



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

3 July 2006

Public authority: Invest Northern Ireland
Address: Bedford Square
Bedford Street
Belfast
BT2 7ES

Summary decision and action required

The Information Commissioner's decision in this matter is that Invest Northern Ireland (Invest NI) has dealt with the request made by the "Complainant" in accordance with Part 1 of the Freedom of Information Act 2000 (the "Act") in relation to the requirements of section 1(1)(b) of the Act but has failed to provide a refusal notice to the Complainant in accordance with section 17 of the Act.

1.0 Application 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 Complainant's request for information made to Invest NI has been dealt with in accordance with the requirements of Part 1 of 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- the application has been withdrawn or abandoned,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.

2.0 The Complaint

2.1 The Complainant made a request on 7 January 2005 for the following information:

'The PWC Deloitte Report on the Emerging Business Trust and its subsidiary EBT Venture Fund' (the "draft Report")

At the date of the Complainant's request the report referred to was in draft form.

Invest NI issued the Complainant with a refusal notice on 4 February 2005 stating that the information he had requested was exempt under sections 22, 36, 41 and 42 of the Act.

The Complainant wrote to Invest NI on 25 February 2005 asking Invest NI to review its decision. Invest NI confirmed to the Complainant on 16 March 2005 that the application of the exemptions in sections 36, 41 and 42 had been upheld as a result of the internal review. The application of the section 22 exemption was not upheld by Invest NI on internal review.

On 27 April 2005, the Complainant asked the Commissioner to review the decision of Invest NI to refuse to disclose the requested information.

3.0 Relevant Statutory Obligations under the Act

3.1 **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.”

4.0 Review of the case

4.1 Scope of the review

The Commissioner noted that Invest NI was added as a public authority for the purposes of the Act by virtue of paragraph 21 of Schedule 1 of the Industrial Development Act (Northern Ireland) 2002. The Commissioner considered whether or not Invest NI had complied with the requirements of the Act and in particular whether it had properly applied the exemptions cited to the information contained in the draft Report. During the course of the investigation in this case, the Commissioner also considered whether or not Invest NI had complied with the requirements of sections 16 and 17 of the Act

as well as the Code of Practice issued under section 45 of the Act by the Lord Chancellor (the “section 45 Code”).

4.2 The Commissioner’s Investigation

4.2.1 The draft Report was commissioned by Invest NI in response to a number of concerns regarding the establishment and operation of the Emerging Business Trust (EBT) and the Emerging Business Trust Venture Fund (EBTVF). The draft Report contains material of a sensitive nature concerning a number of private and commercial parties and includes opinions, legal advice and conclusions arising from the investigation into these two bodies; the bodies concerned were funded by LEDU, the predecessor organisation to Invest NI.

4.2.2 On 8 July 2005, the Commissioner’s Office wrote to Invest NI seeking an explanation for the application of the exemptions claimed and a copy of the information which formed the subject matter of the Complainant’s request. Although not specifically raised by the Complainant, in that letter the Commissioner confirmed to Invest NI that he had considered whether the requirements of section 16 of the Act (the duty to give advice and assistance) had been met in this case and that he was satisfied that they had. Further, the Commissioner raised the issue of whether or not Invest NI had complied with paragraph 4 of Part II of the section 45 Code. Part II requires public authorities to publish procedures for dealing with requests for information under the Act. In particular paragraph 4 requires consideration of a statement in those procedures dealing with circumstances where an authority does not hold the information as well as a statement of when the public authority may need to consult third parties in relation to a decision on whether the information can be released.

The Commissioner also advised Invest NI that the refusal notice provided to the Complainant on 4 February was inadequate in the following respects:

- (i) In relation to the section 36 exemption the notice did not specify the relevant subsection upon which Invest NI sought to rely in refusing the information requested.
- (ii) The notice did not identify the relevant public interest factors in the context of each of the exemptions relied upon by Invest NI.
- (iii) The notice did not provide sufficient details of how each exemption applied to the information sought.

4.2.3 In their letter of 2 September 2005, Invest NI accepted that the refusal notice did not meet the requirements of the Act and in response to the Commissioner’s concerns Invest NI subsequently produced a much fuller refusal notice. Invest NI also accepted that their procedures for dealing with information requests did not contain the necessary statements highlighted above. Invest NI agreed to consider the Commissioner’s comments in this regard when next reviewing their publication scheme. Invest NI also provided

to the Commissioner, in confidence, a copy of the draft Report which was the subject of the request and advised the Commissioner that they now sought to rely on section 36(2)(b)(i) of the Act in that the release of the information sought would, or would likely to inhibit “*the free and frank provision of advice*”.

- 4.2.4 Subsequently, the Commissioner sought further detailed explanations from Invest NI as to their reliance on the exemptions and evidence of the opinion of the qualified person for the purposes of section 36(2)(b)(i) of the Act. By letter dated 26 October 2005, Invest NI confirmed that they had consulted with some but not all of the third parties involved. Invest NI accepted also, that they ought to have considered the application of the section 40(2) exemption in respect of the personal information contained in the draft Report relating to third parties. However, Invest NI confirmed to the Commissioner that they believed the other exemptions claimed were stronger in force.
- 4.2.5 The Commissioner did attempt to informally resolve this complaint by inviting Invest NI to consider providing a redacted version of the draft Report to the Complainant. Invest NI confirmed to the Commissioner that with the exception of very limited information in the public domain, it considered that everything else in the draft Report was provided in confidence and that if a redacted version were to be prepared it would be meaningless. However, at this stage in the investigation, Invest NI did advise the Commissioner that it was considering the release of a redacted version of the *final Report* to the Complainant but for various reasons that did not take place. However, Invest NI later advised the Commissioner that, following extensive consultation and having regard to legal advice, they had decided that the matter could not be resolved informally.
- 4.2.6 During the course of the investigation, the Commissioner also considered whether or not the exemption in respect of section 22 of the Act (referred to in the refusal notice of 4 February 2005) was engaged. Invest NI had considered that section 22 was not engaged when the matter was reviewed internally in March 2005. The Commissioner is satisfied that it was not engaged because at the time of the Complainant’s request Invest NI did not intend to publish the requested information. Invest NI did confirm to the Complainant that it was the intention of the Comptroller and Auditor General for Northern Ireland to deal with the issues raised by the draft Report but it was unlikely that the draft Report would be published in its entirety. The Commissioner does not consider that this is sufficient for the section 22 exemption to be engaged in the circumstances.

5.0 The Commissioner’s Decision

5.1 Section 41

Section 41 provides that:

“(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

5.1.1 Invest NI confirmed to the Commissioner that the draft Report was commissioned to investigate the establishment and operation of EBT and EBTVF and in addition it was commissioned to provide advice to Invest NI regarding its rights and obligations in relation to EBT and EBTVF. The draft Report was prepared by PWC and Tughan Solicitors and provided under Terms of Engagement between Invest NI, PWC and Tughan Solicitors dated 17 January 2003 (the Terms of Engagement). The Commissioner is satisfied that subsection 41(a) is met because the information contained in the Report was provided to Invest NI by other persons, namely PWC and Tughan Solicitors who were the confiders of the confidential information contained in the draft Report. The Commissioner is satisfied that these firms were engaged as independent third parties to advise Invest NI in relation to the matters under investigation. Some of the information contained in the draft Report had been provided to these firms from a number of individuals who had an expectation of confidence in respect of that information. Invest NI advised the Commissioner that the draft Report was covered by confidentiality clauses contained in paragraphs 19 and 21 of the Terms of Engagement. The Commissioner has considered the detail of these clauses and the Terms of Engagement and is satisfied that the parties were bound in relation to the ‘confidential’ information contained in the draft Report.

5.1.2 The Commissioner considers that for a breach of confidence to be actionable it must meet the established tests in *Coco v Clarke*¹. The requirements are that the information must have the necessary quality of confidence; it must be imparted in circumstances giving rise to an obligation of confidence; and there is an unauthorised use of that information.

The Commissioner has carefully considered the information in the draft Report and accepts that a substantial amount of that information had the necessary quality of confidence since it contains legal and financial advice as well as opinions and comments on sensitive issues of conduct involving senior officers. The Commissioner is satisfied that this information was inaccessible to the public at large at the date of the request. Invest NI and the parties to the Terms of Engagement were bound by an express obligation of confidence in respect of that information. The Commissioner considers that, in any event, apart from the express obligation of confidence arising from the Terms of Engagement, given the nature of the investigation, there was an expectation on the part of the confiders that the information was to be held in confidence. The Commissioner is further satisfied that the information was imparted in circumstances giving rise to an obligation of confidence. Although not a prerequisite in every case, the Commissioner has considered the issue

¹ *Coco v Clarke* [1969] RPC 41

of detriment which may be required for a breach of confidence to be actionable. The Commissioner is satisfied that in this case given the extent to which the draft Report highlighted possible conflicts of interest and issues concerning the conduct of certain individuals, damage could be caused by the release of the draft Report.

5.1.3 The Public Interest

5.1.4 Although section 41 is an absolute exemption, so in itself not subject to the public interest test, the Commissioner recognises that in certain circumstances the public interest may override any duty of confidence. Where there is an overriding public interest in any particular case in disclosing the information the courts have accepted that no duty of confidence is owed. The Commissioner must therefore consider whether there was an overriding public interest at the time of the Complainant's request which favoured disclosure of the draft Report.

5.1.5 The Commissioner recognises that there is a strong public interest in the accountability of public bodies for the spending of public money generally. In this case, the Commissioner is mindful of the role of Invest NI's predecessor organisation (LEDU) in providing from the public purse substantial funding to companies such as EBT and EBTVF and in providing financial assistance to small businesses.

5.1.6 The Commissioner also considers that there is a public interest in ensuring that the conduct of senior officers in organisations meets the highest standards in public life. The Commissioner is mindful also that an obligation of confidence will not protect conduct contrary to public policy². The Commissioner recognises the public interest in ensuring that such forensic investigations are conducted fairly and impartially, particularly where the organisation initiating the investigation is the successor to the body under scrutiny.

5.1.7 In this particular case, there was considerable amount of media coverage and general interest in the investigation and the contents of the draft Report. A similar report on a joint investigation into another LEDU-funded company '*Into the West (Tyrone and Fermanagh) Ltd*' had been published in June 2004 and had fuelled public speculation of the matters under investigation, which the Commissioner accepts was substantial at the time of the request. The Commissioner recognises that there is a public interest in informing the public about matters already in the public domain. The fact that the investigation had been completed by Invest NI was already in the public domain at the time of the request. However, the Commissioner is aware that what interests the public is not necessarily the same as that which is in the public interest.

5.1.8 Although the Commissioner recognises that there are public interest factors which favoured disclosure in this case; the Commissioner is satisfied that such considerations did not (at the time of the request), override the strong

² Halsbury's Laws of England, Confidence, para 415;

public interest in the maintenance of confidence. The Commissioner has reached this conclusion for the following reasons:

- (i) In this particular case, given the seriousness of the matters under investigation, there was a countervailing public interest in ensuring that the investigation process was conducted thoroughly and with respect for the views and wishes of the parties who had informed and been affected by that process.
- (ii) At the time of the Complainant's request, the actual investigation had been completed for some 13 months and the clearance of the draft Report which commenced in September 2004 was not complete. Although Invest NI confirmed to the Commissioner that it endorsed the issues raised in the draft Report, the Commissioner notes that this draft had been cleared by some but not all of the relevant parties. In recognising that what is in the public interest is that which serves the public good, the Commissioner does not consider that the public good would best be served by releasing information that could potentially be factually inaccurate.
- (iii) The Commissioner is mindful of the fact that the matters raised in the draft Report were the subject of scrutiny by the Northern Ireland Audit Office (NIAO)³ and the Select Committee on Public Accounts (PAC)⁴. To that extent the Commissioner is satisfied that the public interest in transparency and accountability is met in this particular case.

5.1.9 Information in the Public Domain

5.1.10 The duty of confidence diminishes where information is in the public domain. In consequence of the publication of the NIAO report some of the information requested came into the public domain. Subsequently the PAC report was published in May 2006. The Commissioner has had an opportunity to examine the PAC publication which comprises the final PWC Report (October 2005) together with substantial appendices containing the comments of the parties obtained through the clearance process which were not part of the draft Report. Following discussions with Invest NI, the Commissioner is satisfied that with some exceptions, the bulk of the draft Report is substantially the same as the version now in the public domain. The Commissioner is satisfied that the main difference between the draft and final Reports relates to the inclusion of detailed appendices containing comments from parties involved in the clearance process. The Commissioner's decision in relation to the information contained in the draft Report is that it lost its quality of confidence when the final Report was published by the PAC in May 2006. Whilst the Commissioner is satisfied therefore that the section 41 exemption was engaged at the date of the request, he is of the view that

³ Report by the Comptroller and Auditor General: "Governance Issues in the Department of Enterprise, Trade and Investment's Former Local Enterprise Development Unit", HC 817, Session 2005-06, 9 February 2006

⁴ Select Committee on Public Accounts Report, May 2006

Invest NI no longer has a basis for withholding those parts of the draft Report which are now in the public domain.

