

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2014

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

Decision

1. The complainant has requested;
"... access to OFT documents on Jaguar Land Rover Automative PLC."
2. The Office of Fair Trading (OFT) refused to confirm or deny whether it held any of the requested information, relying on section 44(2) of FOIA in order to do so. Section 44(2) relates to prohibitions on disclosure. In particular the OFT argued that to confirm or deny whether it held the information would breach the statutory prohibition on disclosure created by section 237(2) of the Enterprise Act 2002.
3. The Commissioner's decision is that the OFT has correctly applied section 44(2) and is entitled to refuse to confirm or deny whether the requested information is held.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 14 April 2013, the complainant wrote to the OFT. His letter simply stated:

"Requesting access to OFT documents on Jaguar Land Rover Automotive PLC."
6. The OFT responded on 9 May 2013. It stated that it was refusing to confirm or deny whether it held any information about Jaguar Land Rover. The OFT relied on the exemption provided by section 44(2) of FOIA as its basis for doing so. Section 44(2) provides that a public authority is not obliged to say whether it holds the information that has been requested, if it is prohibited from doing so by an enactment. In particular the OFT explained that disclosing whether or not the information is held was prohibited under section 237(2) of the Enterprise Act 2002.
7. Following an internal review the OFT wrote to the complainant on 24 May 2013. It maintained its reliance on section 44(2) to refuse to confirm or deny whether the information was held.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner considers that the issue which has to be determined is whether, in the circumstances of this case, the OFT is entitled to rely on section 44(2) to refuse to confirm or deny whether the information is held.

Reasons for decision

Section 44(2)

10. Section 44 of the FOIA states that:
 - (1) 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.
- (2) 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)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).
11. Under section 1(1)(a) of FOIA a public authority is required to confirm whether the information that has been requested is held. However, as far as is relevant to this case, section 44(2) means that if another piece of legislation prohibits it from providing such a confirmation, the public authority is not required to do so.
 12. Importantly when applying section 44(2) a public authority is not restricted to considering only the response it would have to provide. It can also consider whether either a hypothetical confirmation or a hypothetical denial would engage the exemption. For example, if the public authority did not hold the information, it should not just consider whether denying the information was held would breach the statutory prohibition, it should also consider the consequence if it had to confirm the information was held.
 13. The OFT has argued that section 237 of the Enterprise Act 2002 prohibits it from providing a hypothetical confirmation that it holds the requested information. The details of the relevant sections, as they apply to this case, are provided in full in annex 1. The full Act can be accessed via <http://www.legislation.gov.uk/2002?title=Enterprise%20Act> .
 14. Section 237 of the Enterprise Act creates what it calls a 'General restriction'. Subsection (1) sets out that the restriction applies to 'specified information' relating to any business. Subsection (2) then states that specified information must not be disclosed while the business continues in existence. Under section 245 it is an offence punishable by up to 2 years imprisonment to disclose information in breach of section 237.
 15. The actual definition of 'specified information' is provided by section 238 of the Enterprise Act. Information is specified information if it comes to a public authority, such as the OFT, in connection with the exercise of any function that public authority has under various parts of the Enterprise Act, any legislation listed in Schedule 14 of that Act or any secondary legislation specified by the Secretary of State.
 16. In view of the above, the Commissioner has considered whether, if the OFT confirmed it held information in this case, this would amount to the

disclosure of information which had 'come to it' in connection with the exercise of any of its functions specified in section 238.

17. The OFT has advised the Commissioner that, collectively, the legislation referred to in section 238 covers the full range of its functions relating to consumer law and its supervision of competition and market issues. The only area of the OFT's work not covered by the provisions listed is that concerned with money laundering. However the OFT's responsibilities in that field are restricted to credit and estate agencies. This is obviously not relevant to Jaguar Land Rover.
18. The Commissioner is therefore satisfied that if the OFT did hold any information on Jaguar Land Rover it would be held for one of the functions listed in section 238 of the Enterprise Act.
19. The Commissioner is further satisfied that if the OFT were to confirm that it held information this would in effect reveal information that had 'come to it' in connection with the specified functions. The Commissioner accepts that the term 'comes to' is broad and that it covers information sourced by the OFT from external sources or provided to it by third parties. The Commissioner understands that any activity in connection with the functions specified in section 238 would be as a result of information provided to the OFT by third parties or gathered by it from external sources. He therefore accepts that in effect confirmation would reveal that information had come to OFT regarding Jaguar Land Rover in connection with its functions.
20. Clearly, as it is an ongoing business, the statutory prohibition is capable of applying to specified information about Jaguar Land Rover.
21. Section 239 to 241A of the Enterprise Act introduces what are commonly referred to as 'gateways'. These are provisions which allow a way through the statutory prohibition on disclosure ie they set out the circumstances under which specified information can be disclosed without breaching the statutory prohibition. In broad terms these include where the business undertaking or individual that the information relates to has given their consent, where a European Community obligation requires the disclosure, where the disclosure is necessary for certain civil or criminal proceedings.
22. Section 241 allows information to be disclosed for the purposes of facilitating one of the public authority's statutory functions. However this would not allow specified information to be disclosed in response to a freedom of information request. Dealing with a request may be a statutory duty, but it is certainly not one of the OFT's functions, ie one of the core purposes for which it was established. Even if it was, section 44 of FOIA expressly states that when considering its response to a

request, a public authority must consider whether a confirmation or denial would, **apart from this Act** (ie FOIA) be prohibited by an enactment. In other words the OFT is required to ignore any obligation to communicate information imposed by FOIA when considering the application of the statutory prohibition created by section 237 of the Enterprise Act.

23. The OFT has advised the Commissioner that at the time of the request and of the internal review, it had no reason to believe that any of the other gateways were applicable. The Commissioner accepts that, even if the information was held, none of the gateway provisions would apply.
24. The Commissioner finds that section 237 of the Enterprise Act prohibited the OFT from providing a hypothetical confirmation that the requested information was held. It follows that the OFT was entitled to refuse to confirm or deny whether the information was held by virtue of section 44(2) of the FOIA.

Right of appeal

25. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Jo Pedder
Group Manager Policy Delivery
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