

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 March 2008

Public Authority: The Advisory, Conciliation, and Arbitration Service (ACAS)
(a non-departmental public body of the Department for
Business Enterprise and Regulatory Reform)

Address: Brandon House
180 Borough High Street
London
SE1 1LW

Summary Decision

The complainant, an employee of the Advisory, Conciliation and Arbitration Service (ACAS), sought information from ACAS relating to an Assessment and Development Centre he had attended to help determine suitability for promotion. Although a substantial amount of information was released to the complainant ACAS withheld some information under section 43 of the Act on the grounds that release of it would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The Commissioner has concluded that ACAS applied this exemption correctly in respect of the prejudice that would be caused to the commercial interests of the company, and thus agreed that the information could be withheld under section 43, although he did not think that section 43 could be applied in respect of ACAS's own commercial interests. The Commissioner also found that ACAS did not respond to the complainant's request in compliance with section 17 of the Act.

The Commissioner's Role

1. The Commissioner's role 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. The complainant attended an Assessment Centre (AC) exercise for promotion purposes in 2005. The materials used at the AC exercise were provided by a company called A&DC Ltd (the company). At a meeting with one of ACAS's Deputy Directors on 7 June 2005 the complainant was provided with a set of

documents comprising photocopies of the assessor's notes for each exercise, Role-player Report Forms, and his personal scoring matrix. He was also allowed, for the duration of the meeting only, to have sight of a copy of the Background Document that had formed the core brief for the assessment centre candidates. He was allowed access to this brief at the meeting on the explicit understanding that it could neither be retained nor copied.

3. Following the meeting the complainant sought from ACAS the following information by email on 8 June 2005. He asked for:-
 - a. "The briefing document for the phone calls that I used, not a generic copy, on the assessment day;
 - b. The briefing document that I used for the written exercise;
 - c. All the paperwork I produced for the written exercise, and
 - d. The feedback from the role player in the Chris Bingley case".

Later that same day he made a further request for:-

- "a copy of the brief given to the role-players for each one of the four phone calls taken on the assessment day"

The Human Resources Director (the Director) replied on 27 June 2005, offering the complainant a meeting and enclosing all of the paperwork produced by the complainant for the written exercise. The Director stated that ACAS had checked the complainant's file and discovered that it did not hold a feedback report completed by the role-player in the Chris Bingley case. In respect of the other two items, i.e. the briefing document for the phone-calls and the briefing document used for the written exercise, they were being withheld as disclosure of them would prejudice ACAS's commercial interests.

4. The complainant replied to ACAS on 4 July 2005. He said that he did not agree that an exemption applied in this case and asked for his emailed letter to be taken as a formal complaint about the refusal to release. He wrote again, by email on 8 August 2005, to ask whether or not ACAS would be prepared to release the information. ACAS replied by return, confirming the decision given in the Director's letter of 27 June 2005.

The Investigation

Scope of the case

5. On 11 August 2005 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. He explained that the briefing documents he had asked for had been used by

himself, by the assessors, and by the role players at an assessment day held in Leeds.

Chronology of the case

6. The Commissioner wrote to ACAS on 5 October 2006 to ask for a copy of the withheld information; to establish if an internal review had actually been carried out in respect of the complaint; and to find out what the public interest arguments were that had been considered when making the decision to withhold the information.
7. The Director replied on 2 November 2006. He said that ACAS was a non-departmental public body (NDBP) and that it was not cited in schedule 1 of the Act as a body covered by it. He went on to say, however, that ACAS was prepared to operate in a transparent way and to provide the reasons why it had determined that the information in question should be withheld from release. He explained that legal advice had been taken in respect of the request and that the public interest arguments were contained within that advice, a copy of which he enclosed with his letter.
8. Given the uncertainty as to whether or not ACAS was in fact covered by the Act, the Commissioner made an enquiry of the Department for Constitutional Affairs (DCA, now the Ministry of Justice (MOJ)). Having consulted with the Department for Trade and Industry (DTI), DCA confirmed in an email to the Commissioner that ACAS was covered by the Act by virtue of its relationship with the Department of Trade and Industry (now Department for Business Enterprise and Regulatory Reform (BERR)). The Commissioner subsequently confirmed this in writing to ACAS on 19 January 2007.
9. On 9 February 2007 the Commissioner wrote again to ACAS. He pointed out that there did not appear to have been any further correspondence with the complainant in relation to his letter of 4 July 2005. The Commissioner suggested that this letter might have been seen as an opportunity for conducting an internal review of the initial decision to withhold some of the information requested, and he invited ACAS to now take the opportunity to do so.
10. ACAS carried out a review of the decision on 19 February 2007. The review explained the sequence of events around the complaint and provided some background about the operation of the assessment centre system. ACAS upheld its original decision but did so without incorporating any public interest arguments either for or against the release of the material.
11. The Commissioner wrote again to ACAS on 21 March 2007, making further enquiries about ACAS policy guidelines on disclosure and asking about the position of the company in this matter. ACAS replied on 25 April 2007, explaining that it provided detailed guidance to staff on its intranet about the information it held on them and how that information could be requested. ACAS also explained its relationship with the company and how the assessment centre modules were created. ACAS explained that it had consulted with the company about the

possibility of consenting to the release of the material but, for a number of reasons, the company could not agree to the material being disclosed.

12. On 27 July 2007 the Commissioner wrote to ACAS, providing it with guidelines on how to conduct an internal review. The Commissioner invited ACAS to follow the process and to send a copy of the completed review to the complainant for his information. On the same date the Commissioner also set out the process for the complainant and explained that, on receiving a copy of the internal review, he should consider what it said and then decide whether or not he was content with the explanation. ACAS subsequently sent a copy of its internal review to the complainant on 15 October 2007. The complainant told ACAS that he did not accept its arguments for continuing to withhold the information he sought, in particular the view that disclosing it would jeopardize the commercial position of the company. On 19 October 2007, therefore, he wrote asking the Commissioner to continue with his investigation.

Findings of fact

13. ACAS employs the company to develop assessment centre processes for its business. The company supplies Assessment Centre Business Simulation exercises that measure specific competencies directly related to the needs of the job under consideration. The complainant attended an Assessment Centre in Leeds in 2005 in order to determine his suitability (and that of others) for appointment as a grade 10 Helpline Officer. There are three sets of documentation used at an Assessment Centre, none of which is available to the candidates before the day. These are:-

- Briefings for candidates for each exercise.

These have the heading 'Instructions for Participant' (IFP) and are given out on the day of the Assessment Centre. They are then collected in at the end of the day because the same material and exercises are used at each Assessment Centre.

- Guides for Assessors (GFAs)

These include scoring mechanisms and are strictly confidential. They are only seen by assessors, on the basis that it would give a candidate an unfair advantage over others if he or she were to see the kind of action that would constitute a 'positive' or 'negative' behaviour in relation to a particular exercise.

- Assessor and Role Player report forms

These forms are used to record the observations of the assessor. The feedback given to candidates is an amalgamation of the observations from all of the exercises.

14. All candidates have a five day period after the conclusion of the Centre in which to appeal against any aspects of the process; this is before any of the results are announced. The complainant did not appeal during this period. Following the

publication of the results, in which he was unsuccessful, the complainant raised a grievance stating that the assessment process had not been carried out fairly, and he requested personal information showing his performance at the Assessment Centre. This information was subsequently provided to him under the Data Protection Act 1998.

15. In a letter dated 25 April 2007 ACAS provided the Commissioner with a copy of the terms and conditions under which the Assessment Centre exercises are provided to it by the company:-

- The briefing material remains the property of the company and the terms and conditions of the contract state in relation to conditions of supply/use of materials that:
- The company's Materials shall not be copied, amended, or resold to any third party. Materials are supplied on the condition that they will be used by the Client in the manner for which they were designed in accordance with company instructions and advice and appropriate professional and ethical standards.
- The company reserves the right to withhold its Materials from those who violate such standards or breach any of these Conditions and/or to cancel the registration of Registered Users who are guilty of non-compliance.

Further on, in the Terms and Conditions, section 8 refers to the Intellectual Property Rights of the supplier. Paragraph 8.3 states that:-

- The Client shall not reproduce or copy or vary or adapt the company's Materials or a substantial part of them by any means or in any way whatever, or enter the same into any kind of information retrieval system including any form of computer system. Any such act or occurrence is an infringement of the company's Intellectual Property and may amount to a criminal offence. The company may take legal action against anyone who infringes its intellectual property rights.

Analysis

16. The Commissioner has considered the public authority's response to the complainant's request for information.

Procedural breaches

17. ACAS acknowledged the complainant's initial request on 27 June 2005 and provided some of the information that he had asked for. However, on the basis of legal advice, ACAS withheld the remaining information on the grounds that disclosure would prejudice ACAS's commercial interests. In its letter ACAS made no specific reference to section 43 of the Act although it clearly referred to having

sought legal advice in relation to possible disclosure under the Act. ACAS made no reference either to the public interest test. The refusal notice was issued within the twenty working days required by the legislation but the notice did not inform the complainant of his right of appeal, nor that he might subsequently appeal to the Information Commissioner.

Section 17

18. Section 17(1) states that a public authority which is relying on a claim that information is exempt must, within the time for complying, issue a refusal notice which:
- (a) states the fact that the information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.

Section 17(3) states that if a public authority is relying on a qualified exemption it must state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner finds that ACAS breached section 17(3) of the Act by failing to provide the complainant with the public interest arguments that it had considered in reaching its decision until after the Commissioner's own investigation into the complaint had begun, and even then only after the Commissioner had invited ACAS to consider the matter.

Exemptions

19. The Commissioner has considered ACAS's use of the exemption in section 43 of the Act in dealing with this request. The full text of the exemption is contained in the legal annex.

Section 43(2) – Prejudice to commercial interests

20. Section 43 provides that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is a qualified exemption which means that, if the Commissioner finds that the exemption is engaged, he must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has noted that the complainant himself does not accept that the exemption applies to the information at issue, arguing that there is no obligation upon ACAS to employ that particular method of selecting candidates for promotion.
21. In coming to a view on whether or not the exemption is engaged the Commissioner has taken into account the decision of the Information Tribunal in the case of *John Connor Press v Information Commissioner (EA/2005/0005)* and subsequent cases. In that first case the Tribunal interpreted the exemption at section 43 to mean that the chance of prejudice must be more than a hypothetical or a remote possibility; what it was necessary to demonstrate was a real or significant risk. This line of reasoning was expanded further through the Tribunal

decisions in the cases of *Hogan v Information Commissioner (EA/2005/0026)* and *Bexley v Information Commissioner (EA/2006/0060)*. In those cases the Tribunal considered what was meant by “would be likely to prejudice” and when a prejudice-based exemption might apply: in particular that, in order to have effect within the meaning of the exemption, “prejudice must be real, actual and of substance” and that “the occurrence of prejudice to the specified interests is more probable than not and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not”.

22. In the course of dealing with this request ACAS has argued that release of this information would prejudice both its own commercial interests and those of the company. In respect of its own interests ACAS has said that, if all of the information sought by the complainant were to be disclosed, it would mean that these particular exercises could not be used again and, on the next occasion that ACAS wished to recruit for this particular role, new exercises would therefore have to be prepared. This would not only be expensive but there would be a knock-on effect in that it would be difficult to resist requests for similar material in respect of other recruitment exercises. This would be enormously costly for ACAS, as exercises could only be used once, and there would be implications for other public sector authorities using similar recruitment processes. ACAS particularly argued that another outcome of this material entering the public domain would be to put those candidates who had access to it at an advantage compared to those who had not, with the real risk that candidates who might otherwise not have been successful would end up being so, which would be prejudicial to the effectiveness of the public service.
23. In terms of the prejudice that disclosure might cause to ACAS’s own commercial interests, the Commissioner does not believe that the case has been made out. The principal argument employed by ACAS is that release of the information might cause it to fall into the wrong hands, thereby giving some candidates an unfair advantage and leading to possibly unsuitable candidates being selected for promotion. While this may indeed be a legitimate concern, it does not seem to the Commissioner to be an argument that sits comfortably within the requirements of this particular exemption: such an outcome, as ACAS has suggested, has more to do with the effect that it might have on the efficiency of the public service than with anything to do with commercial interests. It seems to the Commissioner that this argument, along with the other arguments employed by ACAS in respect of potential damage to its own interests, do not really relate to commercial matters. Given the levels of prejudice referred to in paragraph 22, which are what the Commissioner needs to bear in mind when considering the applicability of an exemption, he is of the view that ACAS has not really made a sufficiently clear connection between disclosure of the information sought and prejudice of the kind required by the exemption.
24. ACAS has also said that disclosure might affect the commercial interests of the company. In that context, the Commissioner has noted the contents of a number of the clauses in the relevant terms and conditions of the contract between ACAS and the company (see paragraph 15 above). It is clear from those clauses in the contract that the company maintains intellectual property

