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## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 25 July 2006**

**Public Authority: Office of Fair Trading**

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

### **Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with Part I of the Act. No remedial action is required.**

- 1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner**
  - 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').
  - 1.2 Where a complainant has made an application for a decision, unless:
    - a complainant has failed to exhaust a local complaints procedure, or
    - the application is frivolous or vexatious, or
    - the application has been subject to undue delay, or
    - the application has been withdrawn or abandoned,the Commissioner is under a duty to make a decision.
  - 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

### **2. The Complaint**

- 2.1 On 11 August 2005 the complainant requested from Consumer Direct – who were at that time part of the Department for Trade and Industry (DTI) - the following information in accordance with section 1 of the Act:



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- the number of complaints they had received regarding a named company (the company);
  - the number of complaints which they had passed on to trading standards; and,
  - the number of complaints about the company that they had passed on to the trading standards department of a named London borough.
- 2.2 On 24 August 2005 DTI responded to the complainant with a refusal notice saying that the information requested was being withheld as it fell within the exemption in section 43 of the Act (commercial interests) and DTI considered that the public interest in withholding the information outweighed that in disclosing it.
- 2.3 On 25 August 2005 the complainant requested an internal review of DTI's decision. He said that he saw strong public interest arguments in favour of allowing access to information which would help to protect the public from unsafe products or unscrupulous practices, even where that might involve revealing a trade secret or other information whose disclosure might harm the commercial interests of a company.
- 2.4 On 16 September 2005 DTI told the complainant that they aimed to complete their internal review by 22 September. On 27 September the complainant chided DTI for their lack of a timely response. On 28 September, DTI's Director General, Fair Markets replied, maintaining their refusal to release the information sought. He cited the exemption in section 43 of the Act and said that he had weighed the public interest arguments, the balance of which favoured withholding the information. On 29 September 2005 the complainant appealed to the Information Commissioner.

### **3. Relevant Statutory Obligations under the Act**

**Section 1(1)** provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

**Section 43 (Commercial interests)** provides that –

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).



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(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

**Section 44 (Prohibitions on disclosure)** provides 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(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

In addition:

**Enterprise Act 2002 (Part 9)**

**Section 237 General restriction** provides that:

(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.

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene-

- (a) that subsection;
- (b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.

(4) Nothing in this Part authorises a disclosure of information which contravenes the Data Protection Act 1998 (c. 29).

(5) Nothing in this Part affects the Competition Appeal Tribunal.

(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.



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**Section 244 (Specified information: considerations relevant to disclosure)**

provides that:

- (1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).
- (2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.
- (3) The second consideration is the need to exclude from disclosure (so far as practicable)-
  - (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
  - (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.
- (4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure.

**4. Review of the case**

- 4.1 On 14 February 2006 DTI, in response to a letter from the Commissioner's staff, said that the reason for withholding the information was that it was uncorroborated and therefore might not be true. They said that traders should be able to compete on an even footing and that release of unverified information could damage a trader's ability to do business.
- 4.2 On 29 March 2006 DTI provided further detail to the Commissioner and gave evidence that some traders had made bogus complaints to try and find out information about their competitors. DTI said that trading standards bodies analysed the detriment to consumers in relation to individual traders and used a risk based approach to regulating the market. DTI believed that disclosure could undermine their own role, and that of the trading standards bodies, and could interfere with the investigation process. It could also affect administration of the Enterprise Act 2002 and lead to inflated numbers of complaints. DTI said that section 43 of the Act was engaged and that the public interest favoured withholding the information
- 4.3 On 1 April 2006 responsibility for Consumer Direct transferred from DTI to the Office of Fair Trading (OFT). The Department for Constitutional Affairs confirmed to the Commissioner that responsibility for resolving this complaint transferred from DTI to OFT at the date of transfer.



