

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 2 October 2008

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

Summary

The complainant requested the names and addresses of respondents in Employment Tribunal applications. The public authority refused to disclose the information stating that it held the information on behalf of the Employment Tribunal and not in its own right. In the alternative the public authority relied on the exemption at section 36 of the Act to withhold the information. The Commissioner investigated and found that the information is held by the public authority in its own right and that the exemption at section 36 is engaged but the public interest in maintaining the exemption is outweighed by the public interest in disclosure of the information. The Commissioner therefore requires the public authority to disclose the information within 35 calendar days of this notice.

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. At the time of the request the Employment Tribunal Service (ETS) was an executive Agency of the Department for Trade and Industry (DTI) now known as the Department for Business Enterprise and Regulatory Reform (BERR). The ETS became part of the Tribunals Service (TS) an executive agency of the Department for Constitutional Affairs (DCA) now known as the Ministry of Justice (MoJ). However, although the TS function devoted to employment is no longer a DTI / BERR responsibility, BERR retained responsibility for employment tribunal

policy and legislation, including the Employment Tribunals Act 1996 and the Regulations made under it.

3. The Commissioner notes that BERR have confirmed that for the purposes of this decision it is the appropriate public authority. For the sake of clarify this decision will refer to BERR as the public authority.
4. The complainant made the following request for information to BERR on 17 January 2005:

“Names and addresses of all Employed Organisations that are Respondents in receipt of all Employment Tribunal claims for England, Wales and Scotland from 1 October 2004 onwards.”

5. BERR responded on 15 February 2005 explaining that it does not hold information relating to Employment Tribunal claims on its own behalf but rather on behalf of the individual Employment Tribunals to whom it gives administrative support. BERR stated that this also applies to the specific information requested. For this reason BERR stated that section 3(2) of the Act expressly excludes information held by a public authority on behalf of another person. BERR explained that Employment Tribunals, like other courts and Tribunals, are not covered by the Act and any approach to the Employment Tribunal would not result in any information requested being disclosed. BERR stated that whilst it has policy responsibility for determining what information is made available on the public register that does not mean that it holds information on respondents or any other information relating to Employment Tribunal claims on its own behalf and for its own purposes.
6. The complainant requested an internal review of this decision on 21 February 2005. The complainant stated that it was his understanding that BERR also holds information on Employment Tribunals for its own purposes, such as statistical analyses that would appear in the annual report. The complainant stated that BERR were denying him access to information he had previously had access to via the Public Register of Tribunal Applications.
7. BERR responded on 25 May 2005 outlining to the complainant its findings following the internal review. BERR explaining that had considered again its position as to whether the names and addresses requested are held for its own purposes, taking into account that it uses an anonymised version of the information requested for statistical analysis. BERR upheld the application of section 3(2) to the information and concluded that the information is held on behalf of the Employment Tribunal. However, in the alternative BERR explained that it also considered that the information is exempt under section 36(2) (c) in that Ministers took the view that disclosure of the information would or would be likely to otherwise prejudice the effective conduct of public affairs. BERR carried out a public interest test in relation to section 36 and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

The Investigation

Scope of the case

8. On 16 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to reconsider BERR's application of section 3(2)(a) and 36(2)(c) to the withheld information.

Chronology

9. On 4 April 2006 the complainant became aware that responsibility for the ETS has passed from BERR to the MoJ (at that time still known as the DCA but referred to here as the MoJ). In light of this the complainant wrote to the MoJ setting out the background to his request and asking MoJ to now consider if it would voluntarily disclose the information requested. The complainant emphasised that he is not seeking any information whatsoever on the applicants who have lodged claims with the Employment Tribunal, only the responding employers.
10. MoJ responded on 24 April 2006 explaining that although responsibility for the ETS passed to the MoJ from 1 April 2006 responsibility for employment legislation and policy, including the Employment Tribunal public Register remains with BERR. MoJ stated it was not appropriate for it to comment on the changes made to the public register. MoJ also explained again that the information is not held by it but is held on behalf of the Employment Tribunal and so it would be in breach of the Act if it were to disclose such details.
11. The complainant wrote again to MoJ on 3 May 2006 asking it to reconsider its response not to voluntarily provide the requested information to him.
12. The MoJ responded on 17 May 2006 upholding its original position that the information it holds is on behalf of the Employment Tribunal and is therefore not available for disclosure under the Act.
13. The Commissioner began his investigation on 10 January 2007 by writing to BERR. The Commissioner asked BERR to provide him with all documents in relation the request for information and to clarify the purpose for which the department holds the information about employers facing claims, what format the information is held in, and precisely what information is held. In relation to section 36(2) (c), the Commissioner also asked for details of the qualified person, when their opinion was sought and details of their opinion.
14. BERR replied on 20 December 2007 providing the Commissioner with copies of all documents in relation to the request. BERR provided clarification of the purpose for which it holds information, the format it is held in and details of what information is held. In relation to section 36, BERR provided the name of the Minister who gave the qualified opinion, the date of the request to the Minister and the date the opinion was provided.

15. Following further conversations with the Commissioner BERR provided, on 31 July 2008, further details of the information the Minister took into account in reaching his opinion on the application of section 36.

Findings of fact

16. The Register of Employment Tribunal Applications was a public record of claims presented to the Employment Tribunals and judgements made by them. The Register was in place for many years and contained details of the claimants and respondents but no addresses. Amendments to the Tribunal Regulations and Rules of Procedure in August 2000 spelt out in greater detail what it should contain. The changes had the effect of bringing the practice in England and Wales into line with that prevailing in Scotland.
17. The new provisions introduced in 2000 specially required the Register to record the following details of a Tribunal Claim:
 - The case number
 - The date of receipt of claim by the Tribunal
 - The names and address of the claimant
 - The names and address of the respondent
 - The Regional Office of the Employment Tribunals dealing with the claim
 - The type of claim brought – in general terms, without reference to its particulars.
18. In October 2001 the Government announced its intention to set up an Employment Tribunal System Taskforce. A consultation exercise was carried out with participants having site of a Consultation document which at Chapter 3 contained a number of options for the future of the Register. Following the consultation process a report was published by the Taskforce. Amongst the 61 recommendations contained within the report was a recommendation, at number 45, that the Register of Employment Tribunal Applications should be terminated.
19. Following the consultation process and the recommendations a revised Employment Tribunals (Constitution and Rules of Procedures) Regulations 2004 came into force which resulted in a removal of the Public Register of Employment Tribunal applications with effect from the 1 October 2004.
20. The complainant is seeking details of the names and addresses of employers who are respondents in receipt of an Employment Tribunal claim since the removal of the Public Register of Employment Tribunal Applications.

Analysis

Procedural matters: Section 3 'Public Authorities'

21. Section 3(2) states that for the purpose of this Act, information is held by a public authority if (a) it is held by the authority, otherwise than on behalf of another person.
22. BERR claim that the information held by them is so on behalf of the Employment Tribunal and so by virtue of section 3(2)(a) the information is not held by them. BERR explained that the Tribunal Service (previously the Employment Tribunal Service) provides administrative support to tribunals, including employment tribunals. The Tribunal Service holds the information requested in order to administer employment tribunal claims.
23. In accordance with the rules of Employment Tribunals (Constitution and Rules of Procedures) Regulations 2004 a claim and response cannot be accepted without the full name and details of the respondent and claimant. The Tribunal Service must be provided with this information on order for a claim to proceed. However BERR state that this is held by it purely on an administrative basis which allows its statutory duties to be carried out for example, the sending out of notices.
24. BERR further explained that when the forms are received by the Tribunal Service, the claimant's and respondent's details are recorded on a computer database. The name and address of the respondent plus their representative's details (if they have one) are entered onto the system. The forms themselves are kept on file as they contain details of the grounds of the response and some optional information on the size of the organisation etc. Files are kept for up to one year after the case has been determined to allow for any review or appeal process.
25. The overall number of claims are aggregated and anonymised to produce statistics relating to the volume of claims to employment tribunals. These are broken down into various categories for various management purposes, to inform policy considerations, and for public consumption. A statistical report was and continues to be produced comprising a number of statistical tables, the most recent version is available online at www.employmenttribunals.gov.uk.
26. BERR explained the purpose for which the Tribunal Service holds the information. They state that the specific details are generated for the actual purposes of employment tribunals and are only stored by it as part of its administrative responsibilities. Therefore, BERR are satisfied that the details should be withheld under section 3(2) (a) of the Act. No claim could be administered without the factual details of all parties being available for the purposes of sending information about hearings, orders and decision. The reports produced do not contain the individual respondent/ claimants' details nor do they produce statistical information other than used above. Therefore the details are not used for other reasons except administrative.

27. Whilst the Commissioner accepts that BERR only hold the information for administrative purposes he does not agree that this in turn means that the information is only held on behalf of the Employment Tribunal. The Tribunal Service use the information provided to it, in its role as administrator of tribunal claims, to produce statistics. Therefore the information used to generate these statistics is also held by it.
29. The Commissioner therefore finds that the information is held by BERR and is not exempt by virtue of section 3(2) (a). The Commissioner therefore finds BERR breached the requirements of section 1(1) (a) by failing to confirm it holds the information requested.

Section 17 'Refusal of Request'

30. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
31. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him. Full texts of the relevant sections are included in the 'legal annex' section of this notice.
32. BERR did not explain to the complaint its reliance on section 36 until the internal review. The Commissioner therefore finds that the refusal notice was issued in breach of section 17(1) as it was issued outside of the time allowed for compliance under section 10 of the Act.

Exemption: Section 36 Prejudice to the effective conduct of public affairs'

33. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs.
34. Information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to lead to the above adverse consequences. In order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons'
 - Ascertain when the opinion was given;
 - Consider whether the opinion was objectively reasonable and reasonable arrived at

35. BERR explained that the request to consider the application of section 36 was submitted on 21 March 2005 to Gerry Sutcliffe who was, at the time, Parliamentary Under-Secretary of State for Employment Relations and Consumer Affairs, Department of Trade and Industry. The Minister agreed that section 36 could be engaged and that the public interest test was satisfied. The submission was approved on 8 April 2005.
36. BERR summarised the factors considered by the Minister in determining that disclosure of the information would otherwise prejudice the effective conduct of public affairs:
- It would leave respondents at risk of unwarranted damage to their reputations for example by press coverage where ill-founded and misconceived complaints are made against them.
 - It would make it easier for organisations to market their services directly to respondents and increase the likelihood of them being formally represented at tribunal proceedings. Where small firms with limited resources are concerned this can amount to more than trivial annoyance, particularly as some of the approaches made are expressed in misleading terms which could result in unnecessary costs to organisations. There is no evidence to show that formal (usually legal) representation from an early stage in an employment dispute increases the chance of the dispute being resolved without resort to litigation. It is Government policy that those involved in such disputes should have as much opportunity as possible to follow a non litigation route to resolution. For this reason, legal representation is not required in employment tribunals, and the names of parties were removed from the public arena in 2004.
 - It would expose the existence of disputes publicly and reduce the chances of disputes being settled in advance of a tribunal hearing.
 - Parliament decided when it passed the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, what information it was in the public interest to place into the public domain relating to employment tribunal claims, and what information was not. The latter category included respondent's details, prior to a judgment.
36. The Information Tribunal has decided in *Guardian & Brooke v The Information Commissioner & the BBC EA/2006/0011 and EA 2006/0013* that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions, both of which are reasonable*'
37. The Commissioner notes that in the Information Tribunal case *McIntyre v The ICO and the Ministry of Defence EA/2007/0068* the tribunal commented "*We would recommend to the Commissioner that in future investigations for complaints where a s.36(2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses.*". The

Commissioner therefore considers that to investigate whether an opinion is reasonable he should establish what the qualified person had in front of them when making their decision, this should include whether a record was made of the decision making process or is capable of being written up.

38. The Commissioner notes that BERR have not agreed to provide the Commissioner with any documentary proof as to the Minister's opinion as it has maintained the view that the Act does not require it to do so. Therefore the Commissioner does not know what information the qualified person had in front of them when making their decision.
39. However, the Commissioner acknowledges that lack of evidence cannot invalidate an otherwise reasonable opinion. Despite the lack of evidence he is prepared to accept that in this case the opinion of the qualified person is a reasonable one and finds that the exemption is therefore engaged.

Public Interest Test

40. Section 36(2) (c) is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore decide if the public interest in disclosure of the information outweighs the public interest in maintaining the exemption.
41. In order to reach a decision as to where the balance of the public interest lies the Commissioner has considered the extent and severity of any prejudice to the conduct of public affairs. In *McIntyre v ICO and the Ministry of Defence* the public authority claimed section 36(2) but did not specify whether the qualified person's opinion was that prejudice would occur or would be likely to occur. The tribunal commented that:

"We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to the level of prejudice that the lower threshold of prejudice applies, unless there is clear evidence that it should be the higher level."

42. BERR has not designated the level of prejudice and therefore in line with the above decision the Commissioner has considered that the lower level of prejudice - 'would be likely to prejudice' - applies. In the case of *John Connor Press Associates v The Information Commissioner EA/2005/005* the tribunal confirmed that 'would be likely to prejudice' means that *"the chance of prejudice being suffered must be more than a hypothetical possibility; there must have been a real and significant risk."* In other words the risk of prejudice need not be more likely than not, but must be substantially more than remote.
43. The Commissioner has also considered the wording of the exemption at section 36(2) (c). In *McIntyre v ICO* the Tribunal commented on the intention behind the exemption at 36(2) (c):

"this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which

are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversification of resources in managing the impact of disclosure."

44. The Commissioner considers that is important to consider that the information sought by the complainant was made public via the Register from 1965 until October 2001. BERR have not provided the Commissioner with any evidence that disclosure of the information sought during this period did have any of the effects which it now considers disclosure would have. BERR have argued that disclosure could damage the respondents' reputations and leave them open to direct marketing by organisations as well as increase the likelihood of formal representation at Tribunal hearings. BERR have not explained how this would affect its ability to meet its wider objectives or prejudice its ability to offer an effective public service.
45. The Commissioner considers that, because of this, the severity of any prejudice to the conduct of public affairs is minimal. Accordingly he finds that there is a very weak – if any - public interest in maintaining the exemption. There is a competing general public interest in disclosure which is strengthened by the more specific public interest in "open justice" so that the details of cases brought before courts and tribunals should normally be in the public domain unless there is good reason for confidentiality. The Commissioner has taken full account of these factors and has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the requested information.

The Decision

46. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it:
- (i) incorrectly applied section 3(2) (a) of the Act and therefore breached the requirements of section 1(1) (a).
 - (ii) incorrectly applied section 36(2) (c) to the withheld information and therefore breached section 1(1) (b) by failing to disclose the requested information.

Steps Required

47. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the requested information previously withheld under section 3(2) (a) and 36(2) (c).

Failure to comply

48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

49. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 2nd day of October 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Public Authorities

Section 3(1) provides that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person,
or
- (b) it is held by another person on behalf of the authority.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and

- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.