

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 March 2014

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

### **Decision (including any steps ordered)**

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1. The complainant made a freedom of information request to the Office of Fair Trading (OFT) for any information relating to adverse behaviour by Firstplus Financial Group Plc. OFT refused the request by relying on the exemptions under sections 31(1)(g) (Law enforcement), 40(2) (Personal information), 42 (Legal professional privilege) and section 44 (Prohibitions on disclosure). The Commissioner's decision is that the information is exempt under section 31(1)(g) and section 44 and that in the case of section 31(1)(g) the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### **Request and response**

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2. On 26 June 2013 the complainant made a freedom of information request to the OFT about Firstplus Financial Group PLC. The request asked for any information concerning adverse behaviour by Firstplus.
3. The OFT responded to the request on 3 July 2013 when it informed the complainant that the requested information was exempt under section 31(1)(a) as disclosure would be likely to prejudice the prevention or detection of crime. The information was also considered to be exempt under section 31(1)(g) because disclosure would be likely to prejudice the OFT's functions for the purposes specified in section 31(2)(a) – (d). It also concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

4. The complainant subsequently requested an internal review and the OFT presented its findings on 13 August 2013 at which point it said that it was upholding the decision to refuse the request. However it also said that it considered that the relevant exemption was section 31(1)(g) rather than section 31(1)(a) but that the information was considered to be additionally exempt under section 44 (prohibitions on disclosure), section 40 (personal information) and section 42 (legal professional privilege).

## **Scope of the case**

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5. On 15 August 2013 the complainant contacted the Commissioner to complain about the OFT's decision to refuse his request.

## **Reasons for decision**

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### **Section 44 – Prohibitions on disclosure**

6. The section 44 exemption has been applied to the majority of information falling within the scope of the request and since this also provides for an absolute exemption the Commissioner has considered whether this exemption would apply in the first instance.
7. Section 44 provides that information is exempt if its disclosure is prohibited under any other law or enactment. The relevant statutory prohibition is section 237 of the Enterprise Act 2002 (EA02) which prohibits the disclosure of 'specified information' which relates to the affairs of an individual or any business of an undertaking.
8. Specified information is defined in section 238 of the EA02 as information which comes to the OFT (or another designated public authority) in connection with the exercise of any function it has by virtue of provisions within the EA02 or subordinate legislation.
9. Therefore in order to be satisfied that the exemption is engaged the Commissioner must determine whether the information relates to an individual or business and whether that information came to the OFT in connection with the exercise of a relevant function.
10. Having reviewed the withheld information the Commissioner is satisfied that where the exemption has been applied the information was obtained by the OFT or else reflects information obtained by the OFT in the course of its investigation of complaints regarding FirstPlus Financial

group Plc. The information clearly relates to that business but also other individuals mentioned within the information. The OFT has confirmed that the investigation was in connection with functions under the Consumer Credit Act 1974 – a relevant function for the purposes of section 238 of the EA02.

11. Like many statutory prohibitions on disclosure, section 237 of the EA02 allows for disclosure of information in limited circumstances – so called 'gateways to disclosure'. The Commissioner is satisfied that none of the gateways apply here. Therefore the Commissioner finds that section 44 is engaged. There is no public interest test to apply.

### **Section 31(1)(g) – Law enforcement**

12. Whilst the section 44 exemption has been applied to most of the withheld information, in a few instances section 44 has not been applied and the information has instead been withheld under other exemptions including section 31(1)(g). This exemption 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). The purpose of the exemption is to protect the law enforcement responsibilities of public authorities.
13. 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.
14. In this context the Commissioner's view is that 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. 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.
15. The OFT has explained that its functions relate to its responsibilities under the Consumer Credit Act 1974 (CCA 74) which requires lenders to have a consumer credit licence. The OFT issues licences to those considered fit to hold them and monitors fitness on an ongoing basis. The OFT has the power to impose 'requirements' on licence applicants and holders where it is dissatisfied with their conduct or the way they conduct their business. The Commissioner is satisfied, therefore that the OFT has the law enforcement powers described in section 31(2)(a) – (d).
16. Disclosure of the information would reveal how the OFT goes about enforcing CCA 74 licensing law making it harder to do future work of this nature. Regulated bodies are also unlikely to cooperate fully and candidly with the OFT if they feel that information they provide in the course of an investigation or as part of a regulatory process will be disclosed, especially if the information is commercially sensitive and could be useful to a competitor. Therefore, the Commissioner is satisfied that section 31(1)(g) is engaged on the basis that disclosure would be likely to prejudice its law enforcement functions.

### **Public interest test**

17. 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 arguments in favour of disclosure**

18. The Commissioner accepts that there is a public interest in disclosure in terms of promoting greater transparency and accountability in the OFT's actions. The Commissioner notes that the manner in which the OFT reacted to alleged adverse behaviour by Firstplus is a matter of significant concern to the complainant and other borrowers.

19. The complainant argues that the OFT's functions do not operate in the best interest of consumers and therefore the public interest favours greater transparency.

### **Public interest arguments in favour of maintaining the exemption**

20. In favour of maintaining the exemption the OFT argued that it is in the public interest for the OFT to be able to effectively carry out its statutory responsibilities under part III of the CCA '74 and other regulatory functions. It said that in its view it cannot be in the public interest for the OFT's investigatory work and the way it conducts it to be undermined and for there to be a risk that investigations will be compromised because regulated bodies feel they cannot deal frankly and in a safe environment with the OFT when being investigated by it.
21. The OFT argued that maintaining the public confidence in the OFT's system of regulatory enforcement is overwhelmingly in the public interest and that the interests of a single group of consumers aggrieved about a discrete and narrow issue should not be placed above the wider interest of the OFT being able to work properly in the interests of consumers as a whole.
22. The OFT also suggested that the exemption should be maintained because it was not in the public interest for licensees' commercially sensitive information and business methodology to be widely disclosed into the public domain.

### **Balance of the public interest arguments**

23. In considering the competing arguments the Commissioner accepts that there is a public interest in disclosure to the extent that it would go some way towards increasing transparency and accountability in how the OFT responded to the complaints regarding FirstPlus. However the Commissioner would also add that the information which has been withheld under section 31(1)(g) and which is not otherwise exempt under section 44 is minimal. In the Commissioner's view disclosure of this information would add little to public understanding on this issue and therefore he has afforded the arguments in favour of disclosure only limited weight.
24. As regards the public interest in maintaining the exemption, the Commissioner would say first that he has not taken into account the arguments regarding the public interest in protecting commercially sensitive information. Whilst this may well be cause for concern, it is not a relevant argument for maintaining the law enforcement exemption.

That said, the Commissioner does accept that the prospect of releasing this information would be less likely to make licensees cooperate with the OFT, as he acknowledged at paragraph 16 above.

25. The Commissioner does accept, however, that there is a strong and inherent 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.
26. The Commissioner notes that the FirstPlus investigation had ended at the time of the request and so there was no possibility of this investigation being undermined. Therefore the public interest in protecting the OFT's handling of this particular investigation is somewhat reduced. However, he is also mindful of the prejudice that would be caused to the ability of the OFT to carry out future investigations of this nature if the information were disclosed. Revealing information which discusses how the OFT conducts its investigations would provide information to licenced traders which could reduce the effectiveness of the OFT's regulatory activities. Disclosure of this type of information would also lead to officials being more guarded in how they discuss future cases for fear of prejudicing an investigation.
27. Disclosure of internal thinking and exchange of views on how the OFT carries out its regulatory functions 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.
28. The Commissioner accepts that the complaints regarding Firstplus are a matter of concern and that there are public interest arguments in favour of disclosure. However, he finds that on balance the public interest favours the OFT being able to properly regulate the credit licence regime which is in the interests of consumers as a whole. In all the circumstances of the case the Commissioner finds that the public interest in maintaining the section 31(1)(g) exemption outweighs the public interest in disclosure.

### **Other exemptions**

29. The Commissioner has not considered the application of the other exemptions cited by the public authority, section 40(2) (personal information) and section 42 (legal professional privilege) as he is satisfied that all of the requested information can be withheld on the basis of section 44 or section 31(1)(g).

## **Right of appeal**

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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  
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