

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

Public Authority: Competition and Markets Authority

Address: 25 Cabot Square
London
E14 4QZ

Decision (including any steps ordered)

1. The complainant has requested information in meeting invites between Lord Tyrie of the Competition and Markets Authority (CMA) and representatives of several firms plus any summaries or meeting notes. The CMA refused to provide the summaries on the basis of section 44(1)(a) and disclosed the meeting invites but redacted personal data under section 40(2).
2. The Commissioner's decision is that the CMA correctly engaged section 44 to withhold the summary it holds for part 2c) of the request. With regard to the personal data redacted from the invites the Commissioner finds that the name of the individuals who met with Lord Tyrie are personal data but there is a lawful basis for processing this data and therefore the CMA is not entitled to rely on section 40(2) to withhold this information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names of the individuals who met with Lord Tyrie that have been redacted from the information provided in response to part 2a) of the request.
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 7 October 2021 the complainant made a request to the CMA for information in the following terms:

"This is a request for information under the Freedom of Information Act 2000.

In 2019, then-chairman Andrew Tyrie had several meetings relating to the CMA's audit market study. As per the CMA's response to IAT-FOIA-919, Mr Tyrie met:

- 1) with a KPMG non executive director on 03/04/2019;
- 2) with BDO on 01/07/2019;
- 3) with KPMG on 17/10/2019;
- 4) with EY on 22/10/2019;
- 5) with PwC on 25/10/2019.

Please provide the following information for each of those meetings:

- 2 a) Any and all information contained in the invitation to the meeting;
- b) Whether Mr Tyrie memorialised the contents of the meeting;
- c) If yes, any and all of the information contained in Mr Tyrie's memorialisation."

6. The CMA confirmed information was held and provided some information in relation to part 2(a) of the request with personal data redacted under section 40(2) of the FOIA. For any summaries of discussions the CMA considered the information exempt under section 44(1)(a) of the FOIA.
7. The CMA upheld its position at internal review.

Reasons for decision

Section 44

8. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under enactment.
9. The CMA states that it is prohibited under section 237(2) of the Enterprise Act 2002 (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.

10. 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;
- (c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.'

11. The CMA explained that the information came to the CMA in connection with the exercise of its functions under the EA2002. In this case the withheld information is an email containing Lord Tyrie's summary of the PwC representative's observations about the audit sector. The observations from PwC were provided in connection with the exercise of the CMA's market study functions under Part 4 of the EA2002 and its general information gathering powers under section 5 of the EA2002 (Part 1).
12. With regard to Part 4 of the EA2002; the CMA has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. Lord Tyrie, as chair of the CMA at the time, was obtaining information and feedback in relation to the CMAs audit market study (the final report of which was published earlier that year).
13. The CMA asserts that the email in question repeats or reveals information that came from the PwC representative and therefore constitutes specified information. However, for information to be 'specified information' it must 'relate to any business' of an existing undertaking, this can be interpreted quite broadly. The PwC representative was clearly acting on behalf of PwC providing information about PwCs experience in relation to the audit sector and the email relates to the business of PwC.

¹ Dey v ICO and OFT (EA/2006/0057)

14. Therefore, the Commissioner is satisfied that the meeting was part of the process of reviewing the audit sector through obtaining feedback on the CMAs audit market study. The Commissioner finds that the CMA was exercising its functions under Part 4 of the EA2002.
15. The Commissioner notes that the information has been internally created. Previous decisions of the Commissioner² and the Information Tribunal³ have accepted that the prohibition on disclosure can extend to the views of the public authority, considerations and other internally created information where the 'created' information incorporates information received by the public authority from another party.
16. The Commissioner is satisfied that the withheld material cannot be separated from information that was received by the CMA in connection with the performance of its functions under the EA2002 and this material therefore constitutes 'specified information'.
17. Sections 239-243 of the EA2002 provide certain 'gateways' for disclosure of specified information. These gateways do not compel the CMA to disclose information but do allow it to disclose information for the purposes set out in these sections. In the Dey case the Information Tribunal commented on the gateways and stated that "it gives a power to disclose, not a duty". The Commissioner therefore accepts that the CMA has discretion as to whether to use the gateways to disclose specified information.
18. The CMA has concluded that no gateways apply in this instance, including the gateway under section 241(1) – disclosure for the purpose of the CMAs functions.
19. Following the binding decision of the Upper Tribunal in 2011 (Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC), the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.
20. Therefore, the Commissioner accepts that there was no obligation on the CMA to disclose the specified information.

² ICO Decision Notice FS50468587

³ EA/2013/0098 and EA/2009/0033

21. In conclusion, the Commissioner's decision is that the CMA has correctly applied section 44(1)(a) to withhold the information it holds for part 2(c) of the request.

