



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 6 June 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 - the application has been withdrawn or abandoned,the Commissioner is under a duty to make a decision.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 The Complainant has advised that on 6 January 2006 the following information was requested from the public authority in accordance with section 1 of the Act.

2.2 *Information relating to an initial complaint against Bacardi (in early 2000) alleging abuse of dominant position and the subsequent negotiations between Bacardi and the OFT which led to assurances being accepted from Bacardi by the OFT in January / February 2000.*

Details of all internal OFT correspondence including emails, inter-departmental memoranda and a copy of the original Rule 14 Notice and Bacardi's response to that Notice.

The OFT replied to the Complainant's request on 25 January 2005. It confirmed that it held the information, apart from inter-departmental memoranda, but refused the application on the grounds that the information was exempt from disclosure by virtue of sections 12, 21, 31, 42 and 44 of the Act. However, OFT relied primarily on the exemption at s.12 of the Act. This exempts information from disclosure where the public authority estimates that the cost of complying with the request would exceed the 'appropriate limit'.

In its letter of 25 January 2005 the OFT invited the Complainant to make a more specific request. It also offered the Complainant an internal review of its initial decision to refuse the request. The Complainant requested an internal review on 28 January 2005. The request was refused again on 23 March 2005. On 6 April 2005 the Complainant appealed against the decision to the Information Commissioner. The OFT has since provided the Complainant with a summary of the type of documents it holds that fall within the scope of the request, with a view to allowing the Complainant to make a more specific request. However, the OFT refused to provide a complete, detailed list of all the documents it holds on the grounds that much of the information contained in the list is subject to a statutory bar on disclosure.

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 16(1) provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

4. **Review of the case**

The Complainant has specifically asked the Commissioner to consider:

- 1) The OFT's categorisation of the request.
- 2) The OFT's alleged failure to satisfy its statutory duty to assist.
- 3) The OFT's alleged failure to apply the exemptions correctly.

1) The OFT's categorisation of the Complainant's requests.

There can be no hard and fast rule for determining whether a request for information is a single request with various elements or a number of separate requests. Requests for information are rarely, if ever, for a single, discrete piece of information. They tend to be for access to a set of information relating to a particular matter. The Act does not require that a request for access to a set of information be treated as a number of separate requests, nor does it allow public authorities to insist that applicants make separate requests in respect of the various pieces of information sought. The information requested in this case was closely related in nature. The request was made at a single point in time. The whole of the request concerned the regulatory engagement between the OFT and Bacardi that led to assurances being accepted from Bacardi by the OFT. It is the Commissioner's decision, therefore, that the OFT complied with its obligations under Part 1 of the Act in treating the request made to it on 6 January 2005 as a single one.

2) The OFT's alleged failure to satisfy its statutory duty to assist.

This part of the Decision Notice deals specifically with the Complainant's opinion that OFT failed in its duty to provide advice and assistance to those making a request. In particular, it deals with the Complainant's belief that OFT should have supplied a detailed list of the documents falling within the scope of the request.

Section 16(1) of the Act provides that –

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons would propose to make, or have made, requests for information to it”.

The Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Act gives practical advice about public authorities' duty to provide advice and assistance to applicants. The Code says that appropriate assistance might include providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority.

The Complainant's original request of 6 January 2005 did not specifically mention a list or index of documents. However, following the initial refusal of the Complainant's request, the Complainant wrote to the OFT on 28 January 2005 arguing that, at minimum, the OFT should have supplied a list of the documents falling within the request. The Information Commissioner requested a copy of the index but was advised by OFT that, given the statutory bar on disclosure, a copy could not be provided unless an Information Notice was served. An Information Notice was served and the OFT did provide a copy of the index to the Commissioner. The Commissioner is satisfied that the list does relate to the complaint against Bacardi and therefore falls within the scope of the Complainant's original request.

Had OFT provided just this part of the requested information, i.e. the list of documents, the Complainant would have been able to make a narrower request, one less likely to have been refused on the grounds of cost. However, the OFT refused to provide a copy of the list of documents to the Complainant. It argued that much of the content of the list falls within the statutory prohibition on the disclosure of information in the Enterprise Act 2002 and that it could not therefore be provided to the Complainant.

The Commissioner has examined the list of documents. It is 114 pages long, with many pages listing 16 or so separate documents. The majority of the information in the list identifies businesses or individuals involved in the OFT's investigation. Indeed, most of the documents in the list are indexed according to a summary of their content, most of these summaries identifying the businesses or individuals that the particular document is about. The list would be largely meaningless without these summaries, and could not be used as the basis for making a narrower request for information.

The Commissioner is satisfied that most of the content of the list is prohibited from disclosure by virtue of s.237 of the Enterprise Act 2002 (see below). Given this, in the Commissioner's opinion the list of documents would need a substantial amount of redaction before it could be released. A substantially redacted version of the list would have offered little by way of advice and assistance to the applicant. Given the list's length and the very substantial amount of exempt information it contains, in the Commissioner's opinion it would not be reasonable to expect the OFT to offer or to provide a redacted version of it as part of its duty to provide advice and assistance to the applicant. It is worth noting that many of the documents in the list would be exempt from disclosure in any event.

The Complainant could have narrowed the original request, or made a new one, so that only the list of documents was requested. However, in the Commissioner's view the OFT could still have refused such a request on the grounds that the cost of redacting the exempt information from the list would have exceeded the 'appropriate limit' set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. It would be unreasonable, therefore, to expect the OFT to provide a redacted copy of the list as part of its duty to provide advice and assistance to the applicant. It should be noted that the OFT has provided the Complainant with a summary of the type of documents held by it falling within the terms of the request. In the Commissioner's opinion this is sufficient to allow the Complainant to make a narrower request. It is the Commissioner's decision that in providing the summary of the type of documents held the OFT has complied with its duty under Part 1 of the Act to provide advice and assistance.

3) OFT's alleged failure to apply the exemptions correctly.

OFT cited a number of exemptions in support of its decision to refuse the Complainant's request. It cited s.12 (exemption where the cost of compliance exceeds the appropriate limit), s.21 (information accessible to the applicant by other means), s.31 (law enforcement), s.42 (legal professional privilege) and s.44 (prohibition on disclosure).

OFT's main argument against disclosure rested on s.12 of the Act. OFT argued that a large number of documents fall within the Complainant's request, and that much of the information contained in them had come to OFT in the exercise of its functions under

the Competition Act 1998. OFT argued that much of this information relates to the business of one or more undertaking and is therefore subject to the statutory bar on disclosure at Part 9 of the Enterprise Act 2002. (Part 9 of the Enterprise Act places a restriction on OFT's disclosure of certain information provided to it in connection with the exercise of its statutory functions under the Competition Act 1998. The restricted information includes that relating to the affairs of an individual or to any business of an undertaking.) The Commissioner accepts the OFT's view that much of the information falling within the Complainant's request is subject to the statutory bar on disclosure at Part 9 of the Enterprise Act 2002. Section 44 of the Freedom of Information Act therefore operates as an absolute exemption in respect of such information. OFT estimated that, given the size of the collection of the information and the fact that there is a statutory bar on much of its disclosure, the cost of extracting the disclosable, i.e. non-exempt, information from the documents would exceed the appropriate limit of £600.

The collection of information falling within the scope of the request is extremely voluminous. It apparently consists of over 13,000 pages of documents. The Commissioner has not verified that this is the case, for example by inspecting the information, although he does have a detailed list of the documents. (The OFT did agree to a member of the Commissioner's staff inspecting the collection to verify its size should the Complainant contest this; the Complainant did not.) Both the Commissioner and the Complainant, are satisfied that about 13,000 pages of documents do fall within the scope of the request.

The Commissioner is satisfied that much of the requested information is subject to the statutory bar on disclosure in the Enterprise Act 2002. This means that in order to comply with the Complainant's request, the OFT would have to go through this very large collection of documents extracting non-exempt information from the documents containing it. The Commissioner is satisfied that given the size of the collection of documents and the fact that much of the information is exempt, the cost of physically extracting the non-exempt information – which is quite different from the cost involved in considering the application of an exemption - would far exceed the "appropriate limit". The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 stipulate that the cost to a public authority of extracting, retrieving etc. information is to be estimated at £25/hour. This means that if it would take the OFT more than 24 hours ($600 \div 25$) to extract the information then the "appropriate limit" would be exceeded and the information need not be provided. Given that the information falling within the request amounts to over 13,000 pages, then the OFT would have to extract non-exempt information from the documents at the rate of about 540 pages of per hour in order to bring costs within the appropriate limit. Clearly this would not be possible. The Information Commissioner's decision is, therefore, that the appropriate limit would be exceeded in this case and that OFT was justified in refusing the request by virtue of the exemption at s.12 of the Act.

Given the conclusions reached, the Information Commissioner has not found it necessary to consider the extent to which other exemptions apply to the request. The applicability of any additional exemptions would make it even less likely that the cost of extracting the non-exempt information would fall within the appropriate limit.

5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the public authority has dealt with the Complainant's request in accordance with the requirements of Part I of the Act:

6. Action Required

No remedial action is required.

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

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 6 day of June 2006

Signed

**Graham Smith
Deputy Commissioner**

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