Tribunals Service
Information Tribunal

Information Tribunal **Appeal Number: EA/2006/0039**

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London, EC4
Decision Promulgated 4th April 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN
Mr David Marks
and
LAY MEMBERS
Andrew Whetnall
Gareth Jones

Between

FRIENDS OF THE EARTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT FOR TRADE AND INDUSTRY

Additional Party

Representation:

For the Appellant: **Philip Michaels**
For the Commissioner: **Timothy Pitt-Payne of Counsel**
For the Additional Party: **Robin Tam QC**

Decision

The Tribunal upholds the Decision Notice dated 31 May 2006 and dismisses the Appeal.

Reasons for Decision

1. This Appeal involves 2 issues which by common consent the parties have regarded as representing questions of particularly wide import which involve the manner in which the Information Commissioner (the Commissioner) undertakes his functions and duties under both the data protection as well as the freedom of information legislation.

2. The principal issue concerns the effect of certain provisions of section 59 of the Data Protection Act 1998 (DPA) which being central to the appeal can be set out usefully at this point, namely:

"Confidentiality of information

59(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1), a disclosure of information is made with lawful authority only if, and to the extent that –

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of –

(i) any functions under the information Acts, or

(ii) any Community obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil, and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of sub section (1) is guilty of an offence.

(4) In this section "the information Acts" means this Act and the Freedom of Information Act 2000."

The terms of subsection (4) were added by the Freedom of Information Act 2000 (FOIA) schedule 2(II) para 19(3). It might perhaps be also useful at this point to set out the prior section, namely section 58 of the DPA which provides that:

"No enactment or rule of law prohibiting or restricting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of their functions under this Act or the Freedom of Information Act 2000".

Again, the final reference to FOIA in section 58 was added by FOIA itself, Schedule (2)(II) para19(3).

Section 70(1) of the DPA provides that "unless the context otherwise requires, "business" includes any trade or profession …".

3. It can be seen that the prohibition on disclosure applies to information which "relates to an identified or identifiable individual or business" (emphasis supplied) under section 59(1)(b). All parties agree that section 59(1)(a) and (c) are not in issue in this case. The central thesis of the Appellant's case is that the term "business" necessarily connotes an organisation which is commercial or profit making in nature or as it was put in the oral submissions made on behalf of the Appellant, namely Friends of the Earth (FOE) by Mr Michaels on FOE's behalf the term "business", could be defined in general terms as:

"A commercial entity which exists to achieve a commercial end or ends although not always with profit-making results, conducted on recognised business principles: it has a structure of which there are many types conducive to achieve business ends: its declared purpose is a purpose of business including but not limited to the provision of goods or services for payment".

The above transcription may not precisely reflect word for word the formulation that Mr Michaels propounded but the gist of this expanded attempted definition remains, the Tribunal feels, clear enough.

4. A secondary issue in the Appeal concerns whether on the facts of this case the disclosure could have been made with lawful authority having regard to the provisions of section 59(2)(c)(i) and section 59(2)(e). To indicate the way in which both issues arise it will be necessary shortly to turn briefly to the facts. The issues have been regarded as sufficiently important for the Tribunal to have directed the joinder of the Department of Trade and Industry (DTI) as the public authority to which a prior request was made. It is the information provided by the DTI to the Commissioner which is relevant to the operation of section 59. It follows that of central significance is the question whether the DTI itself falls within the meaning of the term "business" in the context of section 59.

The facts

5. The somewhat novel feature of this Appeal is that unlike the preponderance of appeals coming before the Tribunal, the public authority with regard to which the appeal is heard is the Commissioner himself. However, the history begins with a more routine request made by the Appellant, i.e. FOE, by a letter of request in the form of an email dated 5 January 2005. FOE in that request sought from the DTI an electronic file list said to be capable of extraction from a system known as the Matrix system managed by the DTI in connection with a number of energy–related teams or units within the DTI during 2004, the file list requested to include the name of the file, the content description as contained in the Matrix system and certain other information which might reasonably be included in any print-out.

6. On 21 April 2005 FOE wrote to the Commissioner complaining about the DTI's failure to respond not only to the earlier request but also to one for a subsequent internal review. The 20 day limit generally applicable to the need to comply with such a request had not been recognised but it is agreed that nothing turns on that for present purposes. On 6 April 2006 the DTI had informed FOE that the list required included 20,000 files, with an early indication that the appropriate costs limit threshold reflected in section 12 of FOIA to the request made under FOIA was almost certainly likely to

be exceeded and indeed so it proved. In its letter to the Commissioner, FOE requested the Commissioner to issue an Enforcement Notice under section 52 of FOIA.

