

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 October 2007

Public Authority: Department for Business, Enterprise and Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant asked DBERR for information concerning its response to his complaint about the activities of a named company, including internal correspondence and communications with other public authorities. DBERR refused to provide the information it held, citing the section 30 exemption of the Act. The Commissioner found that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that DBERR had acted correctly in withholding the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. In June 2007 the Prime Minister announced that much of the then Department of Trade and Industry (DTI) would become the Department for Business, Enterprise and Regulatory Reform (DBERR). For clarity, the public authority is referred to as DBERR throughout this Notice.
3. On 15 January 2006 the complainant asked DBERR for information under a total of nine headings. The matters raised under six of the first seven headings were resolved in subsequent correspondence between DBERR and the complainant; the matters raised under headings six, eight and nine remain unresolved and form the subject of this investigation. They are:

"Were enquiries made by [DBERR] to determine if other complaints had been

made to FSA, [DBERR], or London Stock Exchange regarding the acquisition of the Company concerned?"

"Please provide all correspondence and internal memoranda of [four named officers] relating to my request for a [DBERR] investigation.

Please provide all outgoing and incoming correspondence and memoranda of the head of Department ([another named officer]) concerning my request for a [DBERR] investigation."

4. On 10 March 2006 DBERR responded, saying that the exemption under section 30(1)(b) (Investigations and proceedings conducted by public authorities) of the Act was engaged. This exemption is qualified: DBERR said that confidentiality was crucial to its investigation processes and that it took the view that the balance of the public interest favoured its not disclosing the information sought.
5. On 17 March 2006 the complainant asked DBERR to review its refusal of his request. He said that the exemption cited could not apply any longer in this case because DBERR had decided not to carry out an investigation and, therefore, proceedings could not arise. On 12 April 2006, after a review of the decision, the then Inspector General of the Insolvency Service told the complainant that, having considered the matter carefully, he was satisfied that DBERR had been correct in relying on the section 30(1)(b) exemption and had correctly applied the public interest balancing test in deciding to withhold the information.

The Investigation

Scope of the case

6. On 20 April 2006 the complainant contacted the Commissioner to complain about the way in which DBERR had handled his request for information. Following further exchanges of correspondence, the Commissioner began his investigation of the complaint against DBERR on 12 June 2007.
7. The complainant has indicated that he was concerned that both he and other shareholders had, as he described it, been deceived and defrauded when the fortunes of a named company ("the company") in which they had been investing declined sharply so that major losses were incurred by both himself and other shareholders. He referred the matter to DBERR and asked it to investigate. He also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
8. On 27 July 2007 DBERR told the Commissioner that there had been no further developments in the matter and that DBERR's view remained as set out in its internal review, the result of which had been conveyed to the complainant in a letter of 12 April 2006.

9. On 7 August 2007 the Commissioner's staff invited both the complainant and DBERR to put forward any further representations they wished to make to him concerning the balance of the public interest in this matter. DBERR replied on 15 August 2007 and the complainant on 3 September 2007. The complainant said that he had also complained to the Ombudsman but she had not upheld his complaint of maladministration by DBERR.
10. On 4 September 2007 DBERR provided further withheld information to ICO in confidence, and provided further comments on its view of the balance of the public interest.

Findings of fact

11. The complainant was one of a number of shareholders in the company who saw the value of their shareholding decline drastically over a short period of time before the company was sold; the remaining shareholders thereby suffered substantial losses. The complainant asked DBERR to look into the activities of some of the company's directors which had concerned him with regard to changes in their shareholdings prior to the sale. DBERR had considered if the evidence put to it by the complainant might be such as to justify proceedings, but had decided that it did not.
12. The complainant had also approached the Parliamentary Ombudsman ("the Ombudsman") with a related complaint. On 18 July 2005, the Ombudsman's office told the complainant that:
*" ... [DBERR] looked into your complaints on three separate occasions, and I regard their findings as having been positively based upon sound and detailed enquiries.
Ultimately the question of whether there was any misconduct is a matter of [DBERR's] professional judgement. I am satisfied that their enquiries have been completed broadly within their own timescales, under appropriate supervision, and that their officers have demonstrated their willingness to examine your case in considerable detail, despite your disagreement with their findings. I am sorry but the Ombudsman can do nothing more for you on this occasion."*

Analysis

Procedural matters

Section 10 - time for compliance

13. The Commissioner has seen that the original complaint was put to DBERR on 15 January 2006 but was mislaid for a time and did not receive a reply until 10 March 2006. This response time therefore breached the 20 working day time limit specified by section 10 of the Act.

Exemption

Section 30 (Investigations and proceedings conducted by public authorities)

14. The Commissioner is satisfied that the relevant information is held.
15. DBERR has statutory powers conferred on it by the Companies Act 1985. DBERR's team of vetters examine complaints about companies and decide if they should be investigated further by other DBERR officials. The complainant said that DBERR could not rely upon the exemption contained in section 30(1)(b) of the Act since the exemption related to proceedings and DBERR had decided not to institute any. DBERR said that it had investigated whether the evidence put to it by the complainant might be such as to justify proceedings. The Commissioner has seen that the exemption under section 30 applies if information has been held by a public authority 'at any time' for the purpose of an investigation which may lead to criminal proceedings. He has noted too the decision of the Information Tribunal in the case of *Toms (Toms v Information Commissioner EA/2005/0027)* that the section 30 exemption remains applicable even after an investigation has been completed. Because the information was held for the purpose of considering if proceedings were justified, the Commissioner is satisfied that the exemption is engaged.
16. Although there is no requirement for the public authority to demonstrate that disclosure would result in prejudice to its operations when the section 30 exemption is engaged, the exemption is qualified and the Commissioner therefore needs to consider the balance of the public interest.
17. As regards the balance of the public interest, the complainant emphasised that his request had included information about DBERR's correspondence with the Financial Services Authority and the London Stock Exchange. The complainant said that DBERR had gone through the motions of vetting his request for an official investigation. He said that he had presented DBERR with evidence which he thought showed an act of fraud to have been imminent but his evidence had been ignored; he believed that DBERR would not carry out an investigation that would reveal that fraudulent acts could have been prevented had DBERR acted on the evidence he had provided to it. He said that he was disappointed in the lack of action by DBERR in its investigation and saw some benefit to the public in DBERR revealing the reasons for that lack of action. He said that the public had a right to know how DBERR dealt with public protection.
18. The complainant said that DBERR's secrecy only protected criminals and its own unsatisfactory performance in this matter, both of which were against the public interest. There was a need for transparency but DBERR had done everything possible to conceal its activities. He recognised that confidentiality was important during an investigation but said that, paradoxically, it lost its importance if no investigation took place. He also asked the Commissioner to consider his view that the public interest was best served by protecting the public against fraud. He failed to see that the public interest was served by not revealing information of financial malpractice and the neglect of financial regulators.

19. DBERR said that, while it generally accepted that there might be a public interest in making its investigations more transparent (so that the public could be confident that it investigated alleged wrongdoing in a thorough and efficient way), there was a greater public interest in making sure that those investigations were effective in order to deliver the best possible supervision of those companies that choose to carry on business in Great Britain.
20. DBERR asked the Commissioner to bear in mind, when considering the balance of the public interest, that the role of a DBERR information vetter is to examine complaints received about companies and to decide whether they should be passed to officials for further investigation using the statutory powers contained in the Companies Act 1985. The vetting process inevitably involved a consideration of the strengths and weaknesses of a particular complaint and, in making the recommendation whether or not the case should be taken further, veters needed to be able to be free and frank in their conclusions. If veters felt that their views might be made public this would be likely to inhibit the way in which they expressed arguments, which would be detrimental to the quality of the decision making process.
21. DBERR added that it was also the case that vetting minutes set out how information obtained from third parties, relevant to the decision about whether the statutory investigation powers should be invoked, was considered. For DBERR to disclose whom it chose to consult was not something that should be made public, as DBERR would not want to educate potential miscreants about how to evade investigation. The public interest dictated that DBERR investigated complaints in the most effective way, and its ability to do so would be prejudiced if its investigative techniques were to be made public.
22. DBERR said that contact with other regulators was often an essential part of a DBERR vetting investigation. Those organisations could provide extremely helpful intelligence and, to the extent permitted by law, it was useful for this to be shared with DBERR. By its very nature this material was likely to be confidential. It would be damaging to the investigation process (and therefore contrary to the public interest) if such material was liable to be made public, certainly without the consent of the person providing it, e.g. as a consequence of an FOI request. DBERR said it was concerned that those providing the intelligence it relied upon would become reticent about doing so in future if they felt there was a chance that the material provided would be disclosed under the Act. Were those organisations to become reluctant about providing information, either at all or to the full and frank extent required for proper reliance to be placed upon it, this would significantly hamper DBERR in its role in investigating companies and preventing wrongdoing.
23. The Commissioner is of the view that the factors to be taken into account in deciding where the balance of the public interest lies should include: the stage reached in any proceedings; the extent to which the information has already been released into the public domain; the significance or sensitivity of the information; the age of the information; and, the impact of disclosure on the success of an investigation or potential prosecution. He has noted that the exemption continues to be applicable even after an investigation has been completed. The

Commissioner's decision in this matter has been informed by the earlier decisions of the Information Tribunal in the Toms case and in another DBERR case (*Department of Trade and Industry v Information Commissioner, EA/2006/0007 – "the DTI case"*). In Toms, the Tribunal acknowledged that, in principle, the public interest of protecting information acquired in confidence during investigations could override the public interest in disclosure. In the DTI case, the Tribunal said that there were strong policy grounds to maintain the confidentiality of the then DTI's sources of evidence.

24. The Commissioner believes that the public must be satisfied that DBERR takes seriously information it receives from members of the public that may point to the existence of criminal or fraudulent activity, and that it investigates them thoroughly using sound and effective methods. Sufficient information should therefore be made available to give the public reassurance that its work is done expeditiously both in general and in a specific case. The timing of any disclosure will be important and once an investigation has been completed, as in this case, the public interest in understanding why a particular conclusion was reached or seeing that an investigation has been carried out properly, could well outweigh the public interest in maintaining the exemption. He does not accept that DBERR's vetters, whose job it is to make an honest assessment of the validity of a complaint and the value in pursuing it, would necessarily be deterred from performing this duty properly by the possibility of disclosure of their work under the Act. However, he does accept DBERR's contention that there is a strong public interest in not exposing to public gaze its operating methodologies, including the identities of the other public authorities with which it communicates and the nature of the data shared with them. He accepts that in some circumstances other public authorities might be reluctant to disclose information to DBERR if they perceived a risk of disclosure by it.
25. The Commissioner has seen that the age of the withheld information in this case, which is several years old, is such that any harm likely to have been caused by its disclosure may well have been weakened by the passage of time but, by the same token, the public interest in having the information available is likely also to have diminished. He has noted too that the Information Tribunal's decision in the DTI case supports the view that DBERR's investigations should be afforded some measure of confidentiality although he has also noted that the facts of this case differ in several important respects from those in the DTI case.
26. In this case, the Commissioner has seen that DBERR wrote to the complainant on three separate occasions – on 28 January, 14 May and 10 November 2003 – on each occasion explaining, in some detail, why it considered that it was not appropriate for DBERR to investigate his complaint against the company using its statutory powers in the Companies Act 1985. The Commissioner accepts DBERR's evidence that, whilst the complainant had not seen the Department's internal minutes, he had been kept informed of the decisions that DBERR had taken and the reasons for those decisions. The Commissioner accepts that, in spite of the passage of time in this case, it is appropriate for DBERR not to reveal details of its investigative methods. He has also seen that the Ombudsman investigated a closely related complaint from the complainant, with full access to the relevant papers and personnel, and found that DBERR's findings against the complainant had been positively based upon sound and detailed enquiries. The

Ombudsman was satisfied that DBERR's enquiries had been completed by staff, acting under appropriate supervision, who had examined the case in considerable detail, but also acknowledged that the complainant had disagreed with their findings.

27. The Commissioner believes that it is appropriate and proper for the complainant to seek assurance that DBERR investigated properly the information he laid before it. However, the complainant has already been given much of the relevant information about DBERR's reasoning, which led it to refuse his request for it to act, and has received additional assurance both from within DBERR itself and through the independent scrutiny of the Ombudsman. It remains the case that the complainant has not felt able to accept the judgements those bodies made. However, the Commissioner has decided that the foregoing considerations tilt the balance of the public interest clearly against disclosure. Accordingly his decision is that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

28. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the exemption set out in section 30 of the Act. However, the Commissioner also decided that the handling of the request was not dealt with in accordance with section 10 of the Act.

Steps Required

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 3rd day of October 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal annex

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Investigations and proceedings conducted by public authorities

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,

... and
- (b) it relates to the obtaining of information from confidential sources.”

Section 30(4) provides that –

“In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,