



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2013/0123

ON APPEAL FROM the Information Commissioner's Decision Notice No: FS50467985
dated 28 May 2013

Appellant: CRYSTAL WINDOWS AND DOORS LIMITED

First Respondent: INFORMATION COMMISSIONER

Second Respondent: OFFICE OF FAIR TRADING

Heard at Field House, London EC4

Date of hearing: 11 November 2013

Date of decision: 16 December 2013

Before

Andrew Bartlett QC (Judge)

Dave Sivers

Nigel Watson

Attendances:

For the Appellant: David Mayall (counsel)

For the Second Respondent: Robin Hopkins (counsel)

The Information Commissioner did not attend the hearing but made written submissions.

Subject matter:

Freedom of Information Act 2000 – absolute exemption – prohibitions on disclosure –
FOIA s 44 - Enterprise Act 2002 s 237 – qualified exemption – law enforcement – FOIA s
31(1)(g) and s 31(2)(c)

Cases:

R v Montila (or Montilla) [2004] UKHL 50, [2004] 1 WLR 3141

DBERR v O'Brien [2009] EWHC 164 (QB)

Ofcom v IC and Morrissey [2011] UKUT 116 (AAC), [2012] AACR 1

Ryanair v IC and OFT (EA/2012/0088), 28 January 2013

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 28 May 2013.

SUBSTITUTED DECISION NOTICE

For the reasons set out in the Tribunal’s determination, the Commissioner’s Decision Notice stands, except as follows:

The public authority did not deal with the appellant’s request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that neither FOIA s 44 nor FOIA s 31 was engaged by the documents listed below, which ought therefore to have been disclosed to the appellant.

Item 23, OFT internal email, p202 (page numbers are those in the closed bundles).

Item 30, OFT internal emails, pp264-265, with email correspondence with appellant, pp265-270.

Item 32, OFT internal attachment, pp280-284, subject to the redactions set out in the table below.

Table of redactions to item 32:

Para no.	Text to be redacted	Exemption
9	All after the word “risk.”	s 42(1)
16	First five words	s 44
16	Last sentence	s 42(1)

OFT may also redact any names of individuals where to do so is required by FOIA s 40(2).

Action Required

Within 28 days from the sending of this decision to the parties, OFT shall disclose to the appellant the documents listed above, subject to the redactions listed above.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with information held by the Office of Fair Trading (“OFT”). The principal issues relate to
 - a. application of the FOIA s 44 exemption (prohibitions on disclosure) by reference to Enterprise Act 2002 s 237, and
 - b. application of the exemption in FOIA s 31(1)(g) and (2)(c) where there is said to be prejudice to OFT’s function of ascertaining whether circumstances exist or may arise which would justify regulatory action.

The requests and the Commissioner’s decision

2. The REAL Assurance Scheme is a consumer protection code in the renewable energy sector¹. “REAL” is a company named Renewable Energy Assurance Limited. The appellant is a trader which belongs to the Scheme². By solicitors’ letters of 19 and 23 July 2012 the appellant sought information from OFT concerning changes to the code.
3. The letters were sent pursuant to the Judicial Review Pre-Action Protocol, because the appellant was intending to take proceedings against OFT concerning the lawfulness of OFT’s approval of the amended code and of its decision to carry out a review. The second of the two letters encompassed everything requested in the first letter, so was treated as the substantive request for FOIA purposes.
4. The full text of the requests is set out in the Information Commissioner’s Decision Notice³ at paragraphs 5-15. In outline, the requests asked some specific questions about
 - a. why the requirement to act on complaints quickly and fairly had been removed from the code,

¹ Renamed as the Renewable Energy Consumer Code on 1 April 2013, when responsibility for code approval was transferred from OFT to the Trading Standards Institute.

² Some of the appeal papers were headed with the name of the appellant’s director, Mr Oddi, rather than with the name of the appellant. In our view the correct appellant is the limited company Crystal Windows and Doors Limited, as indicated on the notice of appeal. Given our reasoning on the issues in the appeal, nothing turns on this.

³ http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50467985.pdf

- b. the reasons given by REAL for the amendments,
 - c. OFT's process of consideration and approval, including dates, and communications with REAL,
 - d. how OFT reached its decision to undertake a review of the amended code.
5. OFT supplied some information on 1 August 2012, which included the following:

“On 16 March 2012 REAL submitted their revised Code to OFT for review. On 12 April 2012 the case manager at OFT with responsibility for this Code had a discussion with Virginia Graham of REAL about some initial concerns OFT had with aspects of the revisions and modifications to the Code amendments were discussed. On 24 April OFT colleagues met with REAL representatives and discussed a number of matters, but not the amendments to the Code. As you are aware REAL believe that they were given approval for the changes in that meeting. ... On 18 June OFT were informed by REAL that the revised Code had been placed on their website. On 12 July OFT colleagues discussed the changes to the Code and the Code's placement on REAL's website with Virginia Graham. In an email sent to Virginia Graham at 15.16 on 12 July OFT confirmed its preliminary decision to approve the changes made to the Code. This was expressly stated to be subject to further comments on the changes which would be provided in due course.

“As you were informed in our letter of 19 July, OFT is conducting a further review of the Code revisions. This will take account of the matters raised by ... your Client. ...”

6. On 30 August 2012 OFT provided its summary grounds of defence to the judicial review proceedings. This document provided the following further information to the appellant:

“On 16 March 2012, REAL sought the OFT's approval for changes to the Original Code. The OFT raised one substantive issue with REAL in March 2012 by telephone (relating to the reinstatement of paragraph 9.5 of the Original Code) which REAL acted on by further amending the Original Code to include the provision at paragraph 7.4.

On 18 June 2012, REAL informed the OFT that it had adopted ... the Amended Code. As the substantive issue that had been raised in March by the OFT had been addressed in the Amended Code, the OFT case manager made no further objection. The matter was considered further on 12 July 2012 in response to the Claimant's raising of issue with the OFT at which point the OFT gave further consideration to the changes made.

REAL offered to make any further amendments the OFT required and the OFT made the Decision that the amendments it had seen could be given approval on a preliminary basis to be followed by a further review. The OFT took the view that it would be better in the interests of consumers and members of REAL to have certainty as to the applicable code.”

7. OFT provided its formal response to the FOIA requests on 30 August 2012. This refused to give any further information, relying on numerous FOIA exemptions, including s 44 (statutory prohibition on disclosure), the relevant prohibition being contained in Enterprise Act 2002 s 237. One request was refused on the ground that no information was held. On 8 October 2012 an internal review endorsed the formal response, with only minor differences of reasoning.
8. The appellant complained to the Information Commissioner. In his Decision Notice of 28 May 2013, the Commissioner decided in relation to the exemptions relied on by OFT-
 - a. the s 31 exemption (law enforcement) did not apply,
 - b. the absolute exemption in s 44 (statutory prohibition on disclosure) applied, so that none of the withheld information should be disclosed.
9. The Commissioner reached no view on other exemptions relied on, which were s 21 (information accessible by other means), s 42 (legal professional privilege), and s 43 (prejudice to commercial interests).
10. In the course of his consideration of s 31 he stated that the public interest arguments in favour of disclosure were “particularly strong”, adding-

“Consumer codes are intended to protect consumers and any changes made to these codes are likely to be of interest, specifically in cases such as this where there is evidence that some consumers and a large number of traders consider the changes to the code have been detrimental and made without the proper approval. Therefore, the Commissioner considers that any information which can provide greater clarity on the decision to make the changes and the process by which the changes were approved would be likely to carry significant weight.”

The appeal to the Tribunal

11. The appellant’s grounds of appeal, so far as pursued before us, can be summarised as follows:

- a. The FOIA s 44 exemption applies only to information that “came to” OFT in connection with the exercise of the relevant function under the Enterprise Act.
 - b. OFT should have concluded that the disputed information was disclosable under the ‘gateway’ in Enterprise Act s 241A, which permits disclosure for the purposes of or in connection with prescribed civil proceedings or otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings. Accordingly the s 44 exemption did not apply to any of the disputed information.
 - c. There was a strong public interest in disclosure of the disputed information.
12. OFT, in addition to maintaining the applicability of s 44, relied on all the other exemptions previously claimed and additionally on s 41 (information received in confidence).
 13. The appellant objected to OFT’s reliance on s 41. Such reliance was contained in OFT’s initial response to the appeal. We consider that this was an appropriate means of introducing such reliance, and in our view there is no substantive or procedural reason sufficient to uphold the objection.

Facts and evidence

14. The evidence before us is documentary. Three closed bundles contain everything made available to the Commissioner by OFT, including some information beyond the scope of the request. A redacted version of the index⁴ to the closed bundles was made available to the appellant. There are no witness statements. During the hearing we received certain additional explanations from counsel on instructions, without any objection being taken, and we have treated these as evidence where appropriate⁵. OFT submits, and the appellant does not contest, that the requests should be understood to relate to information held by OFT as at 23 July 2012; we have therefore not considered any additional information first held by OFT after that date.
15. At the end of the hearing we held a short closed session in which counsel for OFT briefly explained the contents of the closed bundle and the marking system adopted. Nothing emerged from the closed session which needed to

⁴ In our view the index to the closed bundles provided by OFT is inaccurate. In the case of some tabbed sections the date in the date column of the index is merely one of the dates of the material behind the listed tab, which includes documents of later dates, not merely attachments to the first dated document. We did not order the preparation of a corrected index because we considered it would be disproportionate to do so.

be drawn to the attention of the appellant. After the hearing we requested and received some additional documents from the appellant and OFT.

16. Most of the material events from 16 March to 12 July 2012, as seen from OFT's point of view, are set out in paragraphs 5-6 above. Mr Oddi of the appellant company first learned of the new code on a date in late June 2012. This arose because he complained to REAL about its handling of a complaint against the appellant. He says he was told in response that the duty to investigate quickly and fairly had been removed from the code. Not unnaturally, this alarmed him, and he pursued inquiries to find out what had occurred. The appellant also commenced proceedings in the High Court, Queen's Bench Division, against REAL and against the Renewable Energy Association (REA) complaining about alleged bias against scheme members engaged in the glazing sector and alleged misconduct in relation to a particular consumer complaint, selection of the appellant for audit, changes to the code, and related matters.

17. On the basis of the open materials and explanations given to us, we find as follows:
 - a. REA is a not-for-profit trade association which represents renewable energy producers and suppliers of various kinds. It is a company limited by guarantee. Its governing documents are its articles of association and bye laws. It is the sponsor of the code.

 - b. REAL is a wholly-owned subsidiary of REA, and is the administrator of the code.

 - c. At the material times OFT ran a Consumer Codes Approval Scheme (CCAS). Under Enterprise Act 2002 s 8(1) OFT had the function of promoting good practice in the carrying out of activities which might affect the economic interests of consumers in the UK. By s 8(2) it was empowered to approve consumer codes or to withdraw its approval.

 - d. The code was approved by OFT in November 2011.

 - e. The Department for Energy and Climate Change made it a requirement that consumers could only benefit from feed-in tariffs if their installation was supplied by a trader who had agreed in a binding manner to adhere to an approved code.

⁵ Pursuant to rule 15(1) and 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended.

- f. During 2012 the REAL code was the only code approved for this purpose, and at that time there was no realistic prospect of any other code being approved for this purpose.
- g. On 16 March 2012, REAL sought OFT's approval for changes to the code. OFT raised one substantive issue with REAL in March 2012 by telephone. REAL altered its draft accordingly.
- h. On or about 18 June 2012 REAL promulgated the amended code without OFT approval. When OFT learned of this it took no action.
- i. As a result of Mr Oddi's queries raised on 26 June 2012, the appellant's initiation of High Court action against REAL on 3 July, and a telephone call from Mr Oddi on 12 July, OFT was effectively 'bounced' into approving the amended code on 12 July 2012. This approval was said to be "preliminary"; OFT said it would review the code and, if further changes were found to be needed, it would require them as a condition of continued approval.
- j. The changes in the 18 June version of the code included the removal of the requirement on REAL to investigate complaints quickly and fairly. This meant that the quality of investigations was governed only by the consumer code bye laws, which were not part of the code itself and were not required to have OFT approval. (These are not the same bye laws as those governing REA.)
- k. It was unclear whether installations made between 18 June and 12 July 2012 were governed by the approved November 2011 code or by the unapproved amended code. If the latter, customers whose installations were made in that period would possibly not be entitled to receive feed-in tariffs.
- l. OFT's purpose in giving preliminary approval on 12 July 2012 was to ensure that there would be certainty as to the applicable code pending completion of the further review. OFT considered this to be the best course in the interests of consumers and of members of REAL. This decision was not in itself irrational or unlawful. Hence the appellant's judicial review challenge ultimately failed.
- m. OFT's review of the code from July 2012 was prompted by Mr Oddi's concerns. It took into account also the general history of complaints from consumers.

- n. OFT's initial response on 12 July 2012 (by email at 15:28) to Mr Oddi's inquiry of 26 June 2012 failed to inform him that the proper answer to his question, at the date he asked it, was that the amended code was unapproved. OFT's further response of 12 July 2012 at 16:38 revealed that the date of approval was 12 July, but did not provide an adequate explanation of the justification for the changes and did not reveal that the approval was on the express basis that a review would be carried out by OFT and further changes might be required.
 - o. At the time of the substantive information request dated 23 July 2012 OFT was aware of the proceedings which had been commenced by the appellant against REAL and REA.
 - p. The review of the code took a considerable time. Extensive further amendments were ultimately approved by OFT in February 2013.
 - q. On 1 April 2013 responsibility for the approval of consumer codes was transferred from OFT to the Trading Standards Institute.
18. We find surprising the low level of competence and efficiency shown by OFT in its initial failure to react appropriately to the publication of the unapproved code. As we understand it, OFT's decision to give approval on 12 July 2012 was rational and lawful only because it was considered to be the least bad option available in the circumstances. In addition, the conduct of REAL as set out above clearly calls for explanation. However, we keep in mind that REAL was not represented before us, and that these aspects of the events are only relevant to the extent that they bear on the issues which we have to decide on the appeal.

Legal submissions and analysis: the FOIA s 44 exemption

19. The FOIA s 44 exemption which is relied upon by OFT depends upon the relevant provisions of the Enterprise Act 2002.
20. By Enterprise Act 2002 s 237, "specified information" which relates to any business of an undertaking must not be disclosed unless the disclosure is permitted under Part 9 of the Act. By s 238, information is "specified information" if (among other things) it comes to a public authority in connection with the exercise of any function it has under or by virtue of Part 1 of the 2002 Act, which includes section 8 (promoting good consumer practice). By s 237(3), the prohibition does not apply to information already lawfully disclosed to the public.

21. Sections 239-243 set out various gateways permitting disclosure. The gateways are of two kinds. There are gateways where the prohibition simply does not apply – for example, s 239, where the authority holds the necessary consents to disclosure. There are other gateways where by the terms of the applicable section the authority is given a discretion to disclose – for example, s 241A, which concerns certain disclosures for the purposes of civil proceedings.
22. Section 244 sets out considerations to which a public authority must have regard before disclosing any “specified information”.
23. In summary, therefore, there is a prohibition on disclosure, which is only a partial prohibition, because it is subject to a variety of exceptions which permit disclosure to be made.
24. In relation to the first ground of appeal, at the hearing it was common ground between the parties that, because of the relevant terms of the Enterprise Act, the FOIA s 44 exemption applies only to information that “comes to” OFT in connection with the exercise of the relevant function under the Enterprise Act. In our view “comes to” is a broad expression which is not dependent upon the making by the public authority of any request or requirement for the information.⁶ It is also common ground that the relevant prohibition related to information, not documents, and accordingly, where information came to OFT so as to fall within the prohibition, it remained within the prohibition when repeated or referred to in other subsequent documents in such manner that disclosure of those documents would reveal the information expressly or by inference. We have approached the application of the exemption on this basis. We give further consideration to the first ground of appeal below, in the section headed ‘Application of FOIA s 44 to the disputed information’.
25. The second ground of appeal is that OFT should have concluded that the disputed information was disclosable under the gateway in Enterprise Act s 241A, which permits disclosure for the purposes of or in connection with prescribed civil proceedings or otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.
26. The second ground faces what seems to us to be an insuperable difficulty, which is that the gateway is defined by reference to “prescribed information”. In the Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc.) Order 2007, article 2, “prescribed information” is defined in such a way

⁶ On the meaning of “comes to” in Enterprise Act 2002 s 237, we were referred to *Ryanair v IC and OFT* (EA/2012/0088), 28 January 2013, at [60]-[61]. The Tribunal there was concerned with rather different circumstances and we do not find the Tribunal’s remarks to add anything material in the circumstances of the present case.

as to exclude (among other things) information which comes to OFT in connection with the exercise of its functions under s 8 of the Enterprise Act (promoting good consumer practice). Thus in so far as the disputed information came to OFT in connection with the exercise of its functions under s 8, the gateway cannot apply.

27. A further difficulty for the appellant lies in the definition of “prescribed civil proceedings”. These are defined by article 3 of the 2007 Order. The most relevant part of the definition is “proceedings relating to or arising out of a legal right or obligation of a consumer”. The judicial review proceedings clearly fall outside this definition. The appellant’s case is that the Queen’s Bench action falls within it, as being proceedings relating to a legal right of a consumer. While it is true that there is mention of a particular consumer dispute within the Queen’s Bench proceedings, the consumer’s rights are not the subject of those proceedings and will not be determined in them. We consider that the rather elastic phrase “relating to” is not to be read in its greatest literal breadth but must be read in a reasonable sense in its context, and we do not consider that the definition is satisfied in this case.
28. Had we taken a different view on the availability of a gateway under s 241A, we would have had to enter upon the difficult questions concerning whether s 44 was engaged in circumstances where the statutory prohibition relied upon was only partial, and applied in limited circumstances and for limited purposes. On this aspect, the submission of OFT and the Commissioner is that the answer is governed by the approach set out in *Ofcom v IC and Morrissey* [2011] UKUT 116 (AAC), [2012] AACR 1, namely that the exercise of a discretion to disclose was a matter for the public authority, not for the Commissioner, and, because the authority has not exercised it in favour of disclosure, disclosure remains prohibited. The appellant submits that, because of the different statutory wording, *Morrissey* does not provide the answer in the present case: since (as it argues) the disclosure is permitted under s 241A, it is not prohibited by s 237 and hence FOIA s 44 does not apply. Because we have held that, irrespective of any question of discretion, the information does not fall within the s 241A gateway, we do not need to decide between the parties’ rival contentions concerning the effect of the *Morrissey* decision. Nor do we need to consider how a disclosure to the appellant in reliance on the limited circumstances defined in s 241A would fit in with the scheme of FOIA, under which a FOIA disclosure is usually regarded as equivalent to disclosure to the general public.
29. The third ground of appeal is that there is a strong public interest in disclosure of the disputed information. It was common ground at the hearing that, so far as the s 44 exemption applies, this is not relevant, because the s 44 exemption is absolute and therefore not subject to a public interest test.

Application of FOIA s 44 to the disputed information

30. Because the matters on which information was sought by the appellant in its information requests all related to changes to the code, the information within the scope of the request which came to OFT all came in connection with the exercise of the relevant function under the Enterprise Act. Accordingly, so far as information came to the OFT which was within the scope of the requests, in our judgment it falls within the s 44 exemption.
31. Moreover, the requests were not directed to information which the appellant already knew but to particular features of the events concerning the code changes which it wished to find out, and we have kept this in mind in determining the scope of the requests, the result being to exclude certain information given by the appellant itself to OFT, as being outside the scope of the specific requests that were made.
32. We have had to look at the disputed information in some detail to determine whether at the material time OFT held other information within the scope of the request which did not “come to” the OFT. It seems to us that in the circumstances this could only be information generated within the OFT itself and which was new and separate, being information that does not repeat or reveal information which came to the OFT from others. This analysis is of particular relevance to request 9 (using the numbering in Decision Notice paragraph 13), namely:

“In your letter of 19 July you accept the need for a “review” to be carried out to the Code which REAL unilaterally altered in Mid-June. Please provide us with documentary evidence of how the decision to launch the “review” was taken, for what reasons and when the decision was taken.”
33. In our judgment, OFT’s recorded expressions of its own thoughts concerning its decision to launch a review fall outside the s 44 exemption, unless they repeat or otherwise reveal information that came to OFT from others. Apart from this particular class of information outside the exemption, in our view the whole of the disputed information held by OFT within the scope of the requests falls within the s 44 exemption.
34. We consider below such documents as record OFT’s own thoughts concerning its decision to launch a review without repeating or otherwise revealing information that came to OFT from others.

Exemptions other than s 44

35. OFT's recorded expressions of its own thoughts concerning its decision to launch a review appear in:
- a. documents where the information is protected by the s 44 exemption because inextricably linked with information which came to OFT (ie, because they repeat or otherwise reveal information that came to OFT) (category A),
 - b. documents protected by legal professional privilege and therefore falling within the qualified exemption in FOIA s 42(1) (category B),
 - c. documents outside categories A and B, for which other exemptions are claimed (category C).
36. In view of our findings above, it is not necessary for us to give consideration to the application of exemptions, other than s 44, which are claimed for materials in category A. For completeness, we record that OFT relied on FOIA s 41 (information received in confidence) and FOIA s 43(2) (prejudice to commercial interests). In relation to these, we found unimpressive the views expressed by the Chief Executive of REAL in a letter dated 15 November 2012, on which OFT relied. In particular, given the near monopoly position referred to at paragraph 17e-f above, it seems to us that the prospect of prejudice to REAL's commercial interests was very small.
37. As regards category B, the appellant acknowledged in oral submissions the inherent weight of the s 42(1) exemption, as made clear in *DBERR v O'Brien* [2009] EWHC 164 (QB) and other cases, and accepted that the public interest factors in favour of disclosure were unlikely to equal or outweigh the public interest in maintaining the exemption unless we found something quite exceptional in the closed material which had that effect. We accept the appellant's assessment of how s 42(1) falls to be applied in this case. Having reviewed the closed material and considered the public interest factors on both sides of the equation, we accept OFT's submission that the present case is clearly not one in which disclosure of legally privileged information would be justified. In view of the very limited extent of the dispute between the parties on s 42(1), it is not necessary for us to say more than that there is no material which in our view would come anywhere near to setting the balance in the appellant's favour.
38. The documents which in our judgment (subject to certain redactions) fall into category C are as follows (using the general nomenclature in the redacted

version of the closed bundles index, with the addition of further descriptions and page numbers for precision):

- a. Item 23, OFT internal email, p202.
- b. Item 30, OFT internal emails, pp264-265, with email correspondence with appellant, pp265-270.
- c. Item 32, OFT internal attachment, pp280-284.

39. To confine these documents to information in category C, it is necessary to redact item 32 in the manner shown in the table below:

Para no.	Text to be redacted	Exemption
9	All after the word "risk."	s 42(1)
16	First five words	s 44
16	Last sentence	s 42(1)

40. For clarity, we confirm that in our view s 44 does not apply to category C, even though it is so claimed by OFT. After redaction, these documents do not contain information that came to OFT, except from the appellant. In addition, despite OFT's reliance on FOIA s 21 (information reasonably accessible to the applicant by other means), we do not consider that there is any real issue for us to decide concerning the appellant's own communications to the OFT. Certain of the appellant's communications are necessarily included in items above to show the context and hence the meaning of the OFT internal documents, and the appellant is not seeking to keep them under wraps. If a gateway were required in relation to anything in the appellant's own communications, it would be provided by Enterprise Act s 239, since the appellant's FOIA request would amount to consent to disclosure.

41. The only other exemption claimed for category C is the exemption in FOIA s 31(1)(g) together with s 31(2)(c). We consider this next, in relation to the three items identified above.

FOIA s 31(1)(g) with s 31(2)(c)

42. Accompanied by the sidenote 'law enforcement', these provisions read as follows:

"31(1) Information which is not exempt information by virtue of section 30 is exempt if its disclosure under this Act would, or would be likely to, prejudice-

... ..

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2), ...

(2) The purposes referred to in subsection (1)(g) to (i) are-

... ..

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, ..."

43. The Commissioner decided that this exemption was not engaged, for reasons set out in paragraphs 26-33 of his Decision Notice, essentially that the word "ascertaining" limits the application of the exemption to those cases where a public authority has the power to formally ascertain compliance with legal requirements with a view to specific enforcement action, and the power to withdraw approval from a consumer code does not constitute "regulatory action". The appellant submits that the Commissioner was right, for the reasons that he gave.

44. OFT submits that the Commissioner took too narrow a view of the exception, and refers to the wide definition of "regulatory function" found in s 32(2) of the Legislative and Regulatory Reform Act 2006.

45. We do not find the definition in the 2006 Act helpful. It is in a different statutory context, and it is a definition of a different expression ('regulatory function', rather than 'regulatory action'). We have regard instead to the contents of FOIA s 31(1)(g)-(i), the context set by s 31(1)(a)-(f), and the use of the word "ascertaining" in each of s 31(2)(a)-(e). We also take into account the sidenote to s 31, in accordance with the guidance in *R v Montilla (or Montilla)* [2004] UKHL 50, [2004] 1 WLR 3141, at [31]-[36]. These indicate, in our view, a relatively formal meaning of the expression "ascertaining ... circumstances which would justify regulatory action ...", such as would be satisfied by a process of determining whether to impose a penalty, sanction or

other formal requirement. In our judgment OFT's functions under Enterprise Act 2002 s 8 in relation to consumer codes do not fall within this statutory expression. Accordingly, we do not consider that the s 31 exemption applies.⁷

46. In case we are wrong on that point, we go on to consider whether disclosure of the information in the category C documents would or would be likely to prejudice the exercise of OFT's functions under s 8 of the 2002 Act. The relevant test here has been discussed in numerous decisions, in which "would" is taken to mean "would on the balance of probabilities" and the alternative of "would be likely" is taken to refer to a very significant and weighty chance. The 'prejudice' in view is prejudice that is real, actual and of substance.⁸
47. OFT submits that at the time of the requests it needed a safe space in which to deliberate and consider how its code approval function should be exercised in the circumstances of this case, and that disclosure of the requested information in response to the requests would have been prejudicial to that function.
48. This submission relates to the whole of the requests. We can see that it has some force in that context. However, because of our findings on the s 44 exemption, we are now only concerned with request 9, which relates only to the decision to undertake a review. Looking at the matter as at the time when the requests were dealt with, we are not persuaded that disclosure of documentary evidence of how, why and when the decision to launch the review was taken "would or would be likely" to cause real, actual and substantial prejudice to OFT's code approval function. In the particular circumstances of this case, it seems to us that it was fairly obvious that a review needed to be carried out, as indeed OFT decided it would do. So far as concerns the decision to undertake the review, this was not in our view a case where OFT needed a safe space in which to take a difficult, sensitive or finely-balanced decision. We also note the absence of any witness evidence from the OFT to support its case under s 31. Accordingly, we are not satisfied as to the requisite likelihood of prejudice within the meaning of s 31.
49. In case we are wrong in concluding that the s 31 exemption is inapplicable, we go on to consider how the public interest balance would stand if it were engaged. In order to do this, we must make the assumption, contrary to our view, both that OFT needed a safe space in which to decide whether to carry out a review, and that disclosure of the requested information in response to request 9 would have created a very significant and weighty chance of real,

⁷ In *WS v IC and N Lancs PCT* [2013] UKUT 181 (AAC) the Upper Tribunal gave guidance on the meaning of FOIA s 31(2)(j). The parties did not submit that this decision was of relevance for our purposes. We have nevertheless considered it, because it contains some valuable general guidance on how s 31 should be read. However, having done so, it does not alter our conclusion on the meaning of s 31(2)(c).

⁸ For case citations, see *Information Rights Law and Practice*, 3rd edn, Philip Coppel QC, 15-021-022.

actual and substantial prejudice to that process of consideration. On this assumption, the public interest in maintaining the exemption was that OFT should not be materially hindered in doing its job properly, as regards taking the decision whether to review. This must be viewed in the broader context of OFT's role in the approving of consumer codes, or of withdrawing approval, as the case may be. On the other side of the balance, and in the same broader context, there was the public interest in transparency and accountability, and in understanding how, why and when OFT took its decision to launch the review. The latter interests would undoubtedly be advanced by disclosure. Given the rather peculiar circumstances leading up to the decision to review (namely, the promulgation of unapproved amendments, and the bouncing of OFT into giving belated approval), we consider that the public interest in maintaining the exemption did not outweigh the public interests in disclosure, which in the circumstances of this case appear in our view to be rather strong.

Conclusions and remedy

50. We conclude:

- a. Nearly all of the disputed information was protected from disclosure by the FOIA s 44 exemption (prohibitions on disclosure), by reference to Enterprise Act 2002 s 237. This is an absolute exemption.
- b. Some of the disputed information was protected from disclosure by FOIA s 42(1) (legal professional privilege) and the public interest in maintaining the exemption outweighed the public interest in disclosure.
- c. Subject to the redactions set out in the table in paragraph 39, the items listed in paragraph 38 above were not protected by the exemptions claimed for them, namely, FOIA s 44 and FOIA s 31, and ought to have been disclosed in response to the appellant's request.

51. We therefore allow the appeal to the limited extent of ordering disclosure of the identified items and we dismiss OFT's cross-appeal concerning the application of FOIA s 31.

Subsidiary matters

52. At the hearing before us it was not in dispute between the parties that OFT would be entitled to redact names of individuals where to do so was required by FOIA s 40(2). Our order for disclosure is subject to that entitlement.

53. The appellant submitted that, if we found s 44 to be inapplicable, we should remit the matter to the Information Commissioner to consider the exemptions on which he did not reach a conclusion in his Decision Notice. OFT submitted that such remission was not within our powers. Given the nature of our substantive decision, it is not necessary for us to consider this question.

54. After preparing our decision in draft, it was sent to OFT and to the Commissioner so that they could check that it did not inadvertently disclose any of the disputed information. OFT responded with a submission expressing concern about the wording of criticisms of OFT conduct made in the decision. As a result we made minor adjustments to the wording of paragraphs 17n and 18, to remove ambiguity and ensure that they would not be interpreted more widely than we intended.

Signed on original:
Andrew Bartlett QC
Tribunal Judge

16 December 2013