



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 24 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 the section 36 exemption is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner's decision in this matter is that the section 43 exemption is not engaged. The Commissioner's decision in this matter is that the refusal notice issued by Invest NI did not comply with the requirements of section 17. Invest Northern Ireland ('Invest NI') has not, therefore, dealt with the request made in accordance with Part I of the Freedom of Information Act 2000 (the 'Act') in that it has failed to comply with its obligations under section 1(1)(b) of the Act.

The Commissioner does not require Invest NI to take steps in this case, as the requested information was provided to the Complainant in March 2006.

1.0 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 Complainant's request for information made to Invest NI has been dealt with in accordance with the requirements of Part I of the Act

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

- the 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- the application has been withdrawn or abandoned,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 requested the following information from Invest NI on 31 January 2005 in accordance with section 1 of the Act:-

'How many shares in AP Galgorm Ltd (Adria Ltd) did Invest NI sell to Quantum Clothing Group in 2004?'

'How much was Invest NI paid by Quantum for these shares?'

'How much did Invest NI pay for the shares when it originally purchased them?'

- 2.2 Invest NI provided the following information to the Complainant on 28 February 2005.

'Invest Northern Ireland sold its entire ordinary shareholding (270,000 £1 shares) in A P Galgorm Ltd to Bramhope Group Holdings Limited, the holding company of Quantum Clothing Ltd, on 10 September 2004.'

'Invest NI subscribed for these shares at par, paying £270,000 on 22 May 2002.'

- 2.3 Invest NI issued the Complainant with a refusal notice on 28 February 2005 in respect of the remaining information stating that the information requested (*'How much was Invest NI paid by Quantum for these shares?'*) was exempt under sections 36 and 43 of the Act.
- 2.4 The Complainant wrote to Invest NI on 11 March 2005 asking Invest NI to review its decision. Invest NI issued the Complainant with the internal review decision on 31 March 2005 stating that the application of the exemptions in sections 36 and 43 had been upheld as result of the internal review.
- 2.5 On 26 April 2005, the Complainant wrote to the Commissioner seeking a review of the decision of Invest NI to refuse 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.”*

3.2 Section 2(2) provides that –

‘In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

- (a) The information is exempt information by virtue of a provision conferring an absolute exemption, or*
- (b) In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

3.3 Section 17(1) provides that –

A public authority which...is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or*
- on a claim that information is exempt information*

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.”*

3.4 Section 17(3) provides that –

“A public authority...must...state the reasons for claiming –

- (a) that, in all circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or*
- (b) that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*



4.0 Review of the case

4.1 Scope of the review

4.1.1 The Commissioner considered whether or not Invest NI had complied with the requirements of section 1(1)(b) of the Act and in particular whether it had properly applied the exemptions cited. In addition, the Commissioner considered whether section 22 might be applicable in all the circumstances of the case. Furthermore, the Commissioner considered whether or not Invest NI had complied with the requirements of section 17 of the Act when issuing their refusal notice.

4.2 The Commissioner's Investigation

4.2.1 On 23 August 2005, the Commissioner wrote to Invest NI and requested a copy of the information which formed the subject matter of the Complainant's request. In addition, the Commissioner asked for additional information to assist in understanding how Invest NI had reached the decision to withhold the information under sections 36 and 43 of the Act.

4.2.2 In the letter of 23 August 2005, the Commissioner asked Invest NI to provide a copy of the record which showed that the decision to rely on section 36 was made by the Chief Executive of Invest NI, Mr Leslie Morrison. The Commissioner also asked Invest NI to provide clear, specific and credible evidence that the substance or quality of deliberations of advice and exchange of views would be materially altered for the worse by the threat of disclosure under the Act. The Commissioner also asked Invest NI to provide evidence that the release of the requested information would deter companies and/or individuals in similar circumstances from entering into such transactions with Invest NI in the future.

4.2.3 In relation to the section 43 exemption, the Commissioner asked Invest NI to clarify the way in which the disclosure of the information would prejudice Bramhope Group Holdings Limited's ('Bramhope') ability to undertake certain commercial transactions. The Commissioner also asked Invest NI to clarify what they meant by their statement that the disclosure of the information '*at this point in time*' could prejudice the commercial interests of Bramhope. The Commissioner also asked Invest NI to specifically comment on the point that the disclosure of the information could be considered to be less prejudicial once the negotiations had been completed and the share sale finalised. In addition, the Commissioner asked Invest NI to provide a copy of their consultations with Bramhope.



- 4.2.4 In its response of 16 September 2005, Invest NI provided a copy of the information which formed the subject matter of the Complainant's request. This comprised of a figure for how much Invest NI was paid by Bramhope for the shareholding. Furthermore, Invest NI provided a copy of their consultations with Bramhope. In addition, Invest NI provided a document which states that Mr Morrison was content to use the exemption under section 36. The Commissioner notes that this document, dated 2 March 2005, post dates the refusal notice issued to the Complainant on 28 February 2005. The Commissioner asked Invest NI to provide evidence that the decision to rely on section 36(2)(c) was provided at the time of the request. Invest NI advised the Commissioner that Mr Morrison had provided verbal confirmation of his decision in relation to the application of that exemption to enable Invest NI to meet the 20 day deadline for response but that this was not confirmed in writing, due to practical difficulties, until 2 March 2005. The Commissioner has accepted this explanation, but has indicated to Invest NI that he expects the precise requirements of section 36 to be complied with by Invest NI should the exemption be claimed in the future.
- 4.2.5 In its response to the Commissioner's enquiries, dated 16 September 2005, Invest NI put forward a number of arguments in favour of maintaining the exemptions. These arguments are reflected in the Commissioner's decision below.
- 4.2.6 The Commissioner requested further information from Invest NI on 21 November 2005. In particular, the Commissioner asked Invest NI to clarify how the disclosure of information would adversely impact on their ability to intervene with companies in the most appropriate manner. Further clarification as to how the disclosure would impact negatively on the shareholders' commercial interests was also sought. Invest NI were requested to clarify how the disclosure would adversely affect Bramhope's bidding for other companies. The Commissioner asked Invest NI to clarify why it would be damaging for share prices for private limited companies to be made publicly available when the share prices for public limited companies are available in the public domain. Invest NI were also asked to provide a copy of the Share Purchase Agreement.
- 4.2.7 By letter dated 16 December 2005, Invest NI provided a copy of the Share Purchase Agreement and provided further clarification of their arguments in favour of maintaining the exemptions. The Commissioner has carefully considered the contents of the Agreement and the additional information.
- 4.2.8 During the course of the investigation, the Commissioner asked Invest NI to clarify which provision within section 36 was being relied on as it appeared to the Commissioner that all three provisions had been referred to at different times. Invest NI confirmed that they were relying on section 36(2)(c).
- 4.2.9 Invest NI confirmed to the Commissioner that Bramhope were intending to declare, in their annual accounts due for publication in January 2006, the purchase of the shares, including details of the price paid to Invest NI at the time of sale. Invest NI



later advised that members of the public would be able to determine the price paid to Invest NI from the disclosure, in Bramhope's annual accounts, of the information relating to the acquisition. Invest NI advised the Commissioner that disclosure of the information requested, in their annual accounts, took place in March 2006.

5.0 The Commissioner's Decision

5.1 Section 36(2)(c) of the Act

Section 36(2)(c) provides that:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

- 5.1.1 To ascertain whether the exemption in section 36(2)(c) is engaged the Commissioner must be satisfied that the opinion has both been expressed by the qualified person and is 'reasonable' in all the circumstances of the case. The Commissioner is satisfied that the decision was taken by the qualified person, the qualified person for Invest NI being the Chief Executive, Mr Leslie Morrison.
- 5.1.2 The Commissioner accepts Invest NI's concerns over the potential impact of disclosure in this case and is therefore satisfied that the qualified person has expressed a reasonable opinion. These concerns are set out in detail at paragraph 5.1.4 below. A reasonable opinion can be defined as one that, given the circumstances of the case, could be said to fall within a range of acceptable responses and be considered neither outrageous nor absurd. In this case, the qualified person expressed the opinion that the release of the information would deter other companies from entering into similar transactions with Invest NI in the future and that this in turn would adversely impact on Invest NI's ability to intervene with companies in the most appropriate manner on the basis that confidentiality could not be guaranteed. The Commissioner is satisfied that this opinion expressed was within the bounds of reasonableness.

5.1.3 The public interest test

Section 36 is a qualified exemption and is, therefore, subject to the public interest test. The Commissioner has considered the issue of the public interest and considers that there are arguments both for maintaining the exemption and in favour of disclosing the withheld information.



5.1.4 In support of their view that the public interest in maintaining the exemption outweighed the public interest in disclosure, Invest NI put forward the following arguments:

- (a) That the release of the information would deter other companies from entering into similar transactions with Invest NI in the future.
- (b) That this would in turn adversely impact on Invest NI's ability to intervene with companies in the most appropriate manner, which would have an adverse effect on their ability to optimise their impact and to ensure their interventions represented best value for money.
- (c) That to provide evidence that the quality of deliberations of advice and exchange of views would be materially altered by the threat of disclosure under the Act, they would need to demonstrate that companies had refused to engage with Invest NI in shared dealings for fear of disclosure of such dealings. Invest NI stated this was difficult because historically Invest NI had confidentiality agreements in place and therefore would never have disclosed the details of negotiations with clients. Invest NI have confirmed to the Commissioner that there had been several instances where companies had approached Invest NI for assurances that they would continue to maintain client confidentiality in light of the introduction of Freedom of Information legislation.
- (d) That third party organisations funded by Invest NI to deliver programmes on their behalf who previously would have allowed them access to information regarding the programmes were now refusing to do so citing potential disclosure under Freedom of Information legislation as the reason.
- (e) That Invest NI believed that had Bramhope considered that Invest NI was not in a position to keep the transaction details confidential then the original deal may not have taken place. This led Invest NI to believe that they would be restricted from carrying out their functions effectively.

5.1.5 The Commissioner recognises that there are public interest factors in favour of disclosing the particular information requested:

- (a) The Commissioner recognises the general public interest in openness and transparency.
- (b) The Commissioner recognises there is a public interest in accountability of the spending of public money. The purchase of the shares involved a substantial expenditure from the public purse by Invest NI. The original purchase price paid by Invest NI for these shares (£270,000) is already in the public domain. The Commissioner considers that there is a public interest in the disclosure of the sale price of the shares to ascertain



whether the transaction achieved value for money to the benefit of the public purse. The Commissioner is mindful that share prices may go down as well as up with corresponding losses or gains falling on the public purse.

- (c) The Commissioner recognises there is a public interest in furthering debate of the issues of the day. At the time of the request, there was heightened public scrutiny of Invest NI dealings and those of its predecessor organisation (Local Enterprise Development Unit) in relation to other matters.

5.1.6 While the Commissioner accepts that the section 36 exemption is engaged, the Commissioner does not accept that, in all the circumstances of the case, the prejudice would be sufficient to outweigh the public interest in disclosing the specific information sought. The Commissioner considers, that in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest disclosing the information for the following reasons:-

- (a) While Invest NI have asserted their arguments in general terms (refer to paragraph 5.1.4), the Commissioner is not satisfied that Invest NI have provided evidence to support their assertion that disclosure of the specific information requested would cause real and significant prejudice to their ability to invest in companies by way of equity transactions.
- (b) Invest NI have confirmed to the Commissioner that Bramhope stated that they '*confirm that at the time of purchase of Adria by Quantum, disclosure of the share price paid would have been negative from our point of view and perhaps even a deal breaker*'. However, the issue of prejudice for the purpose of section 36 needs to be established at the time of the request, which in this case, post dated the agreement by four months.

In reaching this decision on the balance of the public interest, the Commissioner is mindful that under UK GAAP and International Financial Reporting Standards, private limited companies are required to provide details of holdings in subsidiaries, including acquisitions made during the reporting period when they file their accounts with Companies House. At different times, Invest NI confirmed to the Commissioner both that Bramhope intended to declare, in their annual accounts, the purchase of the shares, including details of the price paid to Invest NI at the time of sale and also the slightly different scenario that the public would be able to determine the price paid to Invest NI from disclosure of other information relating to the acquisition.



(c) The Commissioner is of the view that in relation to the particular arrangement between Invest NI and Bramhope, this would have taken place even if confidentiality could not be assured for the following reasons:

- a. Invest NI only participate in investments as an equity provider where the private sector is unwilling or unable to do so¹.
- b. Invest NI help to establish confidence by co-investing with the private sector, leveraging further private sector financing.

5.1.7 The Commissioner, having considered the competing public interest arguments in favour of maintaining the exemption under section 36(2)(c) and in favour of disclosing the withheld information, is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

5.2 Section 43(2) of the Act

5.2.1 *'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).'*

5.2.2 To ascertain whether the exemption in section 43(2) is engaged the Commissioner must be satisfied that the disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The Commissioner's interpretation of 'likely to prejudice' is that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. The Commissioner draws support for this view from the words of Mr Justice Munby in R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin).

5.2.3 In consideration of this exemption, Invest NI stated that there was prejudice to two separate groups; the former shareholders (includes Invest NI) and the new shareholders (Bramhope). The Commissioner has considered the question as to whether the section 43 exemption is engaged in relation to these groups.

5.2.4 The prejudice test

5.2.5 (i) The former shareholders

In support of the assertion that prejudice would be caused, Invest NI provided a document from Bramhope which states, *'we are of the opinion that releasing this information would, or would be likely to, prejudice the commercial interests of both*

¹ 'Principles for Business Support' – Invest NI



the former and new shareholders. Bramhope advised Invest NI that the majority of the former shareholders are private individuals in Northern Ireland with commercial interests outwith the hosiery business and that were the sale price information to be made public this could well impact negatively on their other commercial interests. Bramhope did not provide any evidence or offer any further rationale to explain how the disclosure of the information would cause prejudice to the former shareholders. Furthermore, Invest NI have not provided any such evidence or any such further rationale. Therefore, the Commissioner is not satisfied that Invest NI have demonstrated that the disclosure of the particular information, at the time of the request, would be likely to cause real and significant prejudice to the commercial interests of the former shareholders.

5.2.6 (ii) The new shareholders (Bramhope)

In support of their view that the disclosure of the requested information would prejudice Bramhope's commercial interests, Invest NI provided the Commissioner with a document from Bramhope which stated that,

'the hosiery market place is extremely competitive at the moment and further rationalisation is expected.... Quantum may consider getting involved in this rationalisation process and it would be very detrimental to any negotiations if info relating to the price that Quantum paid for Adria was available in the market place.'

5.2.7 Bramhope confirmed their belief that this situation was unlikely to change for at least three years. Invest NI confirmed that, at the time of the request, there were ongoing discussions between Bramhope and another company regarding a potential company purchase.

5.2.8 The Commissioner is satisfied that negotiations regarding a potential company purchase amount to a commercial activity. The Commissioner accepts the assertions of Bramhope regarding the competitiveness of the relevant market but is of the view that this assertion alone is insufficient to meet the test of prejudice in section 43 of the Act. It is the Commissioner's view that Invest NI have not demonstrated how the disclosure of this particular piece of information would or would be likely to cause real and significant prejudice to ongoing discussions between Bramhope and another company regarding a potential company purchase. The Commissioner, in arriving at this conclusion, has applied the test of *'likely to prejudice'*, referred to above, and as applied by the Information Tribunal in the case of *John Connor Press Association vs The Information Commissioner* (Appeal no. EA/2005/0005). In that decision, the Information Tribunal stated that:-

'we accept that the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction. Whether they were or not would depend on the nature of the information and the degree of similarity



between the two transactions'.

- 5.2.9 The Commissioner is of the view that this approach applies equally to the case of private companies whose information is held by public authorities on account of their dealings with them. The nature of the requested information is the value of a shareholding which Bramhope either intended to publish or would be apparent from information in their annual accounts in due course. The Commissioner accepts that there is a degree of similarity between the negotiations with Bramhope and another company and the purchase of the shareholding by Bramhope from Invest NI. Both negotiations involved the purchase of another company. However, the Commissioner has been advised by Invest NI that a range of factors come into play in negotiations involving the sale of shareholdings in private limited companies. Invest NI have confirmed that the final price could involve many, often subjective, considerations such as the different parties' perceptions of goodwill in the business, how badly the seller wants to sell and how badly the buyer wants to buy, as well as the potential synergies with different buyers.
- 5.2.10 The Commissioner considers that a range of other factors may come into play. For instance, an acquisition may be more attractive because it would allow expertise missing from the existing company portfolio to be bought in or would facilitate economies of scale. The Commissioner accepts that knowledge of the share price paid in a recent transaction involving the same company may be a factor in negotiations but given the multiplicity of factors involved in the negotiation process, the Commissioner is of the view that it is not key. The Commissioner does not consider that such knowledge would be sufficient to obstruct or impede any ongoing negotiations. Therefore, the Commissioner is not satisfied that disclosure of the information would not be of such significance as to cause real and significant prejudice to those negotiations.
- 5.2.11 The Commissioner accepts that information is more likely to be commercially sensitive in relation to the commercial interests of Bramhope whilst the negotiations in relation to any share sale are ongoing but is of the view that the sensitivity of such information will diminish once the sale of the shareholding had been completed as in this case.
- 5.2.12 In addition, the Commissioner is mindful that the valuation of shareholdings depends on a range of factors, referred to in paragraph 5.2.10. The Commissioner is mindful that developments within AP Galgorm or external market forces in the intervening period could have an impact on the company's worth rendering information as not substantially useful for either the seller of the other company or other potential bidders for that business.
- 5.2.13 For the reasons set out above, the Commissioner is not satisfied that Invest NI have demonstrated how the disclosure of the information requested, at the time of the request, would be likely to cause real and significant prejudice to the commercial interests of Bramhope by prejudicing the ongoing discussions between



Bramhope and another company regarding a potential company purchase. The Commissioner is not satisfied therefore that the section 43 exemption is engaged in the particular circumstances of this case.

5.2.14 The Commissioner notes that Invest NI have not claimed that the disclosure of the requested information would prejudice their own commercial interests and therefore this point does not need to be addressed.

5.3 Section 22 of the Act

5.3.1 Section 22 provides that,

'(1) Information is exemption information if –

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- (b) the information was already held with a view to such publication at the time when the request for information was made, and*
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

5.3.2 Invest NI informed the Commissioner that they had consulted with Bramhope regarding the possibility of using the exemption under section 22, information intended for future publication. Invest NI advised that Bramhope did not intend to publish the requested information at some future date as they were uncertain when their interest in purchasing other companies in the hosiery industry would diminish. Invest NI further advised that Bramhope had indicated that, at the time of the request, they were uncertain whether they would be required to publish, in their annual accounts, details of the acquisition, including details of the price paid to Invest NI at the time of the sale. The Commissioner is, therefore, satisfied that, in all the circumstances of the case, the requirement in section 22(1)(b) would not be met and could therefore not be applied to the requested information.

5.4 Section 17 of the Act

The Commissioner is of the view that the refusal notice issued by Invest NI in response to the information requested did not comply with the requirements of section 17 as it did not specify which specific aspect of the section 36 exemption was being relied on.

5.5 The Commissioner's decision

In conclusion, the Commissioner's decision in this matter is that the section 36 exemption is engaged but that the public interest in maintaining the exemption does



not outweigh the public interest in disclosing the information. The Commissioner's decision in this matter is that the section 43 exemption is not engaged. The Commissioner's decision in this matter is that the refusal notice issued by Invest NI did not comply with the requirements of section 17. Invest NI has not, therefore, dealt with the request made in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1)(b) of the Act.

6.0 Action Required

Invest NI have advised the Commissioner that in March 2006, Bramhope published the information requested as part of the annual accounts. The Complainant was provided with a copy of the information at this stage. Accordingly, the Commissioner does not require Invest NI to take any steps in this matter. In addition, the Commissioner does not require Invest NI to take any steps in relation to the defective refusal notice, but has made it clear that he expects any future refusal notice issued by Invest NI under section 17 to fulfill all the statutory requirements.

7.0 Right of Appeal

7.1 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 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Reference: FS50073979



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Dated the 24th day of July 2006

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner
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