7. On 6 July 2005 the DTI sent a substantive response to FOE's request refusing to comply, relying in terms on section 12. On 12 July 2005 FOE lodged a further complaint to the Commissioner refusing to accept the applicability of section 12 and pressing the Commissioner for a decision.

8. On 28 July 2005 the Commissioner replied to FOE saying that it would "seek to reach a decision as soon as possible". On 11 August 2005 the DTI informed FOE that an internal review had upheld its earlier decision to refuse to disclose the information on the basis of section 12. Exchanges continued during the autumn of 2005 between the Commissioner and the DTI. By a letter dated 6 December 2005 the Commissioner informed FOE that the DTI proposed to send a list of all the file series for teams/units listed in the request of 5 January "along with the explanation that you can then select from those series which file list you wish to have access to", adding that the Commissioner "is very likely" to find that this would fulfil the duty to provide advice and assistance under section 16 of FOIA.

9. This in turn prompted FOE in effect to make a fresh request by letter dated 13 December 2005 for disclosure of the information provided to the Commissioner by the DTI in the course of the Commissioner's enquiries. This was refused by the Commissioner in its letter of 14 December 2005. FOE then sought an internal review of the Commissioner's refusal, which repeated the request to provide the information. After some delay the Commissioner informed FOE by a letter dated 10 April 2006 that the request to disclose the information was maintained and a refusal notice provided. In particular three letters provided by the DTI to the Commissioner in July, September and October 2005 respectively were referred to but not disclosed. More importantly, specific reliance was then placed for the first time on section 44(1)(a) of FOIA which states that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment …".

Reference to and reliance upon section 59 DPA is then made.

10. On 21 April 2006 FOE requested the Commissioner to issue a decision notice, the letter containing the observation that the information requested did not "relate to an identified or identifiable individual or business".

The Decision Notice

11. The Decision Notice is dated 31 May 2006. For the purposes of this appeal, the only relevant passage is at paragraph 5.4 which runs as follows:

> "5.4 The extent to which the Commissioner was entitled under section 44 to withhold some of the requested information
>
> 5.4.1 Section 44 of the Act provides that information is exempt from disclosure under the Act if there is a statutory bar on disclosure.
>
> 5.4.2 The Commissioner is satisfied that in this case section 59 of the Data Protection Act as amended by the FOI Act operates as a statutory bar on the disclosure of information provided to him by the DTI. Although the words employed in section 59 are "relates to an identified … business", suggesting perhaps that the DTI as a public authority is excluded, the Commissioner is satisfied that in this context the term "business" includes public authorities.
>
> 5.4.3 The Commissioner is also satisfied that no consent to disclosure has been given and that the information was not provided to him with the intention that it should be disclosed. The Commissioner is also satisfied that disclosure is not required for the discharge of his functions and that disclosure would be likely to inhibit other public authorities from volunteering information to him in the future and that this would not be in the public interest".

The Tribunal pauses here to note that although at an early stage FOE queried whether consent had been sought or obtained, for present purposes the first sentence in paragraph 5.4.3 can be ignored. It follows that the Commissioner stipulated in the Notice that no further steps needed to be taken.

12. Subsequently and prior to FOE's notice of appeal the Commissioner confirmed that he had sought and obtained Leading and Junior Counsel's Opinion on the applicability of section 59 of the DPA to public authorities. In due course it was provided and this judgment will refer to it in further detail below.

13. On 28 June 2006 FOE filed a Notice of Appeal. Four grounds were set out but during the course of the appeal only 2 were canvassed as indicated at the outset of this judgment. On 24 July 2006 the Commissioner lodged a reply. Its contents were developed in this appeal and no further comment need be made on them at this

stage. As also indicated above, the DTI was joined to the appeal in effect adopting the grounds set out in the Commissioner's Reply.

Section 59: is the DTI a business?

14. The question posed is something of a misnomer since as was confirmed during the appeal the real question is whether the term "business" set out in section 59(1)(b) is wide enough to encompass all public authorities and not simply the DTI or whether it is limited to those who might on any conceivable basis be carrying on a business including business in the sense propounded by the Appellant and as set out in the suggested definition in paragraph 3 above.

15. The Joint Opinion referred to above was that of the Hon Michael Beloff QC and Jane Collier and is dated 20 February 2005. It was the subject of analysis and argument during the appeal hearing. The Joint Opinion can be said to make the following principal points, namely:

(1) in the context of section 59 of the DPA a wide construction of the term "business" is warranted such as to cover any identifiable corporation, government department, local authority, charity, other organisation or association whether or not such parties have a "commercial" or profit making purpose or function;

(2) this wide reading is necessary to give effect to a European Directive 95/46/EC (the Directive) on the protection of individuals with regard to the processing of personal data or on the free movement of such data to which reference will be made below;

(3) in particular article 28 of the Directive requires that with regard to a Member State's supervisory authority (here the Commissioner):

"1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive. These authorities shall act with complete independence in exercising the functions entrusted to them.

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7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to

> be subject to a duty of professional secrecy with regard to confidential information to which they have access."

The Directive and in particular article 28(7) is therefore applicable to all confidential information to which the supervisory (i.e. the regulatory authority) has access in accordance with its functions (albeit originally strictly data protection related functions) and not simply to confidential information arising from or provided by natural persons or some restricted class of other persons, e.g. commercial organisations:

(4) The word "business" may be construed narrowly or widely dependent upon its context, see e.g. *Town Investments v Department of the Environment* [1978] AC 359 where the term is called an "etymological chameleon; it suits its meaning to the context in which it is found" (per Lord Diplock at 383); in the same vein the term "business" is wide enough to mean "almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business" – I do not think we can get much aid from the dictionary." (see *Rolls v Miller* (1894) 27 Ch D 71 per Lindley LJ at 88); equally a non-profit making activity representing, for example, the provision by a local authority of schools could be a trade or business in a planning context, see e.g. *Rael-Brook v Ministry of Housing and Local Government and another* [1967] 2 QB 63 at 67 per Widgery J;

(5) Overall as the *Town Investments* decision makes clear, whether a broad or narrow construction is called for is invariably dictated by the "evident object of the particular legislation" and even where the term business is amplified (as here in the case of section 70(1) DPA) any express inclusion may not only serve to indicate the breadth of the meaning but also will serve to avoid anomalies which cannot have been intended if that term, i.e. business, is not wide enough with or without the words of inclusion to embrace the practical manifestations of the evident object of the legislation: see per Lord Diplock in *Town Investments* supra at 383 who added that he thought "… in exercising the functions of Government the civil servants of the Crown are all engaged in carrying on a single business on behalf of the Crown"; however, it is fair to note that in otherwise concurring with the decision Lord Simon in the *Town Investments* case stated at 401 that he thought "the primary sense of "carrying on business" in ordinary speech is commercial" but that it had been commonly agreed by the parties that the notion of "carrying on a business" was or had been extended to the "office activities of say, professional men", adding that the statutory construction in the *Town Investments* case itself

"imperatively" demanded a consideration of the object of the legislation particularly with a view to the avoidance of anomalies;

(6) the definition section, i.e. section 70(1) of the DPA, showed by its reference to profession that the word business meant more than business in the sense of trade, i.e. in the sense of commerce, connoting, it was contended, an occupation going beyond "trade or profession";

(7) the purpose of section 59 is to protect those individuals and organisations who have supplied information to the Commissioner from the "uncontrolled disclosure" of that information subject to the range of coercive powers, including the service of Information Notices on data controllers under section 44 of the DPA (see also section 51 of the DPA), since it was "highly unlikely" that a court would hold that the Parliamentary intention was that only "commercial" entities and individuals supplying information would be entitled to the protection of section 59, otherwise producing the kind of anomalous results indicated by their Lordships in the *Town Investment* decision itself;

(8) consequently as a matter of statutory interpretation this was not a case where the literal meaning (assuming there was or could be said to be one) militated in favour of a narrower reading; and

(9) the DPA was enacted to give effect to the Directive (albeit subject to the application of well-recognised principles of English statutory construction).

16. The Joint Opinion fairly pointed to factors which might otherwise point to a contrary conclusion. One concerned the multitude of various statutory definitions afforded to the term "business" but the Tribunal is of the view that the real arguments in favour of the reading contended for by the FOE were more than amply canvassed during the Appeal. In the result although the Joint Opinion recognised that the contrary view was arguable, its conclusion was firmly in favour of a wide reading.

Business: the arguments on the Appeal

17. The Tribunal has had the benefit of extensive written submissions from all three parties. Although the Appellant in opening made a number of discrete arguments with regard to the issue of whether business should bear a "commercial" meaning, in effect, the submissions could be distilled into two inter-related propositions: first, that the "ordinary meaning" of the term "business" necessarily connoted a commercial entity, albeit one which might not be profit-making in the suggested sense set out above in paragraph 3, and second, that if there were anomalies, the same would arise in the case of a wider reading contended for by the Joint Opinion given the

range of clearly non-commercial organisations or activities which would fall within an all encompassing definition.

18. With the greatest respect to the Appellant and the manner in which his arguments were deployed, it is difficult to see how these two propositions are not in fact different aspects of the same argument, namely that there is a well-established ordinary meaning of the term "business" which in turn finds an equally well-established terminological reflection in a statutory context. As to the first proposition however, the Tribunal fully accepts that in terms of everyday usage, the term "business" will often suggest a carrying on of some form of commercial activity. It is clear that the word can, and does, find a meaningful and totally justifiable place in context where the term is used simply as a non-pleasurable activity in a sense indicated by Lindley LJ in *Rolls v Miller* supra. On the other hand, it is equally clear that the term contains at least one major ambiguity as pointed out by Mr Pitt-Payne for the Commissioner in arguing that the word used as a noun at least can, depending on the context, describe either an activity whether commercially inclined or not, or an organisation.

19. Indeed, the various specific examples canvassed in argument such as the expression "government business" or "the business of a solicitors' firm" clearly demonstrated the sheer impossibility of attributing any single and consistent interpretation of the term.

20. A corollary to the above impossibility was the equally daunting task of ascribing any equally definitive meaning to the term "commercial", and put in practical terms, the almost insuperable difficulty of ascribing even the definition propounded by Mr Michaels to a particular activity or organisation which might carry on albeit in a wider sense both commercial and non-commercial activities.

21. There was some discussion during the course of the appeal hearing whether there was a justification to have recourse to the so-called rule in *Pepper v Hart* which is in general stated to apply only to two categories of cases, namely first, where on the point of issue the enactment is ambiguous or obscure, or secondly, where its literal meaning would lead to an absurdity. The word "business" in section 59 cannot at the same time have both the narrow meaning contended for by Mr Michaels, as well as the wide meaning contended for by the Commissioner and the DTI. The Tribunal is therefore invited to decide that one of these meanings is plainly wrong within the context of the evident purpose of this provision. The Joint Opinion itself concedes that the contrary opinion is arguable. Although none of the parties sought to justify recourse to Hansard under the *Pepper v Hart* rule, the Tribunal's attention was drawn to a section of the debate on the clause corresponding to section 59 in the House of Commons which showed a Minister suggesting that the purpose of the criminal offence in section 59 was to protect the interests of identifiable individuals and

"companies" from unauthorised disclosure of information relating to them (see Hansard: HC: FOI Bill: 5 April 2000 Col 28). The Government spokesman in the House of Lords used similar language (see Hansard HL, 19 October 2000, col 1225-6). The Tribunal is therefore highly conscious of some weight in the argument that had Parliamentary Counsel been instructed to ensure that section 59 should protect identifiable public authorities from unauthorised disclosure of information supplied by and relating to them, it would have been a simple matter of drafting to include a reference to public authorities alongside the references to individuals and business in section 59. Although the precise definition to which public authorities are subject in the FOIA provisions is complex, provision is made for this in effect in various sections of FOIA, eg sections 3, 4, 5, 6 and 7 of FOIA and in Schedule 1, all of which amount to many pages. A simple cross-reference in section 59 would have removed any ambiguity. The Tribunal feels bound to comment that the drafting of this clause which was much debated in both Houses leaves a great deal to be desired and the Tribunal would respectfully recommend that at a suitable juncture a legislative opportunity be taken to clarify the entire provision. In the absence of any such cross-reference it is at least arguable that the evident intention of section 59 is to protect the privacy of identifiable individuals and private businesses, but not to require the consent of public authorities to the disclosure of information provided by them about themselves. Whatever the merits of this interpretation, if section 59 left the Commissioner with no discretion to disclose simple facts and arguments concerning the expense of dealing with a FOIA request, and to disclose them in the course of an investigation so that the applicant could respond in an informed way to a "current thinking" letter, the effect might approach the absurdity that is the other justification for referring to Hansard in *Pepper v Hart*.

22. The Tribunal is of the view that it is important that in this case the Commissioner felt able to consider whether there might be arguments to support disclosure of further information to the Appellant without the DTI's consent, but had on balance decided that the protection of the future uninterrupted flow of information from public authorities was a conflicting consideration to be given greater weight. The Tribunal inspected the disputed information in this case and did not see in it anything so very sensitive that an alternative exercise of the Commissioner's discretion could not have been justified, but on balance, the Tribunal does accept the Commissioner's advice on the possible interference with the Commissioner's ability to discharge his functions if the free flow of informal information from Government departments and other public authorities is prejudiced. Despite the Tribunal's reservations in paragraph 21 above, on balance the Tribunal is persuaded that it is right to uphold the arguments for a broader interpretation of the word "business" as justified by the arguments set out in the Joint Opinion summarised above and as commended to the Tribunal by the Commissioner and the DTI. Counsel for the Commissioner conceded at one point

that a more clearly drafted enactment of the intention that he argued for was conceivable and the Tribunal is inclined to agree. One of the factors that has influenced the Tribunal in arriving at its decision is that the alternative and more narrow commercial meaning of the term "business" as canvassed by Mr Michaels would itself have left some uncomfortable questions of definition to be addressed on a case-by-case basis. In particular, the Tribunal is influenced by the absence of any distinction between commercial and non-commercial entities which will be referred to in further detail below at paragraphs 30 and 31.

Business: additional issues

23. If only out of respect for Mr Michaels' careful arguments, there remain some outstanding matters in relation to this first issue. First, he contended that an inclusive interpretation, such as that contained in section (71) of the DPA, can generally effect an enlargement of the ordinary meaning of a word: see e.g. *R v Crayden* [1978] 1 WLR 604, especially at 607 per Lawton LJ. In that case, the Court of Appeal (Criminal Division) had to consider whether National Health Service Hospitals were "businesses" under the Criminal Evidence Act 1965 which defined "business" as including "any public transport, public utility or similar undertaking carried on by a local authority" including the activities of the Post Office. The court found that the term was to be restricted to activities "with a commercial connotation". As Mr Tam QC for the DTI put it, the expanded definition had a "commercial ring" about it, and indeed the Court of Appeal itself said at pages 608-609 that:

"Had the Act of 1965 been intended to make government records generally admissible, we would have expected to find some words of limitation in the Act, otherwise confidential documents which in the past would not have been admissible in evidence would have been admissible." (an example being given by the court of the regimental records of a serving soldier).

In any event, the Tribunal notes that the *Crayden* decision had no legislative background such as exists in the present case against which properly to consider the "evident object" of the provision in question.

24. Second, Mr Michaels relied on the so-called principle against doubtful penalisation.

25. As described in Halsbury's Laws of England, volume 44(1) (reissue 5) at paragraph 1456:

"It is a principle of legal policy that a person should not be penalised except under clear law, or in other words should not be put in peril upon an ambiguity; so the court, when considering, in relation to the facts of the instant case, which of the opposing

constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle".

26. Particular reliance was placed by Mr Michaels on a decision of the Court of Appeal, namely *Ad Valorem Factors Limited v Ricketts* [2004] 1 All ER 794. Section 216 of the Insolvency Act 1986 makes it an offence for directors to act without leave of the court in relation to a company known by a prohibited name, i.e. a name sufficiently similar to one of a company previously placed into liquidation; section 217 provides that a person so involved in such a company and acting in contravention of section 216 is personally responsible for the debts of the company. It was contended that the purpose of this section, namely section 216, was to curb those cases in which the privileges of limited liability were exploited by those who set up companies with minimal capital and amongst other things transferred assets invariably at an undervalue to an associated company and that here there had been no such transfer so that the appellant should not be held liable. The lower court and the Court of Appeal disagreed. As Mummery LJ at page 898 stated, the "essential question" was whether the name of the second company was "a prohibited name". He endorsed the words and findings of the District Judge that the court "should not import words into the statute that are not there so as to make it easier for the defendant to escape liability". Mummery LJ acknowledged the existence of a purposive approach but said that it had no place in the presence of clear statutory language. It is true that Simon Brown LJ at page 902 referred to the principle under consideration leading him to comment that he would have construed the phrase "as to suggest" in the statutory expression in section 216(2)(b) "it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with [the earlier] company" "rather more stringently than indicated by the judgment below". But again as Mr Tam QC pointed out, Mummery LJ made no reference to the principle and it can therefore be observed that the case is not a striking example of the applicability of the principle in question.

The Tribunal finds that the principle has no role to play in the present case. It is certainly not a principle which compels a narrower interpretation in cases where Parliament's intention is otherwise clear, see e.g. *Secretary of State v Deverell* [2001] 1 Ch 340 especially at para 35.

The purpose of section 59

27. On behalf of the FOE Mr Michaels took issue with the contention he maintained was at the heart of the Commissioner and DTI's case, namely that without section 59 there would result in what was referred to as "uncontrolled disclosure" of information received by the Commissioner from public authorities. He claimed that if section 59

was removed, the persons supplying confidential information to the Commissioner would still enjoy a sufficient measure of protection and indeed so would the Commissioner himself.

28. To achieve a better understanding of Mr Michael's contentions the Tribunal feels it is appropriate to revisit the Directive and the genesis of section 59 in greater detail.

29. As a general proposition it is undeniable that section 59 as enacted by Parliament gave effect to article 28(7) of the Directive. Passing reference was made to a different freedom of information regime which currently applies in Scotland but the Tribunal is not concerned with a jurisdiction or regime with regard to which the Commissioner has simply no role to play as he does in the present case.

30. As Mr Pitt-Payne for the Commissioner reminded the Tribunal, section 59 reflects two aspects of the operation of the Commissioner's office being first the range of functions with which he is entrusted or empowered to carry out and secondly the range of information which he is likely to receive. In the context of data protection, the DPA deals with three relevant entities, first the data controller, secondly, the data processor and thirdly the data subject: see generally the definitions in section 1 of the DPA. It appears to the Tribunal, and again the Tribunal so finds, that the DPA draws no distinction either in section 1 or elsewhere between commercial and non commercial entities with regard to any or all of those categories of persons or parties.

31. Section 6 of the DPA creates and defines the office of the Commissioner. Part III of the DPA contains detailed provisions about the requirement that data controllers provide the requested notification to the Commissioner, i.e. by so called registrable particulars: see generally sections 16-26. Yet again, no distinction is drawn between commercial and non commercial organisations or entities. Part IV of the DPA which deals with the relevant exemptions again provides no assistance in that respect although section 36 does, however, exempt personal data processing only for the purposes of an individual's "personal family and household affairs (including recreational purposes)" perhaps a vague reflection of the type of distinction drawn by Lindley LJ in *Rolls v Miller* supra. Otherwise no distinction of the type suggested by Mr Michaels can be found in the legislation. Part V of the DPA prescribes the functions of the Commissioner under the DPA including the duty to consult with "trade associations" as well as data subjects while more importantly section 54(1)(b) makes it clear, if it were not already abundantly so, that the Commissioner "shall be the supervisory authority in the United Kingdom for the purposes of the [Directive]".

32. The above merely serves to place section 59 in context. As Mr Pitt-Payne for the Commissioner put it, section 59(2) represented a series of "gateways" through which information otherwise treated as confidential can legitimately pass.

33. The Tribunal therefore agrees with the Commissioner and with the DTI that given the wide unfettered terms of both the Directive and section 59, particularly in the context of the various sections in the DPA referred to above, there is simply no legislative or indeed sensible justification for restricting the meaning of the term "business" in the way contended for by Mr Michaels. Indeed any force in his submissions in this respect is further dispelled by the terms of section 58 already cited above. As Mr Tam QC put it, section 58 shows that every data controller whether characterised as "commercial" or otherwise must furnish the information referred to, and as he also, perhaps picturesquely put it, section 59 served to underline the way in which the Commissioner "hoovered up" the information whether or not such information directly touched and concerned the data subject. It was important, therefore, he said, that section 59 provided a strong degree of protection emphasised by rendering the knowing or reckless disclosure of such information criminal offences, all of which pointed to the wide reading contended for. The Tribunal respectfully agrees with those submissions. The Tribunal expresses the hope and wish that the Commissioner and his staff should strike an appropriate balance implicit in section 59(2)(c)(e) as and when particular facts demand such a balance be struck.

34. The Tribunal pauses here to note that in his written and oral submissions Mr Michaels also contended that only "confidential" information attracted article 28(7) of the Directive. That may be true, but the text of section 59 of the DPA itself does not define the term "Confidential Information" nor, more importantly use that term or expression in any way. It is true that the statutory heading of section 59 as can be seen from the citation at the outset of this judgment is "confidentiality of information" but the prohibition imparted by section 59 is with regard to "any information which …. (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the Information Acts …" (emphasis supplied). The Tribunal, therefore, rejects any suggestion that some other unspecified form of "confidential" information might be outside the scope of section 59 if it otherwise satisfies the wording quoted above.

35. The Tribunal also rejects any suggestion that any reliance can be placed on the Environmental Information Regulations 2004 SI 2004 No. 3391 as contended for by Mr Michaels. He pointed out that Regulation 5(6) of the Environmental Information Regulations in effect disapplies section 59. The Tribunal again agrees with Mr Tam QC that the Environmental Information Regulations represent an entirely separate

regulatory structure and finds them of no assistance in arriving at a determination of the principal issue in the present case.

36. Of potentially greater importance however, is the submission by Mr Michaels that if the narrower reading afforded to the term "business" were adopted so as to allow for disclosure of information which would otherwise be protected by section 59, the Commissioner could still rely upon the other stipulated exceptions in FOIA, e.g. section 31(1)(g) which provides a qualified exemption with regard to the exercise by any public authority of its functions for any of the purposes specified in sub section (2) of section 31, being largely related to the question of law enforcement, or regulatory action.

37. The Tribunal finds that the answer to that submission is in effect two fold. First, as intimated above, the range of information which is imparted to the Commissioner under section 58 and 59 of the DPA will include both the disputed information and what can be called adjectival information, i.e. information other than the disputed information but information which nonetheless the Commissioner will need to consider in order to reach a sensible view about the issue or issues under review. If section 59 did not apply to the former, the Commissioner would in effect be relying on much the same, if not all, the exemptions adopted by the public authority whose information he would have been made privy to.

38. The above considerations are sufficient in the Tribunal's view to determine that no line can or should be drawn between disputed information and adjectival information: both are subject to the restrictions imposed by section 59.

39. The Tribunal wishes to add that it is conscious of the width of the various coercive powers enjoyed by the Commissioner under both the DPA and FOIA, e.g. section 43 of the DPA and section 51 of FOIA, both dealing with Information Notices. The Tribunal rejects any suggestion that any such coercive powers represent any form of adequate substitution should the narrower reading of section 59 propounded by Mr Michaels be adopted. The Tribunal is prepared for the sake of argument to suppose that were Mr Michaels' construction to apply it is at least possible that much of the information relating to a public authority otherwise captured by section 59 would be excluded. Quite apart from the Tribunal's finding that as a matter of construction a wide reading is to be adopted, the Tribunal notes that in a Memorandum of Understanding signed 24 February 2005 published by the Department of Constitutional Affairs regarding FOIA it is recognised that the Commissioner will in practice receive substantial amounts of information without the need to use his coercive powers: see e.g. paragraph 7 which in effect reflects a voluntary acceptance on the part of the DCA to make disclosure to the Commissioner. In

addition paragraphs 9 to 11 of the Memorandum without referring to section 59 in terms clearly in the Tribunal's view reflects the reality of that section by reaffirming that the Commissioner will not disclose to a complainant or to a third party information provided, e.g. in the absence of consent in a section headed "obligations in relation to information provided in accordance with this [memorandum]".

40. For all the above reasons, therefore, the Tribunal reaffirms its decision that a wide construction of the term "business" is appropriate in the context of section 59 and duly dismisses the appeal on the first of the two grounds raised.

Second issue: would disclosure have satisfied any of the conditions in section 59(2) of the DPA?

41. The second ground of appeal concerns the question whether disclosure would be lawful within the meaning of section 59(2) of the DPA. This in turn raises two further sub issues, namely whether:

(1) the disclosure would be made "for the purposes of and is necessary for, the discharge of –

(i) any functions under the information Acts …"

within the meaning of section 59(2)(c)(i) of the DPA and secondly,

(ii) whether "having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest …"

within the meaning of section 59(2)(e) of the DPA.

42. As to the first sub issue it was not the Commissioner's view in this case that disclosure was "necessary" for "the purposes" of the discharge of any functions under FOIA. Any purpose would not only be at the instigation of FOE, but it would also be for FOE's purposes in making out their case for access to the information initially requested. If the Commissioner had decided on balance that it was necessary to give the applicant more information about the DTI's reasons for invoking section 12 of FOIA in this case (ie the supporting evidence for their claim that the cost of compliance would exceed the appropriate limit) the disclosure of such information could in the Tribunal's view have been made for the purposes of carrying out the Commissioner's functions under the Act. If a public authority withheld its consent to publish harmless information that could not be regarded as confidential, in the Tribunal's view no offence would be committed if the Commissioner or his staff

disclosed it. Although the Commissioner decided on balance in this case that disclosure would have been likely to impede the free flow of information, a decision which was in the Tribunal's view justifiable, an alternative decision was available to him. The Commissioner and his staff should in the Tribunal's view consider themselves free to strike a responsible balance between the conflicting considerations favouring disclosure or non disclosure as the facts of each case require. Section 59 is a sanction against unauthorised or reckless breach of confidentiality and it is not a necessary requirement of the Directive that it should go any wider than underpinning the duty of professional secrecy with regard to confidential information as required by article 28. The duty to protect individual privacy or the interests of third parties whose information is at issue is in many data protection cases likely to be the overriding consideration. But where the Commissioner is exercising functions under the Freedom of Information Act, the broad purpose of which is to confer statutory rights of access to information, an overriding right of the public authority to withhold its consent to disclosure would contradict the purposes of the legislation. It is right that in each case the Commissioner should be able to balance the importance of the free flow of information contemplated by the letter and spirit of sections 58 and 59, and the case for disclosure of information relating to the public authority which would, in his opinion, be necessary for the purpose of performing his functions, whether or not the consent of the public authority is forthcoming.

43. Insofar as the Decision Notice involved such an exercise of the Commissioner's discretion, the Tribunal does not conclude that he ought to have exercised such discretion differently.

44. As to the second submission and the application of section 59(2)(e) the basic question is whether given the rights and freedoms or legitimate interests of those parties concerned in this issue, public interest considerations militate in favour of disclosure. There is inevitably an overlap with the issues dealt with in relation to section 59(2)(c)(i). The Tribunal agrees that at least four elements enter into the equation, namely, first the extent of the legitimate interests of the FOE, second, the extent of the DTI's interests, third, the public interest in ensuring that there is a transparent public understanding as to the manner in which the Commissioner discharges his functions and fourth and finally, the perhaps countervailing public interest in protecting the ability of the Commissioner to carry out its statutory functions under section 50.

45. To be fair, Mr Michaels on behalf of the FOE agreed that the question required a consideration of the competing public interests and that an overall balance should be arrived at. Mr Michaels relied on a number of points in support of his submission that

the interests of the FOE prevailed coupled with the attendant public interest in favour of disclosure. He said that the information requested was not the same information that formed the subject matter of the original complaint, i.e. the file lists, since the information sought consisted of principally, it was contended, the DTI's explanation as to why it considered that section 12 of FOIA dealing with the appropriate limit applied to the original request; secondly, that this was precisely the type of information that the Commissioner might be said routinely to disclose when he issued decision notices on section 12 complaints; thirdly, the suggestion that public authorities would cease to respond to requests from the Commissioner was untenable because public authorities had a strong self interest in providing the Commissioner with information in response to its investigation of a complaint against them, and that the Commissioner had available to him a number of directly applicable exemptions on which he could rely. Finally, Mr Michaels contended that the Commissioner should make a decision on the facts of each particular case and added that public authorities should now have fundamentally different expectations in respect of the manner in which their information is liable to be treated. The Tribunal appreciates the force inherent in these contentions. The Tribunal accepts that the Commissioner's function in deciding the extent to which he wished to assist the applicant by disclosing more of the factual background than the public authority consents to disclose amounts to a balancing test. However, the Tribunal does not see that the decision reached in this particular case is one that it should set aside.

46. It is well established in this Tribunal that public interest considerations should be weighed carefully to determine whether it is likely that there is prejudice in the sense that these may well be prejudice even if the risk in fact falls short of being more probable than not. The Tribunal is to some extent influenced by the fact that no distinction can be drawn for present purposes in the context of section 59 between disputed information and adjectival information. On the facts of this case the DTI's position has remained consistent as indicated above. It has been argued that the Commissioner should not be burdened with the need to invoke exemptions in a case where he is occupying a purely regulatory function. However, the Tribunal is loath to suggest that this represents anything like an ever present consideration; whether and if he should himself invoke any exemptions must be addressed on a case-by-case basis. In all the circumstances, therefore and on balance, the Tribunal takes the view that there is a sufficient degree of risk attendant upon disclosure in the manner sought in this case. It finds in all the circumstances of this case there are no grounds for contending within the meaning of section 58 of FOIA that the notice against which the appeal is brought was not in accordance with the law; in the alternative, as with the matters considered in paragraphs 41 to 43 of this judgment, the Tribunal finds that insofar as the Commissioner exercised his discretion, the Tribunal does not feel that he should have exercised it differently.

47. For all these reasons, therefore, the Tribunal dismisses the Appeal on the basis of the second ground raised based on the two separate provisions contained in section 59(2) of the DPA.

DAVID MARKS
Deputy Chairman

Dated 4th April 2007