

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 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 all communications between Renewable Energy Assurance Limited (REAL) and the Office of Fair Trading (OFT) between 8 June and 12 July 2012. The OFT refused to disclose this information under sections 31(1)(g), 43(2) and 44 (1)(a) of the FOIA.
2. The Commissioner has first considered the application of section 44(1)(a) of the FOIA, as this exemption was applied to all the withheld information. The withheld information has been labelled (a) to (i). It is the Commissioner's decision that section 44(1)(a) applies to items (a) – (d) and (g) and (i) and therefore the OFT acted appropriately by refusing to disclose this information under this exemption.
3. In respect of items (e), (f) and (h), the Commissioner has decided that section 44(1)(a) of the FOIA does not apply. Although the OFT applied sections 31(1)(g) and 43(2) of the FOIA in the alternative, it did not apply either of these exemptions to these 3 items of correspondence. The Commissioner therefore requires the OFT to:
 - disclose items (e), (f) and (h) as listed in paragraph 10 of this notice to the complainant with any third party personal data redacted.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 20 December 2012 , the complainant wrote to the OFT and requested information in the following terms:

"...details of all communications between the OFT codes team and REAL or its executives between the 8th of June 2012 and 12 July 2012..."
6. The OFT responded on 23 January 2013. It confirmed that it held recorded information falling within the scope of the request but considered it was all exempt from disclosure under sections 31(1)(g), 43(2) and 44(1)(a) of the FOIA.
7. The complainant remained dissatisfied and approached the OFT on 24 January 2013 to request an internal review.
8. The OFT responded on 22 February 2013. The OFT informed the complainant that it remained of the view that the requested information was exempt from disclosure under section 31(1)(g), 43(2) and 44(1)(a) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 15 April 2013 to complain about the way his request for information had been handled. Specifically, he is unhappy with the OFT's decision to refuse his request and does not believe the requested information is exempt from disclosure under the exemptions cited.
10. During the Commissioner's investigation the OFT drew his attention to an earlier decision notice that was issued on 31st May 2013 (FS50467985) which addressed the majority of the withheld information in this case. This notice addressed a request made by another applicant which incorporated in part the same withheld information. The OFT advised and provided details of 9 further communications between REAL and the OFT that did not fall within the scope of the request dealt with in case reference FS50467985 but which are relevant and do fall within the scope of this request.
11. As the Commissioner has already considered the majority of withheld information under case reference FS50467985 and decided that section 44(1)(a) applies to it, he will not repeat his decision on this information here. His decision remains unchanged and therefore applies to this case. The decision notice issued on case reference FS50467985 is available on the Commissioner's website via the following link:

http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50467985.ashx

12. This notice will instead concentrate and address the additional 9 pieces of information which were identified by the OFT as falling within the scope of this request but which were not considered under case reference FS50467985. The OFT described these as follows:
 - a) Email dated 6 July 2012 at 13.51
 - b) Email dated 6 July 2012 at 13.32
 - c) Email dated 3 July 2012 at 13.10
 - d) Email dated 21 June 2012 at 15.39
 - e) Email dated 20 June 2012 at 16:05
 - f) Email dated 20 June 2012 at 17:37
 - g) Email dated 18 June 2012 at 10.44
 - h) Email dated 18 June 2012 at 17:30
 - i) Letter dated 18 June 2012
13. The Commissioner considers each email communication and any attachments to it regardless of whether the attachment alone does not fall within the dates specified by the complainant falls within the scope of the complainant's request.
14. He also considers that all items listed above are within the scope of the request regardless of their contents. The complainant asked for all communications between the two parties between specific dates. He did not relate this request to any particular issue or topic. The Commissioner does not therefore agree with the OFT's approach to consider items (e), (f) and (h) as out of scope because they do not relate to what it believes the complainant is interested in.
15. The Commissioner will consider the application of section 44(1)(a) of the FOIA in the first instance to the information listed in paragraph 10 above. If he finds that section 44(1)(a) does not apply in this case, he will then go on to consider sections 31(1)(g) and 43(2) of the FOIA where these have been applied.

Reasons for decision

16. Section 44(1)(a) of the FOIA states that information is exempt if its disclosure is prohibited by or under any enactment.
17. The OFT confirmed that the information listed in paragraph 10 above came to the OFT in connection with the exercise of an OFT function under section 8 (Part 1) of the EA02, or is so closely connected with that information that it cannot be practicably or usefully be disclosed in separate form. As such, it is 'specified information' as defined in section 237(2) of the EA02.
18. The OFT provided the relevant wording from each section of the legislation referred to above.

"Section 8 EA02 Promoting good consumer practice

8(1) The OFT has the function of promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom.

(2) In carrying out that function the OFT may (without prejudice to the generality of subsection (1) 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.

Section 238 EA02 Information

238(1) Information is specified information if it 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 and 8;
- (b) an enactment specified in Schedule 14;
- (c) such subordinate legislation as the Secretary of State may be order specify for the purposes of this subsection.

Section 237 EA02 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.

Section 245 Offences

- (1) A person commits an offence if he discloses information to which section 237 applies in contravention of section 237(2).
 - (2) A person who commits an offence under this section is liable –
 - (a) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both.
19. The Commissioner has reviewed the withheld information and considered OFT's application of section 44(1)(a) of the FOIA. He will first consider items (a) – (d) and (g) and (i), as listed in paragraph 10 above.
20. He understands that for the information to be 'specified information' it must have come to the OFT in connection with one of its functions, in this case, as outlined in section 8(1) of the EA02 and must relate to the affairs of an individual or a business of an undertaking.
21. Items (a) – (d) and (g) and (i) relate to and discuss the OFT's monitoring of businesses which are members of the code administered by REAL, contain details of some of the complaints it has received about a few named businesses and discuss the code of practice itself. The Commissioner is therefore satisfied that the contents of this correspondence relates to the OFT's specific functions of promoting good practice and approving consumer codes as outlined in section 8(1) of the EA02.
22. The Commissioner notes that some of the correspondence came from REAL and some are the OFT's responses to this correspondence. The correspondence that OFT received from REAL quite clearly *came to* the OFT in connection with one of its functions as explained above. It is less clear if the correspondence sent *by* the OFT would be considered specified information for the purposes of section 237 of the EA2002 as the information has not "come to" the OFT. 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. The Commissioner therefore regards the correspondence sent by the OFT to REAL to be 'specified information' by virtue of the fact that this correspondence discusses the information the OFT received from REAL in connection with its statutory functions and they are inextricably linked to it.

23. Both REAL and the named businesses in the correspondence in question are a 'business of an undertaking' as required by section 237(1) of the EA02 and as stated above items (a) – (d) and (g) and (i) discuss issues relating to those undertakings.
24. Section 237(2) also states that 'specified information' cannot be disclosed during the lifetime of an individual or whilst an undertaking is still in existence. The Commissioner has not been informed or received any evidence to suggest that REAL or any of the named businesses are no longer in existence so he is satisfied that the information cannot be disclosed under the EA02.
25. Sections 239-243 of the EA02 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 Information Tribunal case of *Dey v ICO and OFT (EA/2006/0057)* 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.
26. For the reasons explained above, the Commissioner is satisfied that section 44(1)(a) of the FOIA applies to items (a) – (d) and (g) and (i) of paragraph 10 above.
27. The Commissioner will now consider the application of section 44(1)(a) to items (e), (f) and (h).
28. The OFT stated that arguably these emails do not relate to its function of approving code amendments or any other function which may fall within section 8(1) of the EA02, as they are emails between OFT and REAL relating to REAL's invitation to its annual dinner. However, it still wished

to rely on section 44(1)(a) of the FOIA and required the Commissioner to make a judgement on whether it applied.

29. As stated above for the Commissioner to agree that these emails are exempt from disclosure under section 44(1)(a) of the FOIA, the emails must have come to the OFT in connection with one of its functions outlined in section 8(1) of the EA02 and the contents themselves must relate to one of these functions.
30. While the Commissioner may accept that these emails *came to* the OFT during a time when it was advising REAL about its code of practice and discussing monitoring issues, the contents of these 3 emails themselves do not relate to or discuss any matters which would fall into the statutory functions outlined in section 8(1) of the EA02. The Commissioner considers these 3 emails relate to a separate issue of whether the OFT will or will not be accepting REAL's invitation to its annual dinner. They are therefore only connected to the other items of correspondence as a result of timing rather than content.
31. For this exemption to apply the information must have come to the OFT in connection with one of its functions *and* the information itself must relate to its functions outlined in section 8(1) of the EA02. While these emails may have been received in the midst of other emails which do relate to the OFT functions, the emails themselves do not contain any information or discuss any issues which are connected to these functions.
32. For this reason, the Commissioner does not consider that section 44(1)(a) applies to items (e), (f) and (h). Although the OFT also applied sections 31(1)(g) and 43(2) of the FOIA to this request, it did not apply either of these alternative exemptions to these 3 emails. These 3 emails should therefore be released to the complainant.
33. The OFT asked the Commissioner to consider the issue of section 40 of the FOIA if he was minded to order disclosure of any of the withheld information in this case. As he has ruled that section 44(1)(a) does not apply to items (e), (f) and (h), the Commissioner now needs to consider the issue of personal data and whether any personal identified should be disclosed or redacted from the emails prior to disclosure.
34. The 3 emails are communications between the Chief Executive of REAL and an employee of the OFT. In terms of personal data, the emails contain their names and contact details.
35. It is the Commissioner's view that the names and contact details of these 2 individuals is information from which these individuals could be

identified and is therefore personal data, as defined by the Data Protection Act (DPA).

36. As he is satisfied that the emails do contain personal data, it is now necessary for the Commissioner to consider whether disclosure of this information would be fair and/or lawful. If he finds that disclosure would be fair and/or lawful the information should be released. If he finds that disclosure would be unfair and/or unlawful, disclosure would be in breach of the first data protection principle outlined in the DPA and therefore any personal data should be redacted from the emails prior to their disclosure to the complainant.
37. Disclosure under the FOIA is disclosure to the world at large not just to the complainant in this case. It is basically saying that any information released under the FOIA should be released into the public domain and be available to anyone else that may request it.
38. The relevant consideration here is the expectations of the data subjects concerned ie the employee of the OFT and the Chief Executive of REAL and whether they would have any reasonable expectation that their name and contact details would be released into the public domain.
39. It is the Commissioner's view that the two data subjects have no expectation that their personal data would be released into the public domain and as they would have no reasonable expectation that their personal data would be disseminated in this way, disclosure in this case would be unfair and in breach of the first data protection principle. The Commissioner notes that the Chief Executive of REAL is arguably the most senior employee within that organisation. However, he has undertaken some brief internet searches to see whether the Chief Executive's name is already public knowledge. He has been unsuccessful in identifying the Chief Executive from these searches and can therefore only conclude that as their name is not already public information they will have no expectation that their name would be disclosed by the OFT as a result of this request.

Right of appeal

40. 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

41. 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.
42. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF