



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2014/0055

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50510196
Dated: 11 March 2014**

Appellant: DAVID SIMMONS

First Respondent: INFORMATION COMMISSIONER

**Second Respondent: COMPETITION AND MARKETS
AUTHORITY**

Heard at: Blackpool

Date of hearing: 3 July 2014

Date of decision: 21 January 2015

**Before
CHRIS RYAN
(Judge)
and
MALCOLM CLARKE
PAUL TAYLOR**

Attendances:

The Appellant appeared in person
Neither the First nor Second Respondent attended the hearing or was represented.

Subject matter: Qualified exemptions - Law enforcement s.31
Absolute exemptions - Prohibitions on disclosure s.44

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 11 March 2014 is substituted by the following notice:

Public Authority: Competition & Markets Authority

Complainant: David Simmons

Decision: The original decision notice shall stand save that, for the reasons set out in the Reasons for Decision below and the Confidential Annex to that decision, the Public Authority should disclose to the Complainant, within 35 days of the date of the Reasons for Decision, the information identified in the Confidential Annex.

REASONS FOR DECISION

Introduction and Summary of Conclusions

1. This appeal is against a Decision Notice of the Information Commissioner dated 11 March 2014 (“the Decision Notice”), in which the Information Commissioner decided that the Office of Fair Trading had been entitled to refuse a request for information submitted by the Appellant because the information was exempt information under sections 31 (prejudice to law enforcement) and 44 (statutory prohibition on disclosure) of the Freedom of Information Act 2000 (“FOIA”). Since the Decision Notice was issued the relevant functions of the Office of Fair Trading have been assumed by the Competition and Markets Authority, the Second Respondent to the Appeal. For simplicity we will refer to both bodies as “the Public Authority”.
2. We have decided that, with the exception of information contained in a few documents held by the Public Authority, the Information Commissioner was right to conclude that it had been justified in refusing the information request. The documents to be disclosed are listed in a confidential annex to this decision together with our detailed reasons for ordering disclosure. However we give a general indication of those reasons in paragraphs 41- 43 below.

Background facts

3. The Public Authority has powers under the Consumer Credit Act 1974 (“CCA 1974”) to monitor the operations of those holding a consumer credit licence. In particular it may impose “requirements” on licence holders where it is dissatisfied with their conduct and it may also, where appropriate, suspend or revoke an organisation’s licence. On 7 December 2010 it exercised those powers by issuing a notice addressed to Firstplus Financial Group PLC (“Firstplus”) requiring it to (a) follow its existing policies and procedures to ensure compliance with relevant legislation and official guidance, and (b) not to change those policies and procedures for a period of three years without prior notification to the Public Authority. This notice of requirements was issued at the end of an investigation into the operation by Firstplus of an interest variation provision included in its standard contract for second charge loans. However, the notice did not contain any indication of the facts uncovered during the investigation or the reasons for deciding that a notice of requirements was justified and appropriate.
4. The Appellant had become concerned that the terms regarding interest in the Firstplus second charge loan documentation were unfair, in particular an interest rate variation provision. Since 2009 the Appellant and other members of a campaign group, of which he is a member, have corresponded with the Public Authority with a view to persuading it to take action against Firstplus. They were particularly concerned at what they thought was a lenient approach by the Public Authority in imposing an apparently mild sanction on Firstplus and declining to provide detailed findings arising from its investigation or reasoned arguments for adopting the approach that it did.

The request for information and the scope of enquiry arising under it

5. The Decision Notice proceeded on the basis that the request for information which led ultimately to this Appeal was contained in an email dated 26 June 2013 and covered, (to quote from paragraph 2 of the Decision Notice), “*any information concerning adverse behaviour*” by Firstplus. We became concerned, during the hearing of the Appeal, that the information request, when read in context, might have a broader meaning and asked the parties to provide us with the complete sequence of correspondence that preceded the email of 26 June 2013.
6. The material provided by the parties at that stage, read alongside other material in the bundle of documents prepared for the Appeal, demonstrated the following history:
 - a. The Appellant entered into correspondence with the Public Authority about what he regarded as its inadequate response to the perceived unfairness of the operation by Firstplus of its interest provision. This had led to interest charges increasing (to 13.9% in some cases) during a period of time when interest

rates, generally, were reducing. The Appellant's evident purpose was to both complain about how the Public Authority had dealt with the matter in the past and to seek its assistance for the future. In that context he made it clear that he was contemplating legal proceedings against Firstplus and wished to know what Firstplus had been found guilty of by the Public Authority to justify the imposition of formal requirements.

- b. On 13 May 2013 the Public Authority, in the form of its Head of the Enquiries and Reporting Centre, wrote to the Appellant in an apparent attempt to pull together the various points he had raised. Having first defended the speed and adequacy of the Public Authority's responses, the letter went on to identify a possible request for the disclosure of information under either the FOIA or the Enterprise Act 2002 ("EA 2002"). (In certain circumstances the Public Authority has a discretion under EA 2002 to disclose information it has acquired in confidence if the information is required for the purpose of litigation – see paragraph 15 below.) Although the letter provided detailed reasons for refusing to disclose under EA 2002 it said nothing about FOIA.
- c. The Appellant sent a reply to the Public Authority on the same day in which he said:

"...we consumers are not being treated fairly/reasonably nor do we have access to a free market for the purpose of access to competition hence exploitation.

Humble consumers like myself have no choice but to rely on their regulators to look into these matters & find some common ground with a regard to fixing this situation, I find it very difficult to believe that this can be ignored/let to continue without some kind of investigation."

- d. In an email of 3 June 2013 the Appellant tried to be more specific in stating that he would like "any information you may be able to provide...". That prompted a response from the Public Authority which disclosed uncertainty as to whether the Appellant was in fact intending to make an information request under FOIA. It went on to say:

"if you advise us that you are in fact making a request for information under the FOIA, before we are able to deal with it, you will need to clearly describe the information that you are seeking so that we can consider whether we hold the requested information and whether or not we are under a duty to disclose it to you taking into account the exemptions which may apply."

- e. On 11 June 2013 the Appellant emailed in reply, explaining some of the legal and administrative steps being taken by him and others in respect of Firstplus and seeming to suggest that he would like any information which the Public Authority held which might assist those processes. The Public Authority's response to that communication, in a letter dated 21 June 2013, was to reiterate that it did not intend to treat any of the previous communications as a request for information under FOIA and that, if that was the Appellant's intention, *"you would need to describe the information sought to enable the OFT to consider (1) whether we hold the information requested and (2) whether or not the OFT was under any duty to disclose it."*
- f. On 21 June 2013 the Appellant sent the Public Authority an email in which he confirmed that he did wish to pursue the FOIA route to obtain information. His explanation of exactly what he sought is a little difficult to follow but we believe a fair reading of the document is that the information sought was any relating to the interest variation provisions relied on by Firstplus that had led the Public Authority to conclude that its requirements letter was appropriate. The Public Authority, however, stated, in a letter dated 26 June 2013 that it was still not clear to it what information was being sought and sought clarification of *"what specifically you are requesting under FOIA"*.
- g. The Appellant provided his answer to the question in an email sent on the same date, which clarified that his underlying complaint was about the operation by Firstplus of interest rates and *"associated behaviour in contradiction with current market trends & fair/unfair terms."* The email continued:
- "I would be grateful if it would be considered that any information held on related subject matter which could bring about a more informed conclusion on these matters specifically from the [Financial Ombudsman Service] initially & possibly in a legal capacity should matters have to go that far.*
- ...
- "If information is being held concerning adverse behaviour by [Firstplus] in relation to any of this in total or specific then I must request that consideration is given to release that information."*
- h. The Public Authority treated that email as a request for information under FOIA concerning adverse behaviour by Firstplus in relation to *"interest rates and associated behaviour in contradiction with current market trends and fair/unfair terms"*

Our view as to the scope of the request for information.

7. We interpret the request, in the context summarised above, as being for information relied on by the Public Authority in reaching the decision to impose requirements on Firstplus and/or disclosing the approach adopted by the Public Authority to its investigation, including the record of its conclusions and the public availability of that record. We do not think that the Appellant was asking for information about any allegations that others may have made from time to time, nor of facts or evidence that those other complainants may have presented to the OFT. He was looking for the Public Authority's findings, in a form which he could utilise in order to support his campaign, including the pursuit of the civil claim he evidently had in mind.
8. It is evident that the Public Authority interpreted the information request more broadly in some respects (such as complaints and information requests received from third parties), and more narrowly in others (so as to exclude its detailed conclusions and its decision not to include them in the requirements notice).

The Public Authority's response to the information request

9. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

10. The Public Authority refused the Appellant's request for information in a letter to him dated 3 July 2013. It stated that disclosure would prejudice the Public Authority's ability to carry out effectively its investigatory functions and that the requested information was therefore exempt under FOIA section 31(1)(a) and (g). The relevant parts of that provision are as follows:

"Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
(a) the prevention or detection of crime,
...
(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 –
(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,
...”*

11. The basis of the Public Authority’s reliance on this exemption was expressed in these terms:

“Persons conducting investigations need sufficient space to carry out their work, free of interference and any risk the investigation will be undermined by the disclosure of information about the way in which an investigation has been conducted, the internal processes that were followed, and the relevant information from other sources.”

12. The Public Authority acknowledged that the exemption was a qualified exemption, so that the information would still have to be disclosed unless the public interest in maintaining the exemption outweighed the public interest in disclosure. It informed the Appellant that it acknowledged that there was a strong public interest in transparency but considered that this was outweighed by the public interest in maintaining confidence in its system of regulatory enforcement.

13. The refusal was maintained following an internal review carried out at the Appellant’s request. At that stage the Public Authority indicated, in a letter to the Appellant dated 13 August 2013, that it proposed to rely on FOIA section 31(1)(g), rather than 31(1)(a). It also asserted that it was entitled to rely, in addition, on FOIA section 44(1)(a), read alongside EA 2002 section 237.

14. FOIA section 44 reads:

*“(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.”*

EA 2002 section 237 reads:

“(1) This section applies to specified information which relates to-

- (a) ...
- (b) *any business of an undertaking.*
- (2) *Such information must not be disclosed –*
 - (a) ...
 - (b) *while the undertaking continues in existence unless the disclosure is permitted under this Part.”*

EA 2002 section 238, as applied to the facts of this case, provides that “*specified information*” is information which “*comes to*” the Public Authority in connection with the exercise of certain functions, including the conduct of investigations under the CCA 1974.

15. There are certain circumstances where, notwithstanding the prohibition set out in section 237, the Public Authority may disclose relevant information. The use of the word “may” demonstrates that the Public Authority would have a discretion as to whether or not to disclose: it would not be obliged to do so. One of the circumstances in which the Public Authority would be able to exercise the discretion in favour of disclosure is where information is sought for the purpose of establishing or enforcing legal rights through a civil claim (EA 2002 section 241A(1)).
16. FOIA section 44 is an absolute exemption. If it is found to be engaged then disclosure need not be made: there is no requirement to consider the public interest balance under FOIA section 2.
17. The Public Authority also indicated at this stage that it wished to rely also upon FOIA section 40 (in order to protect the personal data of individuals who might be identified in documents covered by the information request), as well as section 42 (to protect material included in such documents which was covered by legal professional privilege).
18. The Appellant’s response to the outcome of the internal review was to lodge a complaint with the Information Commissioner about the way in which his information request had been handled.

The Information Commissioner’s investigation and the Decision Notice

19. Early in the Information Commissioner’s investigation he indicated that he did not intend to focus his investigation on the section 40 and section 42 exemptions because the information they covered was included in the same documents for which the original two exemptions were asserted. At the same time the Information Commissioner asked the Public Authority for a copy of the withheld information but, in light of its statutory obligation to maintain confidence, the Public Authority declined to release it without a formal Information Notice first being issued. Once that had been issued the Public Authority provided the Information Commissioner with a quantity of material which it said fell within the wide scope of the information request. The material had

been marked up manually to indicate which exemption was relied on in respect of each item of withheld information.

20. On 11 March 2014 the Information Commissioner issued the Decision Notice. He concluded that FOIA section 44 applied to the information in respect of which it was relied on by the Public Authority. It was information which had come to the Public Authority in the course of its investigation of complaints made about Firstplus and clearly related to the business of that company or to individuals mentioned within the information.
21. Although the decision under FOIA section 44 covered most of the withheld information there was some which did not fall within it and the Information Commissioner accordingly considered it in the context of FOIA section 31. He was satisfied that the Public Authority did have law enforcement powers that brought its activities within section 31(2) and that disclosure of the relevant information would reveal how it went about its work under CCA 1974 and would make it harder to do future work of that nature. He also concluded that disclosure would lead to the discouragement of those who might otherwise cooperate with the Public Authority. The exemption was therefore engaged, in his view. As to the public interest test the Information Commissioner acknowledged that there was a public interest in disclosure, because this would promote greater transparency and accountability in the Public Authority's actions. In that context he drew attention to a number of individuals, who were in a similar situation to that of the Appellant and who had expressed concern about the outcome of the Public Authority's investigation of Firstplus. He set in the balance against those considerations the public interest in the effective operation of the Public Authority's regulatory functions, which he thought would be undermined if its methods of investigation were to be disclosed. Those being investigated would not feel able to deal frankly with it when being investigated and communications within the investigating team might become more guarded. He saw strength in that argument even though the investigation of Firstplus had been completed by the time that the information request was submitted. He also took into account that the information which had been withheld under FOIA section 31(1)(g), and which was not otherwise exempt under section 44, was minimal and would add little to public understanding.
22. The Information Commissioner concluded that the Public Authority should be able to regulate the credit licence regime, for the benefit of consumers as a whole, and that the public interest in maintaining the exemption therefore outweighed the public interest in disclosure.

The Appeal to this Tribunal

23. On 17 March 2014 the Appellant lodged an appeal against the Decision Notice with this Tribunal.

24. Such Appeals are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
25. The Appellant's Grounds of Appeal did not seek to join issue with the detailed arguments set out in the Decision Notice. The essence of his argument was that the injustices which he felt had been suffered by people like him, who were trapped into second charge agreements at high interest rates, should outweigh the advantage of confidentiality in the regulatory processes. On that basis he asked, in effect, for the withheld information to be reviewed to see what could be made available in order to provide the public with information about the Public Authority's investigation and its decision to serve a notice of requirements on Firstplus which did not record, or was not accompanied by, its reasons for doing so.
26. In a written Response filed by the Information Commissioner on 11 April 2014 it was argued that the effect of the Grounds of Appeal was to challenge the application of the public interest balance arising under FOIA section 31 and that there was therefore no challenge to the conclusions in the Decision Notice to the effect that the exemption was engaged. Nor, it was said, was there a challenge to the conclusion that the section 44 exemption was engaged and, in that respect, there was no requirement to consider the public interest because the exemption was absolute.
27. The Appellant did seek to clarify his Grounds of Appeal, in response to an invitation to that effect from the Tribunal Registrar, by asserting that he did wish to challenge the engagement of the section 44 exemption. However, his supporting arguments reverted to a general concern that the FOIA should not be used to prevent him, and others in a similar position to him, from being given the information requested.
28. On 21 May 2014 a Direction Notice was issued by the Chamber President to the effect that the Public Authority should be made a party to the Appeal. On 19 June 2014 the Public Authority filed its own written Response to the Appeal. It largely supported the Information Commissioner but also drew attention to the potential danger of disclosing information which might be said to have not "come to" the Public Authority and therefore to be outside the scope of the statutory prohibition relied on. Such information would, it was said, be of limited practical value for the purposes of anyone seeking to use it to call into question the appropriateness of the decision to either take, or not take, particular regulatory or enforcement actions against a holder of a consumer credit licence. It added:

“It would be difficult for any fair-minded person to form any view about the appropriateness or otherwise of the [Public Authority’s] actions, on the basis of internal communications or other documents from which all information that had “come to” the OFT had been excised.”

29. The Appellant chose to have his Appeal considered at a hearing, rather than on the papers. That was his right. However, neither the Information Commissioner nor the Public Authority attended the hearing, both preferring to have the case determined on the basis of their written submissions.
30. The Tribunal was provided with the withheld information, in the same format as submitted to the Information Commissioner during his investigation. It was substantial in bulk and provided in unpaginated files, in reverse date order with a degree of overlap between the contents of different sections and an inadequate index. The Public Authority sought to impose on the Tribunal strict terms as to how the materials should be handled in order to prevent it being seen by any third party, including the Appellant. This included a requirement that the Appellant should not even be allowed to see how much material was involved. It was therefore necessary for the material to be placed in a secure place, outside the hearing room, while the appeal proceeded. It also led to the panel gaining access to the material rather too close to the date of the hearing than was desirable.
31. At the hearing the Appellant accepted that, in light of the Public Authority’s Response, the terms of FOIA section 44 left very little scope for him to develop the argument foreshadowed in his Grounds of Appeal: if and to the extent that withheld information was covered by the statutory prohibition there could be no reason to order its disclosure. His argument did, however, have impact on both the extent to which withheld information fell within the statutory prohibition for the purposes of FOIA section 44 and the issue of whether FOIA section 31 was engaged (and, if it was, the operation of the public interest balance).
32. The Appellant reiterated during the hearing that his interest was, not in seeing every item of information assembled by the Public Authority during the investigation, or every issue taken into consideration by those conducting the investigation. He simply wanted to know what it was that satisfied the Public Authority that it should issue a notice of requirements in the form that it did.

The Tribunal’s deliberations and conclusions

33. The Tribunal panel has carefully considered every document made available to it by the Public Authority. This was done in part on the day of the hearing but, due to the late availability of the closed material and

the way in which it had been assembled, it was necessary to reconvene at a subsequent meeting.

34. We found that some of the material did not require to be disclosed because it falls outside the scope of the information request. We found that the withheld information included material relating to complaints and criticisms of the Public Authority submitted by individuals, (other than the Appellant) or groups. It also included requests for information from those individuals or groups. In some cases the correspondence included specific allegations about Firstplus and the way that it conducted its business. We considered that, in light of the interpretation of the information request in context, as summarised at paragraphs 7 and 8 above, these materials fell outside the scope of the information request and they were accordingly discarded.
35. Our overall conclusion is that the great majority of the remaining documents contained information falling within the scope of the information request and was properly withheld.
36. A careful study of the material satisfied us that many of the documents included information gathered by the Public Authority during the course of its investigation. They clearly recorded information that had “come to” the Public Authority in the course of performing its duties and fell within the statutory prohibition under CCA 1974. The information was therefore exempt under FOIA section 44. The materials took the form of written evidence, submissions presented to the Public Authority and notes made at meetings. On the whole we accepted that this exemption had only been relied upon in respect of documents that were clearly covered by it.
37. With respect to FOIA section 31, we accept the arguments put to us by the Information Commissioner and the Public Authority that those carrying out an investigation should be granted a considerable degree of confidentiality so that their working methods, and the thinking processes involved in assessing evidence and working towards conclusions, should not be available to the public, including those who might have an unworthy motive for obtaining such information. We are satisfied, therefore, that the Public Authority’s investigatory activities would be prejudiced if this category of information were to be disclosed. We are also satisfied that, with a few exceptions, the documents marked by the Public Authority as ones to which, he argued, this exemption applied were properly categorised as such.
38. Some of the material for which this exemption was claimed was anodyne in content. For example, it simply recorded arrangements for a meeting. In those circumstances the case for claiming that the section 31 exemption was engaged is less strong. However, as the information contained in such a document would not provide the Appellant with any of the sort of information he seeks, it would, in any event, fall outside the scope of the information request.

39. The public interest in maintaining the section 31 exemption would have been stronger had the notice of requirement included, or been accompanied by, an explanation of what it was that had convinced the Public Authority that the service of such a notice was appropriate. However, we are satisfied that preserving privacy in respect of the investigation is sufficiently important that it outweighs the public interest in the disclosure of much of the material covered by this exemption.
40. In the course of our review of the materials we identified a small number of documents which are not exempt and should be disclosed. We have set out in a confidential annex to this decision our reasons for concluding that they fell within the scope of the information request and should be disclosed.
41. We are able to say, in this open part of our decision that in some cases the documents did not contain any information falling within the scope of the prohibition in EA section 237. In others the information that would bring the document within the scope of that provision can be redacted without the document as a whole losing its meaning. We have indicated in the confidential annex the redactions which should be made.
42. In some cases we have concluded that the exemption provided under FOIA section 31 does not apply because the document was created after the investigation had been completed and a decision made. We have also concluded, in those cases, that even if the exemption had applied the public interest in disclosure is at least equal to the public interest in continued secrecy so that the exemption may not be maintained under FOIA section 2(2)(b).
43. In every case where we have concluded that neither section 31 nor section 44 of the FOIA prevent disclosure we have considered, also, whether the exemptions provided in either section 40 (third party personal data) or section 42 (legal professional privilege) might apply. We are satisfied that, for the most part, the seniority of those identified justifies disclosure (because it would not constitute a breach of the data protection principles), but the names of less senior individuals have been redacted. We have made an appropriate redaction to one of the documents in order to protect legal professional privilege. We accordingly direct that the Public Authority disclose the documents identified in the annex, and redacted in accordance with guidance we have provided there, within 35 days of the date of this decision.
44. The confidential annex should itself remain confidential until the time for appealing this decision has expired and, in the event that an appeal has been filed by then, that appeal has either been withdrawn or disposed of.
45. Our decision is unanimous.

Chris Ryan
Judge
21st January 2015