioner has decided that the exemption in section 31(1)(g) is engaged and has gone on to consider the public interest test.

The public interest test

22. Section 31 is a qualified exemption and therefore the Commissioner has carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest in disclosure

23. In making his request to the OFT, and subsequently when he contacted the Commissioner, the complainant argued that the OFT had treated him unfairly and that there was a public interest in greater transparency due to what he described as the OFT's 'massive incompetence' in its investigation of his business. The OFT has itself acknowledged in its submission to the Commissioner that there is a public interest in knowing that the OFT's procedures are fair and effective.

Public interest in maintaining the exemption

24. The OFT advanced the following arguments as to why the public interest favoured maintaining the exemption.
- There is a public interest in public authorities with regulatory functions having a 'safe space' within which to work – to deliver functions effectively and to uphold the law.
 - Investigations should not be undermined by premature disclosures or by the perception of those providing information to the OFT that such disclosures will be made.
 - The public interest favours members of the public being confident in bringing information and evidence to the OFT so that it can properly regulate credit businesses in a fully informed way and exclude businesses from the credit market where necessary. It is not in the public interest for unsuitable people to hold a credit licence.
 - It is not in the public interest to disclose information at an inappropriate stage of an investigation.
 - There is a public interest in the proper operation of the consumer credit licensing system. This is for the protection of consumers. Only applicants and licensees who are fit are able to hold or continue to hold a consumer credit licence which ensures an appropriate

standard of consumer protection that supports a well functioning market.

- There is a public interest in being able to rely on the fitness and competence of consumer credit licensees. Consumers need to have confidence that consumer credit licensees are fit and proper persons to hold a licence.
25. For part 3 of the request, which covers internal discussions relating to how the OFT dealt with the complainant's credit licensing case, the OFT said that in addition to the above arguments the public interest favoured maintaining the exemption for the following reasons:
- Disclosure has the potential to undermine any licensing activity taken by the OFT against other credit licence holders. This would not be in the public interest.
 - Disclosure of the information could reveal what appears to be a 'threshold for intervention' as to when the OFT takes enforcement action in a particular case.

Balance of the public interest

26. The Commissioner accepts that there is some public interest in disclosure. As the OFT acknowledges, this was a complex case and the Commissioner considers that there is a public interest in terms of greater transparency and accountability in knowing how a public authority makes decisions and that it treats people with fairness. However, the Commissioner also notes that the OFT publishes certain information about licensing action on the consumer credit public register and usually announces the outcome of enforcement action by issuing press releases.
27. As regards the arguments for maintaining the exemption the Commissioner considers that there is a strong public interest in protecting information relating to the OFT's investigations. In the Commissioner's view disclosure could discourage people from bringing complaints or evidence to the OFT which would have a negative impact on its ability to properly regulate the credit licensing regime. Given the importance of the OFT's work to consumers the Commissioner has afforded these arguments particular weight.
28. The Commissioner has also given a certain amount of weight to arguments about the loss of candour in discussing future cases if officials felt that information about an investigation were to be made public. This would make it harder for the OFT to discuss and evaluate

the progress of its investigations which would not be in the public interest. In reaching this view the Commissioner has taken into account the fact that the information was still very recent at the time of the request (the most recent information was less than 6 months old and the oldest information not more than 3 years old).

29. The OFT has also discussed the public interest in protecting information about how it prioritises its enforcement work and avoiding prejudicing enforcement action being taken against other licence holders. Again the Commissioner has given this argument some weight due to the importance of the OFT being able to prioritise its resources when carrying out its enforcement activities.
30. In the Commissioner's view there is a strong public interest in protecting the conduct of investigations and proceedings. The OFT's powers to effectively regulate the credit licensing regime and take enforcement action serve the interests of consumers and should not be undermined except where there is an obvious and more compelling reason for disclosure. Whilst acknowledging the public interest in transparency and accountability the Commissioner finds that these arguments are essentially more general in nature and ultimately are outweighed by the arguments in favour of maintaining the exemption.
31. In all the circumstances of the case the Commissioner has found that the public interest in maintaining the section 31(1)(g) exemption outweighs the public interest in disclosure.

Other exemptions

32. The Commissioner is satisfied that all of the information is exempt under section 31(1)(g) and that the public interest in maintaining the exemption outweighs the public interest in disclosure, therefore he has not considered the other exemptions claimed by the OFT. However, whilst he has not formally considered the application of the section 42 and 44 exemptions the Commissioner wishes to make clear, for the avoidance of doubt, that were he to have made a formal decision he would in all likelihood have found that both exemptions were engaged and that in the case of section 42, the public interest favoured withholding the information.

Right of appeal

33. 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

34. 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.
35. 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
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF