

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 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 requested the Office of Fair Trading (OFT) to release the total number of complaints it has received against Motor Codes in relation to its operation of the New Car Code. The OFT refused to confirm or deny whether it holds this information citing section 44(2) of the FOIA.
2. The Commissioner's decision is that the OFT acted appropriately by refusing to confirm or deny whether the requested information is held under section 44(2) of the FOIA.
3. As he is satisfied that section 44(2) of the FOIA applies to this request, the Commissioner requires no further action to be taken.

Request and response

4. On 25 February 2013, the complainant wrote to the OFT and requested information in the following terms:
"...the volume of complaints to the OFT against Motor Codes regarding the operation of the New Car code since its approval including the preceding incarnation of the code under the Society of Motor Manufacturers and Traders (SMMT)".
5. The OFT responded on 15 March 2013. The OFT refused to confirm or deny whether the information is held citing section 44(2) of the FOIA.

6. The complainant requested an internal review the same day.
7. The OFT carried out an internal review and wrote to the complainant on 15 April 2013. It confirmed that it upheld its previous decision to refuse to confirm or deny whether the information is held under section 44 (2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 30 April 2013 to complain about the way his request for information had been handled. He stated that his request was for simple numerical data and failed to see how section 44(2) of the FOIA could apply in his case.
9. During the investigation the Commissioner sought clarification from the complainant regarding his request. The complainant confirmed that he wants to know how many complaints the OFT has received against Motor Codes in relation to its operation of the New Car Code, as he wishes to establish the level of dissatisfaction there may or may not be against it.
10. This notice will consider the OFT's application of section 44(2) of the FOIA to this information.

Background

11. Motor Codes was set up by the motor industry as a government-backed self-regulatory body for the automotive sector and is a wholly owned subsidiary of the Society of Manufacturers and Traders (SMMT). Motor Codes is responsible for operating 3 codes of practice:
 - The New Car Code
 - The Service and Repair Code
 - The Vehicle Warranty Products Code.
12. The New Car Code (the code the complainant is particularly interested in) was the first of the 3 codes to gain the OFT's full approval under its Consumer Codes Approval Scheme. The code commits car manufacturers to providing high levels of customer satisfaction as a core element of their business and sets guidelines from advertising, parts supply through to new car warranties. According to Motor Codes website over 99% all of new cars registered in the UK are covered by this code.

13. The Commissioner understands that consumers can complain to Motor Codes about an issue they may have with a particular manufacturer and that Motor Codes can offer a dispute resolution service.

Reasons for decision

14. Section 44(1) of FOIA states that information is exempt from disclosure 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.
15. Section 44(2) of the FOIA states that 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(1)(a) would (apart from this Act) fall within any of the paragraphs (a) to (c) of subsection 1.
16. The OFT stated that it receives and considers information about traders and companies so as to enable it to exercise its functions including, but not limited to, competition and consumer enforcement powers and the function of approving consumer codes. The OFT confirmed that the latter is carried out pursuant to section 8(2) of Part 1 of the Enterprise Act 2002 (EA02). It stated that information that comes to the OFT in connection with the exercise of its functions is accorded special treatment by law. It is classified as 'specified information' for the purposes of Part 9 of the EA02 and it considers any complaints it has received about Motor Codes (assuming this information is held) to be 'specified information'. The OFT argued that section 237 of the EA02 places a general prohibition on the disclosure of 'specified information'.
17. The OFT confirmed that section 44(1) of the FOIA provides for information, if it is held, to be exempt from disclosure under the freedom of information regime, where its disclosure is prohibited by any other legislative provision. It argued that section 237 of the EA02 is one such provision. It further argued that section 44(2) of the FOIA provides that the duty on public authorities such as the OFT to advise requesters whether they hold information which has been requested does not apply if to do so would in itself breach another legislative provision.
18. The OFT stated that it is of the view that it should not confirm or deny whether it holds the requested information, as this simple confirmation would disclose 'specified information' it has received in connection with

its functions as set out in section 238 of the EA02. It argued that if it was to confirm or deny whether it holds the information this confirmation in itself would provide information about individuals or businesses and would amount to a prohibited disclosure.

19. The wording of the relevant sections of the EA02 are as follows:

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.

20. The Commissioner has given this matter careful consideration. He notes that the OFT approved the New Car Code operated by Motor Codes. He therefore accepts that any complaints it may or may not have received about Motor Codes will therefore have been received in connection with its function of approving consumer codes as outlined in section 8 of the EA02.
21. The Commissioner also accepts that if details of any complaints made against Motor Codes are held by the OFT (including the total number it may or may not have received) that this would constitute 'specified information' as defined in section 238(1) of the EA02, as it would be information relating to Motor Codes as a legal entity in its own right which has come to the OFT in connection with its functions outlined in section 8 of the EA02.
22. Motor Codes is a legal entity in its own right and is a self –regulatory body set up to operate the three motor codes of practice. It is a business of an undertaking which is still in existence, as required by section 237 of the EA02.
23. As the OFT has applied section 44(2) of the FOIA, the key question here is whether confirming or denying whether the OFT holds any complaints about Motor Codes in relation to its operation of the New Car Code would *in itself* disclose 'specified information' about a business of an undertaking as defined in section 237 of the EA02. In other words, would a simple yes the requested information is held or no it is not *in itself* disclose 'specified information' about a business of an undertaking which is prohibited by section 237 of the EA02.
24. The Commissioner accepts that confirming or denying whether the requested information is held would reveal whether Motor Codes has or has not received any complaints about its operation of the New Car Code. He agrees, therefore, with the OFT that this simple confirmation would in itself be releasing 'specified information' about the business of an undertaking; Motor Codes. It would be saying, yes, it has received complaints about Motor Codes, which is 'specified information' about a business of an undertaking or, no, it does not hold any complaints against Motor Codes which too is in itself 'specified information' about a business of an undertaking.
25. For the above reasons, the Commissioner is satisfied that the OFT was correct to refuse to confirm or deny whether the requested information is held under section 44(2) of the FOIA.

Right of appeal

26. 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

27. 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.
28. 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

Rachael Cragg
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