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- 4.4 On taking ownership of the matter, OFT carried out a review of the complaint. On 2 May 2006 OFT told the Commissioner that they had reached the same conclusion as DTI because: the information sought was specified information for the purposes of the prohibition of disclosure of information received by OFT in exercising their functions under part 9 of the Enterprise Act 2002; they saw a need to protect businesses from unfair or unfounded scrutiny and to preserve the integrity of any on-going enquiries or investigations; the calls received by Consumer Direct had not been verified or confirmed as genuine; giving out this information could potentially harm the work of OFT if it made traders unwilling to cooperate informally; and, giving out the information could potentially damage a trader's reputation.
- 4.5 On 5 May 2006 OFT provided further comment about their reliance on the Enterprise Act 2002 in continuing to withhold the information.

## **5. The Commissioner's Decision**

### **The complainant's view**

- 5.1 The complainant appealed to Consumer Direct following an experience with the company which he found unsatisfactory. He asked Consumer Direct to provide him with the numbers of complaints received and the extent to which they had been passed on to trading standards bodies. He said, in the context of DTI having cited the section 43 exemption and having applied a public interest test, that he saw strong public interest arguments in favour of allowing access to this information. Disclosure would help to protect the public from unsafe products or unscrupulous practices even though that might involve revealing a trade secret or other information whose disclosure might harm the commercial interests of a company.

### **The public authorities' views**

- 5.2 DTI, who dealt with the matter initially, cited the section 43 exemption in withholding the information sought about numbers of complaints. DTI said that, on balance, the public interest favoured non-disclosure as: OFT and trading standards services needed to be able to maintain their relationships with traders; enforcement agencies would be less able to carry out investigations properly; and, disclosure could motivate unscrupulous traders to disappear, thus effectively preventing trading standards bodies from working to resolve issues. DTI added that the confidentiality provisions of the Enterprise Act 2002 prevented the disclosure of information relating to an investigation by OFT or trading standards bodies. They also referred to the possible application of the Enterprise Act 2002.



- 5.3 OFT said that they considered the section 44 exemption from the Act to be engaged as they believed that part 9 of the Enterprise Act 2002 applied. They said that any information whose disclosure was prohibited by Part 9 of the Enterprise Act would automatically be exempt from disclosure under section 44 of the Freedom of Information Act. OFT added that, if an appropriate gateway to disclose the information existed under Part 9, they might choose to use it where it was consistent to do so. However, such a disclosure would then be made under the Enterprise Act 2002 not the Freedom of Information Act 2000. OFT said that they were not required to use a gateway, even where one existed, if they considered that disclosure would not be in the public interest or if disclosure would significantly harm the traders or individuals to whom the information related. Enterprise Act gateways allowing disclosure existed:
- with the consent of all those concerned;
  - to help with OFT's statutory functions or those functions of a relevant public body
  - to comply with a European Community obligation; and
  - to help investigations that might lead to certain legal proceedings.

#### **The Commissioner's analysis**

- 5.4 The Commissioner has concluded, as did OFT, that much of the information falling within the complainant's request is subject to the statutory bar on disclosure at Part 9 section 237 of the Enterprise Act 2002.
- 5.5 Section 237(6) of the Enterprise Act 2002 says that section 237 does not affect any power or duty to disclose information which exists apart from Part 9 of the Enterprise Act. The Commissioner decided that section 237(6) is not engaged as the Freedom of Information Act 2000 does not impose a duty to disclose exempt information.
- 5.6 Section 44 of the Freedom of Information Act 2000 requires the public authority to consider whether disclosure "**otherwise than under [the Act]**" is prohibited by enactment. Therefore, when considering the application of this exemption the Act cannot be cited as the enactment imposing the obligation to disclose. Therefore, a public authority must consider whether disclosure would be prohibited by enactment if the Freedom of Information Act was not in force. If so, section 44 is engaged and the information is exempt. It follows that section 44 of the Freedom of Information Act 2000 is engaged.
- 5.7 As section 44 operates as an absolute exemption in respect of such information, the Commissioner did not go on to consider the public interest arguments made by the OFT and the complainant.



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**The Commissioner's decision**

5.8 The Commissioner's decision in this matter is that OFT, and DTI before them, have dealt with the complainant's request in accordance with the requirements of Part I of the Act.

**6. Action Required**

6.1 The Commissioner does not require OFT to take further action in this matter.

**7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 25th day of July 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**