

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 February 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant made a request for information about an investigation in which the Ministry of Defence (the “public authority”) was involved. The information requested, which was a report written by British Telecom (“BT”) and passed to the public authority, was originally withheld under the exemptions in section 30 (investigations and proceedings conducted by public authorities) and 43 (commercial interests) of the Freedom of Information Act 2000 (the “Act”). This was subsequently amended to sections 30 and 41 (information provided in confidence). During the investigation the public authority also ‘reserved the right’ to rely on section 40(2) (personal information) and amended the subsections of section 30 that it was relying on.

The Commissioner’s decision is that the exemption at section 30 is engaged, but that the public interest in maintaining the exemption does not outweigh that in disclosure in relation to some of the information. He finds that section 41 is not engaged in respect of the remaining information. The complaint is therefore partly upheld.

The public authority’s handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in 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.

Background

2. The request relates to a fraud which took place at the Operator Assistance Centres (OACs) which BT operates on behalf of the public authority. According to a briefing document written by BT, which has already been released to the complainant as a result of an earlier request,:

“The fraud took place at the Operator Assistance Centres (OACs) which BT operates on behalf of the MoD.

The DFTS [Defence Fixed Telecommunications Service] contract requires the OACs to achieve a Percentage Call Answered (PCA) target of 85% and 99% for emergency calls.

The fraud related to inflating the number of successful calls in order to achieve the PCA target. This generally involved making large numbers of short duration calls from within the OACs to the Operators. The consequence of failing the PCA targets would be payment of service credits.”

“The fraud first came to light in late 2004 when an informant made contact with the MDP [Ministry of Defence Police]. MDP passed the information to BT security who asked the DFTS security manager to conduct an investigation. The outcome of the investigation was that there was insufficient evidence to support the allegation. MDP were informed and the case was closed.

A further informant approached the BT “Whistle Blower” line in late 2005. An investigation was carried out by BT Security Division Investigators. The investigation concluded from witness statements that fraudulent calls had been made to boost the PCA statistics to a greater or lesser degree during the whole period of the contract. This phase of the investigation was completed in March 2006 with the suspension of 6 BT Managers.

A further phase of the Investigation was commissioned in May 2006 to review the conduct of the first, unsuccessful, investigation and to establish whether the fraud went beyond those currently under suspension, i.e. DFTS and BT senior Management.”

“The further investigation did produce further evidence against those managers who were already suspended and concluded that the fraud and knowledge of the fraud was confined to the OAC management.

This evidence has all been made available to the MDP”.

3. Following receipt of the evidence from BT in relation to the second allegation, the public authority commenced a formal criminal investigation. On completion a file was submitted to the Fraud Prosecution Service (part of the Crown Prosecution

Service) who decided that it was not in the public interest to prosecute the BT staff involved in the case.

4. The sum recovered from BT was £1.75 million. This included recompense for the service credits that would otherwise have been paid by BT to the public authority where the service levels (in terms of volume) had not been met and, also, recompense for the fraudulent calls that were made.

The request

5. There has been much correspondence around this request with similar earlier information requests having been made by the complainant. In response to one of his earlier requests the complainant was made aware that:

“The conduct of the investigation and the findings from the investigation have been shared with MoD Police and are not included in the supporting papers to this document”.

6. In light of this, the complainant made the following information request on 20 May 2008:

“... please provide the information the MoD Police has received from BT in connection with a fraud at call centres under the DFTS contract.

This should include, but not exclusively, any reports or briefings BT provided in connection with the issue.”

7. On 23 May 2008 the public authority emailed its response. It refused to disclose the information and referred to the reasons it had cited in response to an earlier information request, without actually stating what these reasons were. (The earlier correspondence cited the exemptions at sections 30 (investigations and proceedings conducted by public authorities) and 43 (commercial interests)).
8. On 23 May 2008 the complainant requested an internal review. There was some initial confusion regarding where his request should have been sent, but the complainant subsequently resent his request for an internal review to the correct address on 27 May 2008.
9. On 11 September 2008 the public authority sent out its internal review. It maintained its earlier stance that the information was exempt from disclosure but amended the exemptions relied on to sections 30(1)(b) and 30(2)(a)(iii) (investigations and proceedings conducted by public authorities) and section 41 (information provided in confidence).

