

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2020

Public Authority: Department for Business, Energy and Industrial Strategy ('BEIS')

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on the consultation by the Chartered Trading Standards Institute with commercial organisations regarding a review of the used car guidance it provides.
2. The Commissioner's decision is that BEIS has appropriately applied FOIA section 43(2) - Commercial interests to withhold the information held within the scope of the request. She also finds that on the balance of probabilities no information is held in respect of points 3 and 4 of the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The Chartered Trading Standards Institute (CTSI) is an independent membership organisation. Its primary role is to promote best practice among its members who are Trading Standards practitioners and provide training for them. It is not a public body.
5. CTSI also has a commercial function that carries out a number of activities on behalf of BEIS. One of these activities is the maintenance and development of a web portal called Business Companion. It is aimed at small businesses that typically do not have access, or that have limited access, to lawyers to interpret and apply consumer law. Business Companion is funded by BEIS.

6. In 2018 CTSI decided to update its guidance on selling used cars as research had indicated that used cars is a significant area of consumer detriment. This guidance was not commissioned by BEIS.

Request and response

7. On 24 January 2020 the complainant wrote to BEIS and requested information in the following terms:
8. "1. In relation to why the extensive and repeated delays have occurred in relation the release of the used car guide.

2. A copy of the exchanges to the consultation from and to CTSI of commercial organisations that are not covered by GDPR, the exchanges were commissioned by BEIS and paid for by BEIS and the taxpayer so are in the public interest.

3. The cost of producing the guide so far and expected final cost.

4. The cost of getting the CPR's onto the statue book and all associated cost so far to the taxpayer.

5. My request as contained in the e-mails to the legal department as to what is considerations are in relation to the proposed guide put to it after the consultation by CTSI. It may also be necessary to raise this as a complaint to the department or have the legal department make contact with me to discuss this whichever is necessary. Also, please could you have your legal team explain what is happening to the release and approval of the used car guide.

6. As put to [name redacted], I request a formal response via my FOI "Please also let me know what further protection of assistance this new guide will provide to affected consumers, that the Motor codes, the CPR's and the SCOTT's motor code and the previous OTF used car guide did not."

9. BEIS responded on 10 February 2020. It provided an explanation on points 1, 5 & 6; a refusal notice in reliance of section 43(2) FOIA with respect to point 2 of the request and explained that no information is held in respect of points 3 & 4.

10. Following an internal review BEIS wrote to the complainant on 24 March 2020 upholding its initial response.

Scope of the case

11. The complainant contacted the Commissioner on 7 April 2020 to complain about the way his request for information had been handled.
12. BEIS addressed the complainant's questions at points 1, 5 and 6 of the request providing answers as requested.
13. It appears to the Commissioner that following correspondence outside of the FOIA the complainant was mis-directed to BEIS as having the information that he requested at points 2, 3 and 4 and this has resulted in a misunderstanding on the involvement of BEIS and any information held by it.
14. In relation to point 2 BEIS explained to the complainant that it does not have access to and is unable to supply information on exchanges between CTSI and third parties. The information it holds comprises reports on this correspondence in the format of a spreadsheet.
15. The Commissioner understands that this information held by BEIS with regard to the used car guidance is as a result of CTSI requesting comment from BEIS. If this had not been the circumstance, the spreadsheet held in regard to point 2 of the request would not have been held.
16. The Commissioner therefore considers the scope of her investigation is consideration of the information held in respect of points 3 and 4 of the request and the application of section 43(2) FOIA to the information held in respect of point 2 of the request.

Reasons for decision

17. **Section 1 FOIA** states:

"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 the information communicated to him."

18. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

19. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
20. From correspondence provided by the complainant the Commissioner understands how he was led to believe that BEIS commissioned the Guide and is responsible for the associated costs and would therefore hold the information requested in points 3 and 4.
21. BEIS explained to the Commissioner, in detail, that it funds CTSI for the development and maintenance of its Business Companion web portal and sets the framework for so doing. However, the day to day operation of Business Companion is left to CTSI to manage independently including decisions on the publication of guidance and the use of the funding provided in the most cost-effective way based on its own intelligence and experience. Business Companion contains around 250 guides each of which is produced by CTSI based on information received through its horizon scanning exercises. BEIS does not receive or hold any information as to the costs associated with any individual piece of guidance.
22. With regard to points 3 and 4 of the request the Commissioner is satisfied by BEIS' explanations and confirmation that the requested information is not held.
23. **Section 43(2) FOIA** states:

"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)."
24. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would – or would be likely – to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the

Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

25. In this case it is the commercial interests of CTSI and those commercial respondents to the consultation which are the focus of the refusal notice.
26. Where the disclosure of requested information may potentially prejudice a third party's commercial interests, a public authority should consult with the relevant third parties about such disclosure at the time of the request. This is in accordance with the section 45 code of practice.
27. In responding to an FOIA request the Commissioner therefore expects public authorities to consult with those individuals who are involved with a consultation and whose commercial interests may be affected by disclosure of the requested information. In this case BEIS consulted CTSI as it was the contact with those responding to the consultation.
28. Following consultation BEIS explained CTSI's view that the requested information contained within the spreadsheet should be withheld under section 43(2) FOIA. CTSI identified that both its own commercial interests and those of the commercial respondents to the consultation would be likely to be prejudiced by disclosure of information relating to the operation of their businesses and their free and frank comments regarding the new guidance.
29. The Commissioner understands that when conducting consultations, as in this case CTSI, must solicit industry for responses to contribute. This particular consultation was aimed at strengthening consumer protection in the area of used cars. In order to produce the guidance which is now available¹ commercial organisations and others such as the British Vehicle Rental and Leasing Association² and the National Franchised Dealers Association³ provided feedback which assists in creating well-considered guidance.

¹ <https://www.businesscompanion.info/focus/car-traders-and-consumer-law>.

² <https://www.bvrla.co.uk/resource/2019-bvrla-response-to-ctsi-car-traders-consultation.html>

³ <https://www.nfda-uk.co.uk/press-room/newsletter/2020/10/nfda-responds-to-ctsi-consumer-law-guide-for-used-carindustry>

30. The Commissioner notes that the comments provided to CTSI were not provided to a public authority subject to the FOIA. The information held in a spreadsheet of responses, which comprises the information withheld by BEIS, is only held by BEIS because it was provided to it by CTSI for specific advice. The responders were not advised that the material provided could be subject to the FOIA. As referenced in paragraph 29 some non-commercial respondents have already published their contributions online.
31. BEIS explained to the Commissioner that:

"CTSI also has a commercial interest which would likely to be prejudiced by release of the spreadsheet. The development of the used cars guidance was carried out under the business education grant from BEIS to CTSI. All the projects under this contract feature some level of industry engagement or consultation. The business education contract seeks to support legitimate businesses and protect consumers by offering specific and practical guidance on how the Law may apply in certain circumstances."
32. The Commissioner notes that full engagement by respondents is therefore important to complete such projects. She has had the benefit of examining the withheld information and notes that CTSI, with reference to BEIS has determined the content of the published guidance based on its balanced assessment of the various contributions of numerous non-commercial and commercial organisations.
33. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by BEIS relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
34. The Commissioner is satisfied that the second criterion is met as disclosure of the information withheld on the basis of this exemption has the potential to harm both consultation respondents and CTSI commercial interests as described above. The Commissioner considers that the likely prejudice could also be broadly interpreted as prejudicing the working relationship between CTSI and respondents to consultations.
35. BEIS specified that it believed that prejudice to commercial interests 'would be likely to' result, rather than 'would' result. This means that the test that the Commissioner has applied here is whether there is more than a hypothetical or remote possibility of prejudice occurring. She is satisfied that the level of prejudice has been met.
36. Having determined that the exemption is engaged the Commissioner has considered the public interest test in accordance with FOIA section 2(2)(b).

The public interest

37. In considering whether there is an overriding public interest in providing the requested information, the Commissioner has considered the arguments put forward by BEIS. She must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. BEIS acknowledged that there is always public interest in the disclosure of information to demonstrate openness and transparency in public authorities.
39. In favour of maintaining the exemption BEIS explained that if businesses would be less likely to respond to consultations in an open manner, or at all, due to concern that their comments may be released into the public domain, this would impact on the breadth and full consideration of all the views sought. In turn, this would be likely to have a negative impact on the quality of any guidance that CTSI is able to produce. If respondents are deterred from contributing there may be insufficient evidence generated to fully consider issues that are affecting business or in the way that businesses are engaging with consumer protection legislation.
40. The Commissioner attributes significant weight to greater transparency making Government and its decision making more open and accountable. However, she also considers that it would not be in the public interest to negatively impact the ability to develop and publish guidance which is created for the benefit of consumers.
41. She accepts the compelling public interest in companies and Government, including CTSI in their role of providing guidance on consumer law to businesses on behalf of Government, being able to have discussions relating to commercially sensitive information. Such information can assist in formulating Government policy and understanding the challenges faced by companies as well as considering how to respond to those challenges. In sharing information in this way companies should not face prejudice to their commercial interests. The Commissioner is cognisant of the fact that the response were provided to a body not subject to the FOIA.
42. Consequently the Commissioner considers that the public interest favours maintaining the exemption and withholding the information held at point 2.

Other matters

43. The Commissioner cannot comment on private organisations, such as the CTSI, however, she notes that the circumstances in this case have not been assisted by the lack of clarity and the referrals made to BEIS which have misled the complainant with the notion that BEIS holds particular information.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Hughes
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