



Freedom of Information Act 2000 (FOIA)

**Heard in Belfast
On 30 April and 1 May 2007**

**Decision Promulgated
4th June 2007**

BEFORE

Information Tribunal Chairman

John Angel

And

Lay Members

David Wilkinson and Henry Fitzhugh

Between

**BRIAN MCTEGGART
Appellant**

And

**THE INFORMATION COMMISSIONER
Respondent**

And

**THE DEPARTMENT OF CULTURE, ARTS AND LEISURE
Additional Party**

Representation:

For the Appellant: In person
For the Respondent: Mr. Timothy Pitt-Payne
For the Additional Party: Mr. Adrian Colmer

Decision

The Tribunal has decided to substitute the following decision notice in place of the decision notice dated 5 October 2006 and partially allows the Appeal.

FREEDOM OF INFORMATION ACT 2000 (SECTION 50 and 58(1))

SUBSTITUTED DECISION NOTICE

Dated 5 June 2007

Name of Public authority: The Department of Culture, Arts and Leisure
Address of Public authority: The Inerpoint Building, York Street, Belfast BT15 1AQ

Name of Complainant: Mr Brain McTeggart

The Decision Notice of the Information Commissioner dated 5 October 2006 shall be substituted as follows:

Nature of Complaint

The complainant requested an unredacted or full copy of the report into the investigation of his complaints against the chief executive of Waterways Ireland. He has since received parts of the report.

Action Required

The following parts of the report, not already disclosed to Mr McTeggart before the hearing, be disclosed to him within 21 days of the date of this Decision, namely Appendix 2 (with minor redactions), Appendices 12 and 13 (which were disclosed during the course of the hearing) and the text of paragraphs 49, 50 (redacted) and 51 of the report.

Chairman



Reasons for Decision

The request for information

1. On 14 February 2005 Mr Brian McTeggart (Mr McTeggart) wrote to the Department of Culture, Arts and Leisure (DCAL) requesting a full copy of the report (the Request) relating to the investigation of his allegations regarding Mr John Martin (Mr Martin) the Chief Executive (CEO) of Waterways Ireland (the Report). The allegations related to:
 - 1.1 Bullying and harassment of Mr McTeggart and other staff associated with him by the CEO;
 - 1.2 Victimisation and continuation of bullying and harassment of Mr McTeggart as a result of highlighting the matters in 1.1;
 - 1.3 A culture of patronage, bullying and secrecy emanating from the CEO; and
 - 1.4 Questionable recruitment and promotion practices in relation to certain posts.
2. The Report contains the conclusions and recommendations of the investigators and a summary of the evidence and findings in relation to the evidence, some 60 pages. It also contains 17 annexes which include some witness statements.
3. DCAL confirmed to Mr McTeggart on 15 March 2005 that it held the Report. It subsequently provided him with those parts of the Report which contained his personal data as DCAL regarded the Request also as a data subject access request under s.7 of the Data Protection Act 1998 (DPA), but it refused to provide the remainder of the Report on the basis that it was exempt under ss 27(2) (international relations), 36 (prejudice to effective conduct of public affairs), 41 (information provided in confidence) and 40(2) (personal information) FOIA (the Refusal Notice).
4. On 5 April 2005 Mr McTeggart sought an internal review of the decision. On 20 May 2005 DCAL informed him that it had upheld the Refusal Notice.
5. At the commencement of the hearing it emerged that Mr McTeggart thought that the Report also included notes of the interviews with the 24 people who were interviewed by the investigators. This is quite understandable as he does not have the benefit of seeing the whole Report because it has been kept confidential pending the determination of the Tribunal. As a result the Tribunal found it necessary to review the scope of the Request. We decided that the request was for the Report only and not other documents which might have been used as background reference material for the Report, but which were not contained in the Report as such. Mr McTeggart accepted this ruling and the case continued on that basis. It was explained to him that if he wished to see this other information that it would need to be the subject of a new FOI request.

The Decision Notice

6. Mr McTeggart complained to the Information Commissioner (IC) on 27 June 2005 who investigated the complaint. The IC issued a decision notice dated 5 October 2005 (the Decision Notice) which categorised the information withheld as follows:
 - 6.1 Statements and opinions expressed by individuals in relation to Mr McTeggart's allegations;
 - 6.2 Biographical and other identifying information relating to officials in Waterways Ireland; and
 - 6.3 Findings and conclusions of the investigators in relation to the general allegations concerning the culture, recruitment and promotion practices in Waterways Ireland.
7. The IC was satisfied that the information in categories 6.1 and 6.2 was exempt under ss 36(2), 40(2) and 41. However it considered that the information under category 6.3 should be disclosed to Mr McTeggart. DCAL disclosed this information during the course of the IC's investigation. The IC considered that only s.36 was relevant to information in category 6.3. S.36 is a qualified exemption. As a certificate was provided under s.36(7) the IC found the exemption was engaged and went on to find that the public interest in maintaining the exemption did not outweigh the public interest in disclosure but that as DCAL had provided a redacted version of the Report containing the information in 6.3 above and those parts of the Report containing his personal data, no further steps needed to be taken.
8. The IC considered that s.27 was not engaged in relation to the Report.

The appeal

9. Mr McTeggart appealed against the IC's findings in relation to the information in categories 6.1 and 6.2. As a result it has only been necessary for the Tribunal to consider the application of the ss40(2) and 41 exemptions, particularly as DCAL had accepted before the hearing that ss27 and 36 were not engaged in relation to these categories of information.

Agreed facts

10. Waterways Ireland is one of six North-South Implementation Bodies established by international agreement between the British and Irish Governments (the Good Friday Agreement) in 1999. These Bodies operate, in accordance with interim procedures, under the jurisdiction of the North-South Ministerial Council, providing for relevant Ministers, North and South, to operate jointly. They are not subject to FOIA, nor are they subject to freedom of information legislation in the Republic of Ireland (ROI). DCAL is the sponsor body in Northern Ireland responsible for Waterways Ireland and is covered by FOIA. The Department of Community, Rural and Gaeltacht Affairs (DCRGA) is the sponsor body responsible for Waterways Ireland in ROI and is covered by FOI legislation in that country.

11. Mr McTeggart had been a Northern Ireland civil servant for 23 years when he joined Waterways Ireland on secondment on 24 February 2000. His role was to establish the new headquarters for the body in Enniskillen and to help set up the body across the island. From 2000 to March 2002 he undertook the role of Director of Corporate Services and from April 2000 to August 2002 he was acting Director of Corporate Services. Following an open competition in the summer of 2002 on 6 September 2002 he was offered the permanent post of Director of Corporate Services in Waterways Ireland reporting to the CEO and based at Enniskillen.
12. Mr McTeggart wrote a lengthy and detailed letter on 20 January 2003 to Mr Nigel Carson (Mr Carson), who at the time was Director of Sports, Recreation and Museums Division, later the Culture and Recreation Division at DCAL, setting out a series of complaints and issues relating to the CEO and other members of the senior management team. These allegations were wide ranging covering not only bullying and harassment but also making allegations about appointments to Waterways Ireland and voicing concerns about the way the organisation was being managed by the CEO and others. He was also concerned about the starting salary being offered for his new post. His letter also indicated that other staff would corroborate the allegations and concerns.
13. Because of the seriousness of these allegations DCAL and DCRGA jointly set up an investigation into the complaints. During the investigation its scope was narrowed down to deal with Mr McTeggart's allegations of harassment and bullying by Mr Martin and the recruitment and promotion practices at Waterways Ireland. It would appear that Mr McTeggart was not aware of the limitations of the investigation until much later when he was given the opportunity to briefly review the findings. The investigation culminated in the Report. Mr McTeggart and Mr Martin were both invited to inspect a version of the Report without appendices, but otherwise unredacted, in order to correct any factual errors. On 19 November 2004 Mr McTeggart was allowed approximately one and a half hours with his solicitor on short notice to undertake this exercise, although Mr McTeggart was not well at the time. He was not allowed to take away a copy of the Report and was required to sign an undertaking that he would surrender any notes made from or pertaining to the Report.
14. The Report has never been published. However there had been publicity around the investigation and the Report in the press and Parliament. Also DCAL and DCRGA issued a joint press statement on 4 April 2005 in which they provided their version of a summary of the findings reached by the investigators and stated that the conclusions and recommendations in the report had been accepted by the Departments.

Evidence in dispute

15. There are two matters in dispute. Firstly, whether Mr McTeggart was given any assurances that he would be provided with a copy of the Report and that it would be published. Secondly, whether the witnesses who gave statements to the

investigators either in written form or by way of interview where notes were taken or both, did so in confidence.

16. On the first point, Mr McTeggart's own understanding, based on the nature of the investigation and the implications of its findings for his own position in Waterways Ireland, was that the Report would be given to him and published. In particular, he claims that at a meeting at DCAL on 27 October 2004 he was informed by Mr Carson that both he and Mr Martin were going to be "given" the report that was going to be "issued". However, he then received a telephone call on 12 November when Mr Carson informed him of the procedures that were eventually followed, as set out in paragraph 13 above. In oral evidence, Mr Carson confirmed that originally he had envisaged Mr McTeggart and Mr Martin being allowed to take home a copy of the report so that they could study it. Ultimately, however, DCAL decided, to impose a more restrictive and controlled form of access to the Report in order to minimise the risk of further media coverage. Nonetheless, the original purpose of the exercise remained the narrow one of giving the two key parties an opportunity to check the Report for factual accuracy. Mr Carson insisted in evidence that the Department never gave Mr McTeggart an undertaking that he would be given his own copy of the Report for his own purposes or that the Report would be published. He further gave evidence that the understanding between DCAL and DCRGA throughout was that the Report would be delivered exclusively to the two commissioning officials of the respective Departments, namely himself and Mr Hamill.
17. On the second point on 26 May 2004 all witnesses to the investigation into Mr McTeggart's allegations were sent a letter by the investigators setting out the process for the investigation. It explained that the investigation would be conducted within the framework of DCAL booklet *Procedures for Dealing with Equal Opportunities and Harassment Complaints*. In that booklet at paragraph 4.5.2 it explains that "Staff involved in the investigation should appreciate that the investigation is conducted on a confidential basis and therefore must not discuss the matter with any other person." Also in the letter, which is contained in one of the redacted annexes to the Report, but was disclosed during the course of the hearing, it emphasises that "the confidential nature of the interview and of the investigation in general." We also note that the terms of reference of the investigation, which were known to Mr McTeggart, stated that "The investigation will be conducted on a confidential basis and those interviewed must be informed that they are not to discuss the matter with any other person."
18. Richard Buchanan (Mr Buchanan), one of the investigators, gave evidence that the interviews were carried out at the Killyhevin Hotel, away from the offices of Waterways Ireland, in order to ensure confidentiality. At the interviews he again emphasised the confidential nature of the interview and of the investigation in general and that was recorded in the notes taken at the time. The investigators explained though, that there was always a possibility of disclosure to Mr Martin if legal proceedings ensued. We note also that the witness statements included in the redacted part of the annexes to the Report are stated to be 'in confidence'.

19. In addition we take into account that although Mr McTeggart was able to see the Report without annexes for correction purpose he was not allowed to take away a copy of the report or any notes that he made at the time.
20. Mr McTeggart makes the point that although the process of the investigation may have been undertaken on a confidential basis this did not apply to the Report. We can understand how Mr McTeggart might have been confused on this point. As his allegations had triggered the investigation he may have been under the natural expectation that any report would be disclosed to him. It was somewhat unusual that he was allowed to review the body of the Report but not take away a copy. Notes of the investigations of two witnesses were provided in evidence by Mr McTeggart which contained no reference to confidentiality and one of the witnesses provided a signed witness statement to the effect that he was given no assurance of confidentiality by the investigators during his interview that his evidence would not be disclosed. In response Mr Buchanan said in evidence that he may not have made the confidential nature of the investigation clear during some of the early interviews, but that did not apply to the majority of witnesses. The Tribunal notes that the witness statements which are the subject of the Request and have been withheld are all clearly provided in confidence.
21. We also note from Mr McTeggart's evidence that it was, at least partially, at his wish and behest that witnesses were offered confidentiality in the first place; he wanted witnesses to feel free, come forward and give frank evidence without risk of recognition or retribution.
22. The Tribunal has considered all the evidence on both of these issues and finds that:
 - 22.1 While we can understand Mr McTeggart's perception that he would be given his own copy of the Report, we note that the terms of reference, on which he was consulted and to which he agreed, clearly state that "on receipt of the investigating officers' report the sponsor departments will agree how to proceed". In short the departments explicitly reserved to themselves decisions on how they were going to handle the Report until they had received it and had had an opportunity to consider its content. Our finding is that this is what they did and that there was no decision to publish the Report.
 - 22.2 The evidence from witnesses was obtained in confidence, particularly in relation to the disputed information. This was in some part so as to protect them from Mr Martin and Waterways Ireland. In order to do this confidentiality would need to extend to the contents of the Report so far as it would identify any witnesses other than Mr Martin and Mr McTeggart,.

The issues for the Tribunal to determine

23. The parties accept that there are two categories of information which have been redacted from the version of the Report now provided to Mr McTeggart. These are set out in paragraphs 6.1 and 6.2 above, namely statements and opinions expressed by individuals in relation to Mr McTeggart's allegations and biographical and other identifying information relating to officials in Waterways Ireland.

24. The Tribunal needs to determine:
- 24.1 whether the exemptions claimed by DCAL and upheld by the IC, namely that the Request contains personal information (s.40(2)) and that the information was provided in confidence (s.41), are engaged;
 - 24.2 if they are engaged, then in relation to
 - (a) the s.40(2) exemption whether the disclosure of personal information of third parties would be fair and lawful processing;
 - (b) the s.41 exemption whether the information is confidential information in the terms of the section and if so whether there is a public interest defence where the public interest in disclosure outweighs the public interest in the maintenance of the duty of confidentiality.
25. Although other exemptions were claimed in the Refusal Notice and were dealt with in the Decision Notice it is agreed by the parties that these are no longer relevant to this appeal and that only the matters in paragraph 24 need be considered by the Tribunal.
26. The redacted parts of the Report have been disclosed to the Tribunal in confidence in order that we can determine the above matters. As a result it has been necessary to produce a confidential annex to this decision which is only disclosed to DCAL and the IC.

The law

27. Section 41(1) provides:

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.*
28. The leading case in this Tribunal on the application of this exemption is *Derry City Council v Information Commissioner* (EA/2006/0014). In relation to the meaning of confidential information *Derry* at paragraph 30 sets out the test as follows:
- 28.1 whether the information has the necessary quality of confidence about it in that it is not common knowledge and not in the public domain;
 - 28.2 whether the information was communicated in circumstances imparting an obligation of confidence;
 - 28.3 whether, subject to any defence, disclosure would be a breach of that confidence; and
 - 28.4 whether there is a defence to any action for breach of confidence, based upon the public interest in disclosure of the information, and if this part of the test is satisfied then

28.5 would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

29. In relation to the question of whether there is a public interest defence, the Tribunal considers that the IC's decision to adopt the approach set out in the *Derry* case at paragraph 35 is the correct approach. In order for there to be a public interest defence, the public interest in disclosure must outweigh the public interest in the maintenance of the duty of confidentiality. The Tribunal accepts that IC's view that: (i) there is no requirement to show exceptional circumstances in order for this defence to be made out; and (ii) the defence is not confined to specific and defined categories of case.

30. S.40(2) provides that

Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1) [applicant's personal data], and

(b) either the first or second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within paragraphs (a) to (e) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise under this Act would contravene-

(i) any of the data protection principles,

31. The relevant data protection principle under Part I of Schedule 1 DPA is:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met ...

32. Part II of Schedule 1 to the Act contains further material as to the interpretation of the data protection principles. Paragraph 2 of Part II relates to the circumstances in which data are treated as being processed fairly for the purposes of the first data protection principle. So far as relevant to this appeal, it reads:

(1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless-

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(3) The information referred to in sub-paragraph (1) is as follows, namely-

- (a) *the identity of the data controller,*
- (b) *if he has nominated a representative for the purposes of this Act, the identity of that representative,*
- (c) *the purpose or purposes for which the data are intended to be processed, and*
- (d) *any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.*

33. Additionally in order to satisfy the first data protection principle, it is necessary for processing to satisfy one of the conditions in Schedule 2 to the DPA. The condition that is potentially relevant in these appeals is in paragraph 6(1) of Schedule 2:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

34. In the Tribunal's decision in *The Corporate Officer of the House of Commons v The Information Commissioner and Norman Baker* EA/2006/15 and 16, the Tribunal found that the application of paragraph 6(1) involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context is a member of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects. However because the processing must be 'necessary' for the legitimate interests of members of the public to apply The Tribunal find that only where (i) outweighs (ii) should the personal data be disclosed.
35. The first DPP also requires that personal data shall be processed 'lawfully'. Where processing of personal data is in breach of a duty of confidentiality this would be unlawful and therefore in breach of the principle.

The Tribunal's powers

36. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows.

(1) If on an appeal under section 57 the Tribunal considers-

- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*

- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

37. The question whether the exemptions in ss 40(2) and 41 apply is a question of law or (alternatively) of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision that this exemption does not apply, and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority. Also the Tribunal has power, in the case of an appeal by an applicant for information, to allow and substitute such notice as could have been served by the Commissioner - *Guardian Newspapers and Heather Brooke v The Information Commissioner* EA/2006/0011 and 0013 at paragraphs 16 – 23.

Whether the exemptions are engaged?

38. The Tribunal finds that the IC was correct in finding that both exemptions were engaged in relation to the information in categories 6.1 and 6.2.
39. In relation to category 6.1 information having taken into account all the evidence and applied it to the relevant legal provisions we find that most of the information was provided in confidence and that the s.41 exemption is engaged.
40. In relation to category 6.2 information having taken into account all the evidence and applied it to the legal provisions we find that most of the information is personal data and that its disclosure could contravene the first DPP, namely (fair and lawful processing) and that the s.40(2) exemption is engaged. We have considered the requirements in paragraph 2 of Part II to Schedule 1 DPA and find that these have been met and to this extent the processing is fair.
41. Although these are both absolute exemptions under FOIA as set out in paragraphs 27 to 35 above there are further tests we need to consider under the DPA (the legitimate interest balance) and under the common law (the public interest balance) in order to decide whether any information should be disclosed.
42. We should mention that because of our finding in paragraph 39 this means that it would be unlawful (as an actionable breach of confidence) to disclose the information and therefore it could be argued there is no need to go on to consider the legitimate interest balance. However because it is still necessary to consider the public interest balance to determine whether or not it is unlawful we have proceeded to consider both tests in relation to the Report.

The Report

43. We have considered the unredacted version of the Report in confidence. We have applied the two tests where relevant to the redacted information. In applying the tests we have taken account of the following factors.

Legitimate interests of Mr McTeggart and the public:

44. In relation to the test set out in paragraph 34 above we have taken into account the following legitimate interests in favour of disclosure to McTeggart and the public at large:
- 44.1 Interest and concern of the public regarding the standards of personnel management and fair and transparent appointment practices exercised by a CEO within a public body;
 - 44.2 Interest in seeing how accountability was secured in a North-South body without a supervisory board and over a period when the NSMC was not operational. In other words did DCAL in the admittedly difficult and sensitive political circumstances discharge effectively its role in securing a robust and fair investigation?
 - 44.3 Interest and concern of the public regarding the efficient working of a North-South body established under the Good Friday Agreement;
 - 44.4 Interest in being able to know the detailed facts and reasons behind the findings in the Report;
 - 44.5 Mr McTeggart has already seen the body of the Report, albeit briefly, and it would be unfair to not let him have a copy of the Report.

Legitimate interests of Mr Martin and witnesses to the investigation

45. We have taken into account the following legitimate interests of the data subjects involved:
- 45.1 Any witness whose identity is disclosed may be subject to some form of discrimination or retribution;
 - 45.2 Staff may be reluctant to take part in such investigations in the future if their identity would be disclosed;
 - 45.3 Given the nature of press interest, Mr Martin's actions could be subjected to unfair analysis and attention;
 - 45.4 Other managers of Waterways Ireland whose names are known could suffer some form of "guilt by association" in the eyes of the public
 - 45.5 Disclosure of biographical and other identifying information of officials of Waterways Ireland would be unfair because these individuals are not the focus of McTeggart's complaints and its disclosure might lead to speculation about the validity of their appointments.

Public interest considerations in favour of disclosure

46. In relation to the test set out in paragraph 29 above we have taken into account the following public interest factors in favour of disclosure:
- 46.1 Interest and concern of the public regarding the standards of management and practices within a public body;
 - 46.2 Interest and concern of the public regarding the efficient working of a North-South Body established under the Good Friday Agreement;

- 46.3 Given that it is public knowledge that an investigation has taken place, non-publication of results or merely the press release that has already taken place will erode public confidence in this and future investigations;
- 46.4 Potential witnesses may in future not choose to be part of a seemingly ineffective process, nor wish to take any risk for no result;
- 46.5 Publication of results, however uncomfortable, should lead to management improvements, which is to the public benefit.

Public interest considerations against disclosure:

- 47. We have taken into account the following public interest factors against disclosure:
 - 47.1 Evidence given in confidence must be respected as such. It is not in the public interest to break such confidences. In this case we find that if such assurances of confidentiality had not been given then it would have been difficult to undertake the investigation and we have therefore given considerable weight to this particular public interest;
 - 47.2 Regardless of any finding on the nature of any undertakings as to confidentiality given to witnesses, disclosure of testimony, even anonymously, may be a deterrent to witnesses taking part in investigations.

The Tribunal's findings

- 48. The Tribunal has considered each redaction in the Report and as a result has decided to allow the appeal in part and issue a substituted decision notice as set out in the Decision above.

Date 4th June 2006

Chairman
John Angel