

Hearing 85-202000964

Decision

Utility Regulation and Competition Office (OfReg)

Sandy Hermiston

Ombudsman

20 May 2021

Summary

An applicant requested fuel test results from the Utility Regulation and Competition Office (OfReg) under the Freedom of Information Act (2021 Revision). OfReg routinely publishes those records on its website, but it uses codes to withhold the names of the retail locations tested.

OfReg exempted the location key listing, which links the codes to the underlying retail businesses, claiming that it constituted information concerning commercial interests that would be prejudiced by its disclosure. OfReg also claimed that the names of two fuel retailers who were sole traders constituted personal information that would be unreasonable to disclose.

The Ombudsman found that neither of the two exemptions applied. OfReg did not demonstrate that it was more likely than not that commercial interests would be prejudiced by the disclosure. The names of the two sole traders were not personal information, and in any event it would not be unreasonable to disclose the redacted information, as it was already in the public domain. Even if the exemptions applied, the disclosure would be in the public interest.

The Ombudsman required OfReg to disclose the location key listing within 14 days.

Statutes¹ considered

Freedom of Information Law (2021 Revision) (FOI Act)

Freedom of Information (General) Regulations (2021 Revision) (FOI Regulations)

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

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A. INTRODUCTION

- [1] On 12 August 2020, the applicant made a request to OfReg under the FOI Act for the following information:

Please send me copies of the latest inspection reports which show the quality of different fuels at all the gas stations on the island. I do not know [what] these reports are called but am concerned about contaminated fuels from water or whatever. I would also want any reports which show fuel leakage into the environment at all the gas stations on the island if you have those. For example, water may be leaking into fuel tanks that are rusting underground. Fuel may also be leaking out and tainting the soil and ground water.

- [2] The Information Manager (IM) acknowledged the request within two days, and issued the initial decision on 7 September 2020. OfReg clarified that it conducts random periodic fuel testing as part of its fuel sectors consumer protection activity. The latest available results of the tests are routinely published on OfReg’s website. The IM also confirmed that there are no records on file of any compromised fuel tanks allowing fuel to leak out or water to leak in, as the applicant had suggested.
- [3] The applicant appealed to the Ombudsman, on the basis that the time taken to respond was unreasonable and that it violated the requirements of section 7(4) of the FOI Act. The applicant also requested more details about the location codes for the fuel test results. Each fuel test report is identified by a code that links it to the particular supplier or retail outlet. These codes are given in the location key listing, which is the requested record in this appeal.
- [4] On 7 October 2020, OfReg indicated that it was withholding the location key listing in accordance with the exemption in section 21(1)(b), relating to information prejudicing commercial interests. The applicant requested an internal review of this decision.
- [5] On 7 November 2020, OfReg’s Chief Executive Officer (CEO) told the applicant that conducting the internal review would incur a delay of 14 days, since OfReg was seeking input from third parties. However, following this delay no internal review decision was issued.

- [6] On 26 November 2020, the applicant appealed to the Ombudsman over OfReg’s failure to provide access to the location key listing. The dispute could not be resolved informally, and a formal hearing process was started.
- [7] In the course of the hearing, OfReg also raised a new exemption under section 23, arguing that disclosure of the withheld location key listing would reveal the personal information of two individuals and that such disclosure would be unreasonable.

B. CONSIDERATION OF ISSUES

(a) Is the location key listing exempt from disclosure because it contains information concerning the commercial interests of any person or organization and the disclosure of that information would prejudice those interests, pursuant to section 21(1)(b)? If so, would disclosure nevertheless be required, as it would be in the public interest under section 26(1)?

- [8] Section 21 exempts certain records from the general right to access, as follows:

21. (1) Subject to subsection (2), a record is exempt from disclosure if —

(a) its disclosure would reveal —

(i) trade secrets;

(ii) any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(b) it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.

(2) Subsection (1) shall not apply where the applicant for access is the person or organisation referred to in that subsection or a person acting on behalf of that person or organisation.

- [9] The term “commercial interest” is not defined in the FOI Act. In a previous decision I found that:

Given that there are specific exemptions for “commercial value” and “trade secrets” I must find an interpretation that makes sense of the words “commercial interests” and find a meaning that does not repeat or contradict the other two exemptions listed in section 21. It is my opinion that this provision refers to interests that relate to trading such as the sale or purchase of goods which are undertaken for the

*purpose of revenue generation and normally take place within a competitive environment.*²

[10] OfReg stated that:

It is obvious that the test results would be information of commercial value and that commercial interests are impacted.

[11] For clarity, it is the location key listing that is at stake in this appeal, not the fuel test results, which are already in the public domain, as they are routinely published on OfReg’s website in pseudonymized form. The test results and the location codes are linked to the sale or purchase of goods (i.e. fuel), undertaken for the purpose of revenue generation within a competitive environment, and therefore involve “the commercial interests of any person or organisation”.

[12] OfReg claimed that the disclosure of the location key listing might harm the commercial interests of the fuel retailers. According to OfReg, full disclosure of the location codes “would be in breach of existing commercial agreements. The Office held the position that this should be confirmed prior to the release of the key to the codes ...”. However, OfReg did not specify what these commercial agreements were.

[13] OfReg consulted the third-party fuel retailers on the disclosure of the location key listing and received a handful of responses. The response from one fuel retailer indicated that it thought that its overseas supplier might object to its identity being revealed as the fuel producer, and it made an unspecified reference to the disclosure potentially “breaching commercial agreements”. The retailer indicated that it would seek the views of its overseas supplier, but none were provided to me. When we pursued the matter with OfReg, although several months had passed, we were told that no further information was available on that point.

[14] This reasoning is particularly unconvincing because the name and logo of the overseas fuel supplier is prominently displayed on the home page of the local retailer’s website. Therefore, it is not reasonable to suggest that the fuel supplier would have any expectation of confidentiality. It can hardly be a violation of a commercial agreement to disclose information that is already published by the retailer itself. Furthermore, private sector entities cannot simply “contract out” of their regulator’s lawful obligations under the laws of the Cayman Islands, including the FOI Act.

[15] It is not acceptable for OfReg to hypothesize that disclosure might breach commercial agreements and state that this “should be confirmed”. Section 43(2) places the burden of

² Ombudsman, Hearing Decision 72-201800330/72-2018000337, Ministry of Commerce, Planning and Investment, 18 October 2018, para. 17(iii).

proof in an appeal on the public authority (i.e. OfReg) “to show that it acted in accordance with its obligations under this Act”. Simply stating that further evidence is required does not meet those obligations. For these reasons, I consider this argument unproven and abandoned.

- [16] A small number of other fuel retailers who replied took the general position that “releasing the key to the codes could have serious consequences, such as the loss of business due to the size of the jurisdiction and the fuels market.” OfReg also argued that:

[Use of the] codes seeks to eliminate any stigma persons may have of perceived issues at sites, and would allow persons to review the results on an objective basis.

- [17] OfReg seems to argue that the identity of the retail businesses should be withheld in order to protect them in the event that their fuel was found deficient and customers decided to take their business elsewhere. It seems reasonable that the general public might choose not to patronize a particular retailer whose fuel does not meet standards, and in that sense the disclosure of the location key listing could potentially affect the commercial interests of retailers with bad fuel test results. This position is inconsistent with OfReg’s role of “protecting the interests of consumers”.

- [18] One of the consulted retailers pointed out that, because of the unique nature of their products in the Cayman Islands, they could already be identified in the fuel test reports. However, they did not perceive this as a problem and, indeed, expressed the view that a “level playing field” would require the other retailers to be equally identifiable.

The voluntary nature of the testing programme

- [19] OfReg stated that there is no formal statement or regulation that sets out fuel quality parameters and specifications in the Cayman Islands. The fuel testing programme is not required by Cayman Islands’ law, and there are no written agreements between OfReg and the fuel retailers in this regard. The testing programme relies on the willing cooperation of the fuel vendors, which, OfReg argues, is more readily ensured if the fuel test results are not linked to specific retailers. According to OfReg, disclosure of the identity of the fuel retailers associated with specific test results could cause some of them to withdraw from voluntary cooperation with the programme.

- [20] It is important to assess this in the light of OfReg’s enabling legislation, the Utility Regulation and Competition Act (2021 Revision) (the URC Act), section 6 of which lists OfReg’s broad responsibilities and powers, which require it to protect consumers and ensure that services are satisfactory. OfReg may conduct research and enquiries, establish standards and require the production of information.

- [21] Given these broad and strong regulatory powers, it seems that OfReg could require the production of this information in any event.

Confidentiality of information under the URC Act

[22] Section 107 of the URC Act deals with the confidentiality of information submitted to OfReg. It provides a mechanism for identifying and protecting confidential information, which subsection 107(1) defines as “information which is given in confidence to [OfReg] and which, in the case of a document, is marked ‘Confidential’ by the person giving the document.”

[23] Subsection 107(2) states:

(2) Any person submitting information to the Office may request that the Office treat such information as confidential.

[24] Subsection 107(3) empowers OfReg to “grant a request to treat information as confidential if [it] concludes that the information” meets one of the listed criteria, including:

...

(b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure; [and]

(c) other information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates;

[25] I do not find that this reasoning supports OfReg’s arguments for withholding the identity of the retailers taking part in the fuel testing programme. Neither the fuel test reports nor the location key listing were “given in confidence” to OfReg, and, since its establishment in 2017, no requests for confidentiality protection under section 107 have been submitted by fuel retailers. OfReg speculated that this was because their identities are not revealed in the fuel test results. Irrespective of this, the argument does not support OfReg’s claim that disclosure would prejudice commercial interests.

Misunderstanding the test results

[26] OfReg contended that misinterpretation of the fuel test results “can prejudice” the fuel retailers and “potentially result in the loss of business and other reputational issues, which may place a liability on government.”

[27] OfReg did not explain what it meant by its reference to government liability, but it seems to suggest that the government could be blamed for any loss of business caused by the misinterpretation of poor fuel test results if the location key listing were disclosed. I find this reasoning unconvincing.

[28] The risk that government information is misinterpreted always exists, but it is not removed by withholding records. This is especially so in the light of the FOI Act, which not only

supports openness and accountability but also requires user and motive blindness.³ The best way to counter misinformation about fuel test results is to educate consumers and help them to protect their health, safety and financial interests on an informed basis, rather than withholding the retailers' identity from them in case they misinterpret the fuel test results.

The likelihood of prejudice

[29] For the exemption to apply, section 21(1)(b) requires that the disclosure "would prejudice" the commercial interests. The UK Information Tribunal has clarified that the term "would" means "'more probable than not' that there will be prejudice to the specific interest set out in the exemption...".⁴ OfReg therefore has to demonstrate that the disclosure would more probably than not cause prejudice to commercial interests.

[30] OfReg has described the likelihood of the prejudice in different ways (as already described above):

- It said that the disclosure of the location key listing "would" be in breach of commercial agreements, but it did not provide any details, explanation or evidence to back up this assertion, and it said the issue remains to be confirmed, which it has not done.
- It said that some businesses "could" withdraw from the voluntary testing programme if the retailers' names are disclosed, but it has not explained whether this is more than a mere possibility, as required for the exemption to be engaged.
- It said that misunderstanding the test results "can" prejudice the retailers. However, the mere possibility of prejudice is not sufficient for the exemption to be engaged, which requires that prejudice is more likely than not.

[31] **For the above reasons I find that OfReg did not demonstrate that commercial interests would be prejudiced by the disclosure of the location key listing, or that the required standard of likelihood was met. Therefore, the disclosure of the location key listing is not exempted under section 21(1)(b).**

[32] Since I have found that the exemption claimed by OfReg does not apply, I am not required to conduct a public interest test pursuant to section 26(1).

[33] For the avoidance of doubt, even if the claimed exemption applied, the public interest in the disclosure of the names of the businesses associated with particular fuel analysis results would outweigh the public interest in protecting the commercial interests involved.

³ See: Ombudsman, Hearing Decision 71-201900152, Lands & Survey Department, 24 September 2020, para. 29.

⁴ UK Information Tribunal, Ian Edward McIntyre v Information Commissioner and Ministry of Defence, 11 February 2008, EA/2007/0068, para. 40.

(b) Is the location key listing exempt because its disclosure would involve the unreasonable disclosure of personal information of any individual, whether living or dead?

[34] Section 23 states:

23. (1) Subject to the remaining provisions of this section, a record is exempt if its disclosure would involve the unreasonable disclosure of personal information of any natural person, whether living or dead.

...

(5) In determining whether the disclosure of third-party personal information would be reasonable, consideration shall be given as to whether the disclosure would be permitted under the Data Protection Law, 2017.

[35] “Personal information” is defined in regulation 2, as:

... information (including information forming part of a database) or an opinion, whether true or not, about an individual, whether living or dead, whose identity is apparent, or can reasonably be ascertained, from the information or opinion, and includes the particulars set out in Schedule 1.

[36] Schedule 1 of the FOI Regulations provides examples of various types of personal information, including an individual’s name.

[37] OfReg argued that:

Two permit holders operate the retail business in their own names ... disclosing the codes would reveal their personal information as per sub regulation 23(g) “an individual’s educational, financial, employment, ...”. Thus, the record cannot be disclosed to the requestor without their consent. The DP [Data Protection] Act also provides that personal data should only be disclosed under certain circumstances.” Nonetheless, the Office notes that the DP Act will not apply to data, in relation to the parties, which is publicly available and/or if the data cannot be classified as “personal”, e.g., trade and business licences and not enough information for direct identification [sic].

[38] OfReg also stated that:

The external labs who conduct the testing may require samples to be randomized. Hence, the Fuels team took measures to ensure the anonymity of the source of the samples sent for testing.

[39] This statement relates to the testing methodology and the manner in which the samples are provided to the lab that analyzes them, but it has no bearing on the question of access to the results after completion of the tests, and it does not support the case for non-disclosure under the FOI Act. The fuel tests are already conducted on a pseudonymized basis. However, the need to randomize samples does not preclude OfReg from identifying the retailers and disclosing the test results afterwards.

[40] OfReg cited a case decided by the European Ombudsman (EO), involving clinical study reports held by the European Medicines Agency (EMA), in which the EO supported the redaction of codes (pseudonyms) identifying individual patients “to ensure that patients could not be indirectly identified.”⁵ However, the circumstances of that case are fundamentally distinguished from the present appeal, as the former case concerned sensitive health information, and redacting the pseudonyms ensured that the data could not be combined with other data to identify the individuals indirectly. Therefore, it has no bearing on the present appeal.

[41] There are a number of gas stations and other fuel businesses in the Cayman Islands that are named for individuals (presumably the owners), e.g. “X’s Esso”, or “Y’s Rubis”. The location key listing includes at least 13 businesses with a company name that comprises a personal name. These names are commonly used in correspondence and advertising, and on social media and signage by the retailers themselves.

[42] In **Durant v FSA**, the court ruled that “Mere mention of the data subject in a document held by a data controller [would not] necessarily amount to his personal data.” For information to be subject to protection under data protection legislation, it would have to be “biographical in a significant sense” and:

have the data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or had an interest... In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.⁶

⁵ European Ombudsman, Decision European Medicines Agency, Case 1602/2016/JAS, 8 February 2018.

⁶ Michael J Durant v Financial Services Authority, [2003] EWCA Civ 1746, para. 28.

- [43] The disclosure of the location codes would not reveal personal information on any individual's educational, financial or employment life, as OfReg claimed. The fuel test results do not relate to the owners as individuals, whether sole traders or not. They are not biographical in nature, and they do not focus on the private life of the individual owners, but rather on the quality of the fuel products they sell.
- [44] In addition, the names of owners or co-owners of local resident companies, such as gas stations, are included in the register of past and present members of the company pursuant to section 40 of the Companies Act (2021 Revision). In accordance with section 44 of that Act the register of members must be open for public inspection at the registered office of the company. The fact that an individual is an owner or co-owner of a gas station is therefore public knowledge.
- [45] OfReg informed me that one of the two sole traders among the owners is deceased. Since the Data Protection Act (DP Act) applies only to the personal data of living individuals, there are no objections under the DP Act to disclosing the deceased individual's name. The other name is very common and cannot be considered to identify any given individual.
- [46] **Under these circumstances, I find that the names of two sole traders, which feature on the location key listing and which OfReg claims are exempt under section 23(1), are not personal information. Even if they were, and after consideration under the DP Act, it would not be unreasonable to disclose the redacted information, since the names are already in the public domain.**
- [47] **Consequently, the exemption in section 23 does not apply, and no further public interest test is required.**
- [48] For the avoidance of doubt, even if the claimed exemption were to apply to the name of the sole traders, the public interest in disclosure would outweigh the public interest in maintaining the exemption.

Procedural issues

Timing of the initial response

- [49] The appeal was initially made because the applicant considered that OfReg took too long to provide its initial response.
- [50] The request was made on 12 August 2020 and the initial decision was provided on 7 September, which was 26 days later. Therefore, the initial decision was given well within the statutory 30 calendar days allowed for a response.

[51] The initial decision essentially referred the applicant to the (redacted) published fuel test results on OfReg’s website. The IM also informed the applicant that there were no records of fuel leaks. The applicant argued that this initial decision violated the requirement in section 7(4) to respond “as soon as practicable”, given the fact that the records were readily available.

[52] Section 7(4) requires that an initial decision is given as follows:

(4) A public authority shall respond to an application as soon as practicable but not later than —

(a) thirty calendar days after the date of receipt of the application; or

...

[53] Section 7(4) requires that the initial decision be given “as soon as practicable” and within 30 calendar days. This should be interpreted as “promptly” or “without undue delay”. Public authorities should consider the 30-calendar-day period allowed for a response as the longest possible time frame in which they can respond, not as a target date (except where an extension for good cause is relied on).

[54] Public authorities should be able to account for their time and explain why they have taken as long as they did. In this instance, the response to the request was simple, as the information was already available on OfReg’s website, and OfReg could have responded sooner. Nonetheless, OfReg acted within the period allowed in the FOI Act, and it does not need to take any further action on this point.

Third-party consultations and Internal review

[55] As described above, after receiving the initial decision that the names of the retailers were being withheld, the applicant asked for an internal review. At the end of the 30 days allowed for the internal review, OfReg’s CEO announced that a further 14 days would be needed, since third parties were being consulted. After this time had passed, no internal review decision was issued to the applicant.

[56] Although public authorities are free to consult commercial third parties, doing so does not extend the time within which decisions have to be provided to an applicant. There is no statutory requirement to consult commercial third parties (unlike consultation with third parties concerning the disclosure of their personal information). There is also no provision to extend the time allowed for an internal review, which must be conducted within 30 calendar days. Therefore, the delay communicated to the applicant was not compliant with the FOI Act.

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decision:

- The exemption in section 21(1)(b) does not apply to the requested record.
- The exemption in section 23(1) does not apply to the requested record.
- I require OfReg to disclose the requested record (the location key listing) within 14 days.



Sandy Hermiston
Ombudsman