The investigation

Scope of the case

10. As it was not clear which information request the complainant wished the Commissioner to consider, and there had been several similar requests made by the complainant to the public authority, the Commissioner clarified this directly with the complainant.
11. On 19 October 2009 the complainant confirmed to the Commissioner that he wanted "*a copy of the full report*", i.e. the final report of the DFTS investigation which was written by BT and provided to the public authority.
12. During his investigation, the Commissioner ascertained that the report also had a number of appendices. These consisted of information which had been provided by the six staff who were interviewed in connection with the investigation. The complainant confirmed that he wished the Commissioner to consider disclosure of these items as well as the report itself.

Chronology

13. On 27 August 2009 the Commissioner wrote to the complainant to advise him that he was commencing his investigation. He sought clarification about the scope of the investigation. He sought further clarification on 1 and 8 September, and 6 October 2009.
14. On 19 October the complainant clarified the scope of the investigation.
15. On 20 October 2009 the Commissioner raised queries with the public authority. On 25 November 2009 the Commissioner received a response from the public authority.
16. On 30 November 2009 the Commissioner raised further queries with the public authority. He also sought information regarding some appendices which should have accompanied the report but which did not seem to have been considered by the public authority.
17. A response was received on 7 December 2009.

Analysis

Exemptions

Section 30 – investigations and proceedings conducted by public authorities

18. Following correspondence with the Commissioner, the public authority indicated that it wished to rely on the exemption provided by section 30(1)(a) of the Act, in place of its previous reliance on section 30(1)(b) and 30(2)(a)(iii).
19. 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”.
20. Although the information was originally obtained and collated by BT for its own internal purposes, it was subsequently passed to the public authority on the understanding that it would undertake a criminal investigation, in order to ascertain whether or not a person should be charged with an offence. The information requested relates to an alleged fraud and potential criminal charges. The public authority have confirmed that the MOD Police have statutory police powers: *“in relation to matters connected with anything done under a contract entered into by the Secretary of State for Defence for the purposes of his Department or the Defence Council”*. The Commissioner is therefore satisfied that the information in the report, and its appendices, is held by the public authority for the purposes of a criminal investigation which it is empowered to conduct.
21. Section 30 is a class-based exemption, so that where the information is found to be of the class described then the section is applicable. Whilst the Commissioner does not accept that section 30(1)(a)(ii) applies, as it is not a function of the public authority itself to determine criminal guilt, he does find that 30(1)(a)(i) is engaged.
22. Having concluded that the exemption is engaged it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. There is an assumption in favour of disclosure and, therefore, if the public interest arguments for maintaining the exemption are equal to those for disclosure then the information should be disclosed.

Public interest arguments in favour of disclosing the requested information

23. The public authority put forward the following arguments in support of disclosure:

“Release of this information would contribute to the quality and accuracy of public debate on the subject of fraud where taxpayers are the ultimate

victims, and would demonstrate that such activities are subject to rigorous investigation”.

“Where public funds are being spent, there is a valid public interest in accountability and justification”.

24. It further stated in its internal review that:

“In cases such as these where a fraud has been committed, public confidence in the investigations carried out to ascertain whether any person has failed to comply with the law would be increased by disclosure of information relating to the investigation process and the investigation itself”.

25. In the Commissioner's view, having looked at the withheld information, it would add to the public's understanding of the nature of the investigation and the conclusions reached were the information to be disclosed. However, he is also of the opinion that a considerable amount of information about the fraudulent activity has already been placed in the public domain, including some that was released in an earlier disclosure to the complainant. As such, he considers that this public interest factor is of only limited weight.

26. The Commissioner further considers that greater public scrutiny as a result of disclosure of the withheld information would ensure accountability on the part of the public authority in ensuring it chooses suitable contractors to carry out its work. It may also assist in demonstrating that the public authority undertook appropriate action once it became aware of events and 'took over' from the internal BT investigation. Whilst the Commissioner attributes some weight to these arguments, however, he again notes that much of the information was already in the public domain.

27. The Commissioner is also of the view that there is a general principle that the actions of those charged with the use of public funds should be as open and accountable as possible. Whilst there is little in the requested information which would shed light on the costs incurred by the public authority in the course of its duties, the information gathered does relate to the investigation of fraudulent activity which had cost the public authority, and therefore the public purse, a considerable amount of money. The Commissioner notes that the volumes of money concerned were assessed and a large sum was subsequently repaid by BT. Having viewed the withheld information, the Commissioner does not consider that its disclosure would add further insight into the costs incurred or offer an accurate assessment of the amount of money which BT misappropriated. Nevertheless, in view of the amount of money involved he believes that there is still merit in disclosing any information which may lead to a better understanding about how such a large amount of money came to be misappropriated.

Public interest arguments in favour of maintaining the exemption

28. The public authority put forward the following arguments against disclosure:

“Information relating to an investigation will rarely be disclosed under FOIA and only where there is a strong public interest consideration in favour of disclosure. Whilst such information may be released in order to serve a “core policing purpose” e.g. to prevent or detect crime or to protect life or property, it will only be disclosed if there are strong public interest considerations in favour of disclosure. The further the considerations in favour of disclosure are from a core policing purpose, the lighter those considerations will be. In this case, it cannot be demonstrated that releasing the information would serve any particular core policing purpose.”

29. The Commissioner does not agree with the argument presented above. Section 30 is not an absolute exemption and as such it is subject to a public interest test, which favours disclosure unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

30. The public authority also advised that the specific information which BT had provided to it for the purposes of its investigation would: *“not add sufficiently to the public understanding of the events that took place, but would have a detrimental effect on the ability of the MDP to carry out any future investigations”*. The Commissioner understands that parties may well be less willing to co-operate were they to believe that their views may be released to the world at large under the Act and he accords this argument some considerable weight.

31. There remains a very strong public interest in the ability to prevent and detect crime, and to gather information for the possible future prosecution of offenders. Disclosure may reduce the chances of a successful prosecution, either now or in the future, as witnesses may become less willing to provide information. Additionally, where a decision has been taken not to bring criminal charges, disclosure of any information gathered during the investigation may be unfair to those who came under investigation, but have not been prosecuted.

Balance of the public interest arguments

32. When determining the balance of the public interest factors on either side of the scale outlined above, the Commissioner has taken into account the following:

- the stage of the investigation;
- whether information is in the public domain;
- the significance or sensitivity of the information;
- any independent evidence which raises questions which disclosure might help to address; and
- the age of the information.

The stage of the investigation

33. The public authority concluded its investigation in April 2007. Therefore, the investigation had been completed for a year prior to the request.

Whether information is in the public domain

34. Much information about this case is already in the public domain. This has been partly as a result of earlier disclosures made by the public authority as well as much media interest. Some employment tribunals in relation to the case have also been publicised and BT staff lost their jobs as a result of the fraudulent activity.

The significance or sensitivity of the information

35. The information consists of a report explaining some background to the fraudulent activity along with enquiry statements from witnesses involved. It is a significant document which was provided to the public authority to assist it in deciding whether or not to undertake a criminal investigation.

Any independent evidence which raises questions which disclosure might help to address

36. The Commissioner is not aware of any such independent evidence. Staff at BT were held to account by BT itself and compensation was later awarded to the public authority. The Commissioner again notes that the case was presented to the Fraud Prosecution Service (part of the Crown Prosecution Service) who decided that it was not in the public interest to further prosecute any BT staff.

How old is the information?

37. The Commissioner notes that the report is dated March 2006 and that the request was made in May 2008. However, the report was produced to pass to the public authority with a view to it undertaking a criminal investigation and this subsequent investigation did not cease until April 2007. Nevertheless, the Commissioner notes that the requested information was more than two years old at the time of the request, even though the actual investigation undertaken by the public authority did not cease until more than a year after the initial report.

Conclusion

38. The Act contains an assumption in favour of disclosure and therefore in order for information to be withheld it is necessary for the factors in favour of maintaining the exemption to outweigh those in favour of disclosure.
39. In respect of all the appendices, the Commissioner considers that the argument that disclosure of the withheld information could dissuade witnesses from providing information in future has substantial weight. He notes that the information was initially provided by employees to their employer, and that the information provided relates to private witnesses and alleged criminal activity. He

further notes that BT itself is not a public authority and its staff would therefore not be aware that information they provided could be the subject of a request under the Act. The Commissioner considers this argument to be compelling and he finds it outweighs the counter-arguments in favour of disclosure.

40. In respect of the report itself, which is only a short document, much of this also refers to named individuals and the arguments above are therefore relevant. In a similar vein to the arguments above, the Commissioner concurs with the public authority that disclosure may reduce the chances of a successful prosecution, either now or in the future, as witnesses may become less willing to provide information. Additionally, where a decision has been taken not to bring criminal charges, disclosure of any information gathered during the investigation may be unfair to those who came under investigation, but have not been prosecuted.
41. However, other parts of the main report relate to the general boundaries of the investigation and these have largely already been released within earlier information, albeit in a different report. The Commissioner does not accept that there is any further harm which could be caused by release of this 'anonymised' information. In reaching this conclusion he notes that although the case is comparatively recent it was nevertheless complete at the time of the request and its outcome was public. Therefore, the Commissioner finds that there is no risk of prejudice to this specific investigation. Furthermore, as it does not reveal any investigative techniques the Commissioner does not consider it likely that disclosure of the majority of the disputed information would harm other ongoing investigations of a similar nature.
42. The Commissioner considers that the most sensitive information is that which has been provided by witnesses and he concludes that this has been appropriately withheld. He does not consider the remaining information to be particularly sensitive.
43. The Commissioner therefore concludes that this exemption was appropriately applied to part of the report, but that the remainder should be disclosed.

Section 41 – information provided in confidence

44. The public authority argued at internal review stage that the report and appendices were provided in confidence and that BT: *"have a reasonable expectation that the information provided to MOD for the purposes of the investigation would be held in confidence and not subject to public disclosure"*. It went on to state: *"it is in the public interest to protect the ability to gather evidence, and for an authority to be provided with evidence, in confidence"*. It also stated that this was in the interests of both itself and BT.
45. During the investigation, the public authority further informed the Commissioner that the report was: *"provided by a BT investigator on behalf of the company"*, and that it bears the caveat *"in confidence"*. It went on to say that it had taken the view that the report had been provided on that basis and that it was passed for use in connection with the investigation of alleged criminal offences. It included correspondence from the third party, written after the request, which stated:

“given that BT had a genuine expectation that the information would be treated in confidence and used only in connection with the investigation of criminal offences, and BT would suffer a detriment if the confidence were breached, I would say that it could be argued that BT would have an actionable breach of confidence if the MOD were to disclose this information”.

46. BT had added further specific concerns about any information provided by the witnesses, in both the report and its appendices. The Commissioner has already concluded that those parts of the report, including the appendices in their entirety, are exempt under section 30 above so he has disregarded these elements of BT's concerns. However, he will go on to consider whether the remaining information is exempt under section 41.

47. Section 41(1) provides that:

“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”.

48. Information is exempt by virtue of section 41 if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under this Act) by the authority holding it would constitute a breach of confidence ‘actionable’ by that or any other person. This calls for detailed analysis of the wording of section 41 and the common law relating to breach of confidence as it applies to the requested information.

49. Therefore, in relation to the application of the section 41 exemption, the Commissioner must first consider whether or not the requested information was in fact obtained from another person in order to satisfy the requirements of section 41(1)(a). The Commissioner notes that the report was written by BT and subsequently passed to the public authority for it to consider as evidence into alleged criminal activity. It is therefore clear that the report was obtained by the public authority from a third party and this requirement is satisfied.

50. Having established that the requested information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the Act), would constitute a breach of confidence ‘actionable’ by that or any other person.

An ‘actionable’ claim for breach of confidence

51. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v*

Clark [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

52. All three elements must be present for a claim to be made out. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the Act requires a further consideration in any case, namely, whether or not there would be a defence to such a claim.

The necessary 'quality of confidence'

53. Information that is trivial is unlikely to have the necessary quality of confidence. The report in this case outlines details regarding alleged criminality of BT staff and the Commissioner is satisfied that this information is not trivial in nature. However, he does not consider that this alone is sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore he has also considered whether the information is in the public domain in order to determine whether, in his view, the information satisfies this aspect of the test. This requirement was articulated clearly in the case of *Coco v Clark* by Megarry J, who stated that:

"However confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge."

54. As stated earlier in this Notice, there are been several related requests made by this complainant. As a result of one such earlier request, a separate piece of information was disclosed by the public authority. This briefing was also prepared by BT and also bore the caveat "*in confidence*". Entitled: "*DFTS OCA Fraud – Briefing for MoD Management*", it was released to the complainant on 5 March 2008, having been approved for release by BT at that time. (The Commissioner has cited extracts from this in the 'Background' section.)
55. This earlier document is clearly in the public domain having been released under the Act. It is the Commissioner's opinion that the remaining content of the report under consideration in this case is substantially similar. As such, he believes that the remaining content is already in the public domain.
56. Information will not have the necessary quality of confidence if it is already in the public domain. It is therefore the Commissioner's view that the information which is not exempt by virtue of section 30(1) is also not exempt by virtue of section 41(1) because section 41(1) is not engaged.

Procedural requirements

57. The original refusal notice was inadequate in that it did not actually state the exemptions relied on. Furthermore, the letter that it directed the complainant to refer to in order to demonstrate what these exemptions were did not include details of the subsections of the exemptions. However, these failures were identified by the public authority during its internal review so the Commissioner does not find any breach.

58. Section 1(1) of the Act states 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.”*

59. Section 10(1) of the Act states 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.”

60. As the Commissioner has decided that some of the information covered by the request is not exempt from disclosure on the basis of section 30(1) or 41(1), he believes that this information should have been provided in line with the duty at section 1(1)(b). The public authority's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the public authority also breached section 10(1).

The Decision

61. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly withheld information supplied by and about parties subject to the investigation under section 30(1).

62. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- some information was incorrectly withheld under section 30(1) and section 41(1) is not engaged for this information;
- the remaining information, as identified in the confidential annex supplied to the public authority, should be disclosed;
- the public authority breached sections 1(1)(b) and 10(1) by failing to disclose this information.

Steps required

63. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- the information identified within the attached confidential annex should be disclosed.
64. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

65. 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.

Other matters

66. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
67. Paragraph 38 of the section 45 Code of Practice (the "Code") states that *"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint...."*
68. The complainant received his refusal notice by email and, on receipt, appealed to the sender of the refusal notice. The refusal notice clearly stated that the complainant should forward any request for an internal review to a different address. However, the Commissioner considers that it would have been good practice for the public authority, and in conformity with the recommendations of the Code, to have directed this appeal through its complaints procedure, rather than requiring the complainant to re-submit the appeal to the appropriate address within the authority.
69. Paragraph 39 of the Code recommends that complaints procedures should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time

taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 70 working days for an internal review to be completed, despite the publication of his guidance on the matter. The Commissioner's concerns about this practice were highlighted in a practice recommendation issued to the public authority on 10 August 2009¹.

70. The Commissioner has upheld the public authority's view that it is not in the public interest to disclose information which was supplied by and/or about third parties. However, if he had not concluded that it was not in the public interest to withhold this information under section 30, by virtue of his responsibility as the regulator for data protection he would necessarily have considered section 40 ('personal information'). His initial view on this matter is that it is very unlikely that he would have found in favour of disclosure.

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/mod_practice_recommendation_130809.pdf

Right of Appeal

71. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 February 2010

Signed

**Steve Wood
Assistant Commissioner**

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SK9 5AF**