Section 40

22. The CMA has withheld the names and contact information of various individuals who made arrangements for meetings with Lord Tyrie and the names of the individuals who met with Lord Tyrie.
23. Neither the complainant nor the CMA has advanced arguments relating to the names and contact information of the individuals who arranged the meetings ie the personal assistants. It is the names of the senior representatives at KPMG, BDO, EY and PwC that Lord Tyrie met with that are under consideration here.
24. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A), (3B) or 40(4A) is satisfied.
25. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information that has been withheld is personal data within the definition in section 3(2) of the DPA.
28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

30. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

31. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁵.

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad or narrow, compelling or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
37. The CMA stated it accepted there is a legitimate interest in disclosure in this case, i.e. the general requirement for transparency in public life including in relation to the discharge of statutory functions.
38. The Commissioner accepts that there is a legitimate interest in the disclosure of the requested information. It would promote openness, transparency and accountability as the CMA has stated.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The CMA submits that disclosure is unnecessary as the general requirement for transparency has already been discharged in this case. Specifically, the CMA has already publicly disclosed (via a previous FOI request) that Lord Tyrie met with representatives of KPMG, BDO, EY and PwC to discuss the CMAs audit market study. It can be reasonably inferred that he met with senior representatives of those businesses; disclosing the identities of those representatives is unnecessary to discharge a general duty of transparency about the CMAs work on audit market reform.
41. Given that the Commissioner has concluded that there is a legitimate interest in knowing the identities of the individuals in question, this legitimate interest cannot be met by less intrusive means. He has therefore concluded that the necessity test is met and has gone on to carry out a balancing exercise.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

42. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
44. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
45. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
46. The CMA argues that the individuals concerned have a reasonable expectation of privacy given that they work for private companies and are not public officials. Further, in addition to its formal information gathering powers, the CMA relies on businesses and individuals to voluntarily supply information in relation to the exercise of the CMA's regulatory functions (including in relation to market studies). Public disclosure of information of this nature may deter individuals from supplying information to the CMA on a voluntary basis.
47. The CMA further noted:
- "It is difficult to predict the consequences of disclosure on the individuals concerned. While it may not cause any great distress or damage, disclosure of this information would be contrary to the individuals' expectation that the details of their meetings with Lord Tyrie would not be made public."

48. The complainant argues that senior employees of regulated firms have a very low, if any, legitimate expectation of privacy when meeting the officials who regulate them and to find otherwise would be to open the government to secret high-level lobbying.
49. The complainant also points out that "the information is the most basic, and least sensitive, sort of personal data. It is merely the names of persons who appear to be acting in a professional capacity. This information does not intrude into anyone's personal life."

The Commissioner's view

50. In the circumstances of this particular case, the Commissioner considers that the legitimate interests outweigh the rights of the data subjects.
51. The personal data that would be disclosed relates to the professional life of the individuals concerned. It does not reveal anything about their personal or private life.
52. The CMA has made a point about the issue of consent – stating the individuals concerned were not asked if they were willing to consent as this would set an 'unhelpful precedent in relation to future informal information gathering in connection with market studies and the CMAs other regulatory functions. Further, the CMA considers that it would be unfair to now ask the individuals concerned for consent to disclose their personal data in circumstances where they had an expectation of confidence in meeting with and providing information to Lord Tyrie.'
53. However, this is not the lawful basis on which the personal data would be processed. The Commissioner has not investigated whether or not the CMA had the consent of the individuals concerned at the time of responding, rather the Commissioner has been seeking to establish what the reasonable expectations of the individuals were and whether disclosure would be contrary to those reasonable expectations. If it would not be, the legitimate interest in the information is likely to override the rights and freedoms of the data subjects.
54. The Commissioner considers that individuals who occupy senior roles in the organisations referred to in the request should have an expectation that, whilst not public facing, their names and positions may be publicly known. If engaging in meetings with Chief Executives or similarly senior officials there is a likelihood that this will attract a higher degree of scrutiny and their involvement may become publicly known. The CMA has stated that the individuals would have an expectation details of their meetings with Lord Tyrie would not be made public but the Commissioner considers there should be some reasonable expectation

that at senior positions their identity and involvement may become more widely known.

55. The Commissioner considers the identity of the individuals who met with Lord Tyrie is an important part of the process of ensuring transparency in the process. The Commissioner is not convinced the disclosure would be contrary to the reasonable expectations of the data subjects – or that the data subjects are likely to suffer damage or distress as a result of disclosure, a point even the CMA acknowledges.
56. The Commissioner is therefore satisfied that, in the circumstances of this case, there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.

Fairness and transparency

57. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
58. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
59. The requirement for transparency is met because as a public authority, the CMA is subject to the FOIA.
60. The Commissioner has therefore decided that the names of the individuals at KPMG, BDO, EY and PwC who met with Lord Tyrie do not engage section 40(2) of the FOIA.

Right of appeal

61. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

62. 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.
63. 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

Jill Hulley
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