5.2 Other Exemptions

- 5.2.1 The Commissioner considers that the draft Report contains some personal information relating to a number of third parties. This includes the identity of the third parties, as well as the opinions of others relating to those individuals. The disclosure of this information at the time of the request ought therefore to have been considered in light of the provisions of the Data Protection Act 1998 (the DPA). In particular in order to meet the requirements of the first data protection principle, any disclosure must be fair and lawful. The provisions of section 40(2) of the Act exempt personal information relating to third parties where disclosure would breach any of the data protection principles. As referred to at 4.2.4 above, Invest NI confirmed to the Commissioner that they did not consider this exemption.
- 5.2.2 In light of his decision that the section 41 exemption is engaged in respect of the draft Report, the Commissioner does not intend to set out in detail the arguments in relation to application of the section 40(2) exemption. However, the Commissioner is satisfied that the release of the personal information contained in the draft Report at the time of the request would have been unlawful and unfair to the individuals concerned as it would have breached confidentiality. In those circumstances the Commissioner is satisfied that disclosure of the personal information would have breached the first data protection principle.
- 5.2.3 The Commissioner also considered whether the information was exempt under sections 36 and 42 of the Act as claimed by Invest NI in its refusal notice to the Complainant. Although the Commissioner considered the arguments raised by Invest NI in relation to the exemption for information which would, or would be likely to, inhibit the free and frank provision of advice (section 36(2)(b)(i) of the Act), in view of the Commissioner's findings in relation to section 41, it is not necessary to address the applicability of section 36 in this decision notice.

Invest NI had claimed that the draft Report in its entirety was subject to legal professional privilege, relying on both advice and litigation privilege, and the draft Report was marked "Privileged and Confidential". The Commissioner is satisfied that the section 42 exemption was engaged at the time of the request in relation to the legal advice contained in the draft Report. However, the Commissioner is not satisfied that the section 42 exemption is engaged in respect of all of the information contained in the draft Report as in his view it was not commissioned for the "dominant purpose" of seeking legal advice, which is a prerequisite for privilege.⁵ While the Commissioner accepts that one of the purposes of commissioning the draft Report was to obtain legal advice on its rights and obligations concerning the issues raised, Invest NI had advised the Commissioner that the 'primary objective' in commissioning

⁵ Waugh v British Railways Board [1980] A.C 521

the draft Report was to investigate concerns regarding the establishment and operation of the relevant companies.

6.0 The Commissioner's Decision

6.1 The Commissioner's decision in this matter is that Invest NI has dealt with the Complainant's request in accordance with the requirements of section 1(1)(b) of the Act for the reasons set out above.

However, the Commissioner is mindful that in this case Invest NI failed to consider at all the applicability of the section 40(2) exemption. It also failed to meet the requirements of section 17 of the Act and has accepted that the refusal notice was inadequate.

Although not part of the formal decision in this case, the Commissioner notes that Invest NI did not consult with all the relevant third parties on receipt of the request in relation to the contents of the draft Report and to that extent it did not comply with the requirements of the section 45 Code. Furthermore the Commissioner is not satisfied that Invest NI's procedures for dealing with requests adequately reflect the requirements of paragraph 4 of Part II of the section 45 Code. Despite the fact that this matter was drawn to Invest NI's attention by the Commissioner it is noted that the procedures in question remain deficient in this regard. The Commissioner will continue to monitor Invest NI's compliance with both the Act and the section 45 Code in this regard.

7.0 Action Required

In light of the decision in this case, that the section 41 exemption is engaged, the Commissioner does not require Invest NI to take any steps.

8.0 Right of Appeal

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

| | |
|-----------------------------|---|
| Information Tribunal | Tel: 0116 249 4326/4320/4295 |
| Arnhem House Support Centre | Fax: 0116 249 4131 |
| PO Box 6987 | Email: informationtribunal@dca.gsi.gov.uk |
| Leicester LE1 6ZX | |

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 3rd day of July 2006

Signed:

Ref: FS50073978

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF