



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 31 May 2006

Public Authority: Department of Trade and Industry
Address: 1 Victoria Street
London
SW1H 0ET

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Department of Trade and Industry (the "DTI") has dealt with the complainant's request in accordance with the requirements of Part I of the Act.

1. Freedom of Information Act 2000 (the "Act") – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the "Commissioner") has received an application for a decision whether, in any specified respect, the complainants' request for information made to the DTI has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the "Act").

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 On 31 December 2004 the following information was requested via email from the DTI in accordance with section 1 of the Act.

”the report of the 1994 DTI investigation into share dealings in Anglia TV during takeover negotiations.”

2.2 In an email dated 1 February 2005, the DTI stated that there were two inspections relating to this matter. Having clarified this, the DTI informed the complainant that the information requested was exempt from disclosure under section 44 by virtue of a statutory prohibition. This prohibition was based on section 179 of the Financial Services Act 1986 (the “FSA”). Although this statute has since been repealed, the restrictions are effectively continued by section 348 of the Financial Services and Markets Act 2000 (the “FISMA”).

2.3 The complainant asked the DTI to review this decision in an email dated 1 February 2005.

2.4 The findings of the internal review were sent to the complainant in an email of 25 February 2005. In this correspondence, the DTI reported that the outcome of the internal review was to maintain the section 44 exemption and, consequently, the requested information was being withheld.

2.5 Subsequently, the complainant applied to the Information Commissioner on 1 March 2005 for a decision as to whether the DTI’s decision to withhold the information was in accordance with the requirements of Part I of the Act.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

This right is subject to Section 2 of the Act which provides for exemptions to the rights created by Section 1.

4. Review of the case

The complainant asked the Commissioner to investigate the DTI's decision to withhold the requested information on the grounds that it was exempt by virtue of a statutory prohibition. Accordingly, the application of the section 44 exemption was examined. The Commissioner carefully reviewed the submissions of both parties, and contacted the DTI for a further explanation of the statutory prohibition on disclosure of the requested information.

In reaching the decision as to whether the prohibition was still provided for in law and whether the prohibition was applicable to the requested information, the Commissioner has taken into account the submissions of both parties, the legal advice which has been obtained and other relevant documents on the case file which were generated by the investigation. The findings of the investigation are outlined in detail below.

5. The Commissioner's Decision

Section 44 exemption (prohibitions on disclosure)

5.1 Section 44 states:

(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,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

5.2 Section 44 is an 'absolute' exemption and therefore requires no consideration of the public interest test. Therefore, although the complainant made submissions to the Commissioner concerning the public interest in disclosure of the information, it has not been possible to take these into account in coming to a decision on the validity of the exemption.

5.3 In applying this exemption, the DTI explained that the reports of the 1994 inspections into share dealings in Anglia TV (the "inspections") had been carried out pursuant to the provisions of section 177 of the

FSA. Section 177(1) states:

If it appears to the Secretary of State that there are circumstances suggesting that [an offence] under Part V of the Criminal Justice Act 1993 (insider dealing) may have been committed], he may appoint one or more competent inspectors to carry out such investigations as are requisite to establish whether or not any such [offence had been committed] and to report the results of their investigations to him.

- 5.4 Section 179 of the FSA imposes a restriction on the disclosure without consent of information obtained either directly or indirectly under section 177 on the basis that “it relates to the business or other affairs of any person” (s179(1)). The DTI (in the form of “the Secretary of State”) is a “primary recipient” of this information further to s179(3) and is therefore bound by this provision. The issue of who must provide this consent is dealt with in paragraphs 5.12 to 5.14. Section 179 states:

Restrictions on disclosure of information

- (1) *Subject to section 180 below, information which is restricted information for the purposes of this section and relates to the business or other affairs of any person shall not be disclosed by a person mentioned in subsection (3) below (“the primary recipient”) or any person obtaining the information directly or indirectly from him without the consent of the person from whom the primary recipient obtained the information and if different, the person to whom it relates.*
- (2) *Subject to subsection (4) below, information is restricted information for the purposes of this section if it was obtained by the primary recipient for the purposes of, or in the discharge of his functions under, this Act or any rules or regulations made under this Act (whether or not by virtue of any requirement to supply it made under those provisions).*
- (3) *The persons mentioned in subsection (1) above are—*
 - [(aa) the Treasury;]*
 - (a) the Secretary of State;*
 - (b) any designated agency, transferee body or body administering a scheme under section 54 above;*
 - (c) the Director General of Fair Trading;*
 - (d) the Chief Registrar of friendly societies;*
 - [(e) the Friendly Societies Commission];*
 - (f) the Bank of England;*
 - (g) any member of the Tribunal;*
 - (h) any person appointed or authorised to exercise*

any powers under section 94, 106 or 177 above;

. . .

- (i) any officer or servant of any such person [as is mentioned in paragraphs (a) to (h) above]*
- [(j) any constable or other person named in a warrant issued under this Act].*
- (4) Information shall not be treated as restricted information for the purposes of this section if it has been made available to the public by virtue of being disclosed in any circumstances in which or for any purpose for which disclosure is not precluded by this section.*
- (5) Subject to section 180 below, information obtained by the competent authority in the exercise of its functions under Part IV of this Act or received by it pursuant to a Community obligation from any authority exercising corresponding functions in another member State shall not be disclosed without the consent of the person from whom the competent authority obtained the information and, if different, the person to whom it relates.*
- (6) Any person who contravenes this section shall be guilty of an offence and liable—*
 - (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;*
 - (b) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both.*

Whether legislation still in force

- 5.5 The Commissioner is aware that the FSA was repealed by the FiSMA. In view of this, steps have been taken to ensure that the prohibition on disclosure provided for in section 179 of the FSA is still applicable.
- 5.6 The DTI contends that on the repeal of the FSA by the FiSMA, the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the “Regulations”) effectively continued the restriction under section 179 FSA by applying to information obtained under section 177, the restriction under section 348 FiSMA.
- 5.7 The Commissioner is satisfied that the prohibition on disclosure provided for in section 179 of the FSA continues under section 348 of the FiSMA. Under Regulation 15 of the Regulations, “section 348...of the [Financial Services and Markets] Act [2000 (FSMA)] apply to transitional information in the same way as they apply in relation to confidential information within the meaning of s348(2) of [FiSMA]”.

- 5.8 The Commissioner considered whether the requested information is caught by the term “transitional information” in Regulation 15. The term is defined in the Regulations as “information which immediately before the coming into force of section 19 of [FiSMA] was subject to restrictions on disclosure by virtue of a pre-commencement provision.” As the phrase “pre-commencement provision” is in turn defined to include Part VIII of FSA which s179 is in, the requested information must therefore be covered by this legislation.
- 5.9 Under Regulation 13(3) of the Regulations, as “the Secretary of State” was considered a “primary recipient” for the purposes of section 179, so he is considered a “primary recipient” for the purposes of section 348 of the FiSMA. The effect of this is that the requested information the DTI gathered in accordance with their powers under the FSA is now bound by an equivalent section in the FiSMA, namely section 348. Section 348(1) essentially replicates the provisions of section 179 of the FSA. Section 348(1) states:
- (1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –*
- (a) the person from whom the primary recipient obtained the information; and*
- (b) if different, the person to whom it relates.*
- 5.10 The rest of the provisions of section 348 of the FiSMA are largely irrelevant to the requested information, as the remainder of the section deals with the meaning of “confidential information” and “primary recipient” both of which are, for the purposes of the requested information gathered under section 179 of the FSA, dealt with under the Regulations.
- 5.11 In summary, the same restrictions continue to apply to the requested information now under section 348 FiSMA as they did under section 179. Under section 352 FiSMA, criminal penalties apply for any breach of section 348, so there can be no disclosure of the requested information without consent.

Consent to disclosure

- 5.12 The DTI cannot disclose the requested information without the consent of either the person from whom the information was obtained and, if different, the person(s) to whom it relates. It is common knowledge that the requested information relates to an investigation into a number of individuals (as the DTI took the step of acknowledging the investigation publicly). The DTI has submitted that it would require the consent of all the parties to be able to disclose the requested information.

- 5.13 Currently, the DTI does not have this consent and it contends that it would be unlikely to obtain it. The Commissioner has been informed that some of those named within the report are out of the jurisdiction and may be hard to trace, a difficulty exacerbated by the length of time since the original investigation. This, coupled with the nature of the information, which could be potentially damaging to individuals means that the likelihood of the DTI being able to obtain consent from all of the named parties in the report is sufficiently low.
- 5.14 Section 348 FiSMA simply states that disclosure is prohibited without consent, it does not create a duty for the DTI to actively seek this consent. In view of this, and the fact that the likelihood of obtaining such consent is low, the Commissioner is satisfied that it is not necessary to insist that the DTI makes any further effort to obtain this consent. Such efforts to obtain consent are likely to be unsuccessful, and therefore a waste of time and public money.

6. Conclusion

In view of the above, the Commissioner is satisfied that in this particular case, the DTI has applied the requirements of the FSA and the FiSMA correctly by withholding the requested information. Consequently, the Commissioner is satisfied that the requested information is exempt under Section 44 of the Act.

7 Action Required

- 7.1 In view of the Commissioner's decision that the DTI was entitled to rely upon section 44 to withhold the requested information he does not require any steps to be taken.**

8. Right of Appeal

- 8.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Reference: FS50065858

8.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 31st day of May 2006

Signed

**Richard Thomas
Information Commissioner**

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