rights in the material under discussion and that materials supplied by the company are required to be used only for the purposes supplied and not in any manner outside those purposes. The company has not given its consent to release of the information and clearly has a concern (as reported in correspondence by ACAS) that, if these materials were to find their way into the hands of those not qualified to use them, then the commercial position of the company might be jeopardized by those persons or bodies using them in such a way as to bring the company and its products into disrepute. Those currently administering these exercises on behalf of the company are highly trained professionals: direct supervision is carried out by an expert and professional consultant occupational psychologist. Release of this information to the complainant, which by definition means release into the public domain, means that such materials would therefore effectively be available to all in an uncontrolled manner: the Commissioner accepts that this would cause a real and significant risk to the commercial interests of the company. On that basis, the Commissioner is of the view that section 43 is engaged.

Public Interest

25. Section 43 is, however, a qualified exemption and the Commissioner therefore needs to consider the application of the public interest test. In considering where the public interest might lie ACAS has recognised that there is a public interest in increasing the amount of information available as to how public bodies spend their funds. But, in arguing the case as to whether or not this particular information should be released, ACAS has essentially restricted itself to setting out its view of the perceived commercial consequences, both to itself and to the company, of the release of this information into the public domain: it has not addressed the issue of what the public interest might be in such information being released into the public domain. The Commissioner has deduced that neither ACAS nor the company would regard such a disclosure as being in the public interest, but it is unfortunate that ACAS has not set out any arguments in support of that view, either from itself or from the company, when withholding this information from the complainant.
26. The Commissioner recognises the value of the information sought to the complainant. He has also noted the view of the Information Tribunal, in paragraph 71 of the very similar case of *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)*, that such information should be regarded not only as of interest to the complainant but as possessing value for a wider audience. He also understands the argument that there are other ways of assessing the suitability of candidates for promotion and that ACAS is under no obligation to use assessment centres: that, however, is not a matter for the Commissioner and has no direct relevance to the complaint. Given that ACAS has elected to use that particular method for selecting candidates for posts, what the Commissioner needs to decide is –would it be in the public interest for the information sought by the complainant to be released into the public domain? However, in coming to a view on that matter the Commissioner has not been assisted by the absence of arguments from either ACAS or the company as to why it would not be in the public interest for this information to be released. In the case of *Derry v Information Commissioner (EA/2006/0014)* the Information

Tribunal made it clear that it would not accept an argument in respect of the impact release of the information might have on the commercial position of the relevant third party in the absence of any direct submission by the third party itself. In this case ACAS has reported the views of the company that release would damage its commercial interests but those views do not include any consideration of the public interest that applies to this exemption.

27. However, it is clear from the documents seen by the Commissioner that the company's view (as reported by ACAS) is that damage to its commercial interests would be caused by the release of this information. ACAS has drawn attention to the nature of the contract that it has signed with the company. It would appear to the Commissioner, from consideration of some of the terms of that contract, that release of the information sought without the consent of the company (which ACAS says has not been given) would constitute a breach of the contract. It would also result in the unauthorized use of information in such a way as to damage the commercial interests of the company. The Commissioner is of the view that neither of those circumstances would be in the public interest. Accordingly, he is of the view that, in all the circumstances of this case, 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 failed to deal with this request in accordance with the requirements of section 17 of the Act. The Commissioner's view is that, in respect of the exemption cited, ACAS correctly applied section 43 to the withheld material at least in respect of the company's commercial interests.

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

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 17th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 1 - (1) 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 17. - (1) A public authority which, in relation to any request for information, 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) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection 1(b) or 2(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming-

- (a)
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 41 - (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.

Section 43. -

(2) 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)

