

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 April 2009

Public Authority: Department of Business, Enterprise and Regulatory Reform
Address: The Insolvency Service, Complaints Investigation Branch
10 Victoria Street
London
SW1H 0NN

Summary

The complainant asked DBERR for information concerning its investigation into their complaint about the activities of a named company, including the reasoning behind the Department's decision to take no further action. DBERR neither confirmed nor denied that it held the requested information, citing the exemptions in sections 30 and 43 of the Act. The Commissioner found that the exemptions were engaged and that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether DBERR holds the information. The Commissioner therefore found that DBERR had acted correctly in refusing to confirm or deny whether it held the information.

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. Relevant legislation mentioned in the Notice is set out in full in Annex 1 below.

The Request

Background

2. This request for information is longstanding, the information having originally been sought under the Code of Practice for Access to Government Information (Open Government Code). The complainants expressed concerns regarding the activities of a named company, alleging that overpayments had been taken by this company from its customers and the complainants provided copies of

information that had been gathered to support this allegation. Specifically the complainants asked:

- a) Did the public authority discuss the matter with the named company?
- b) Were the three individuals whose names were provided spoken to?
- c) Was a request made to obtain records/documents?
- d) Details of any contact between the public authority and the named company.

Full details of correspondence in relation to the request under the Code can be found at Annex 1.

3. In June 2007 the Prime Minister announced that much of the Department of Trade and Industry (DTI) would become the Department of Business, Enterprise and Regulatory Reform (DBERR). This complaint relates to the Insolvency Service, an executive agency of DBERR. For clarity the public authority is therefore referred to as DBERR throughout this notice.
4. On February 2005 the complainants requested information in relation to DBERR's decision not to investigate their allegations regarding the named company. This request was a reiteration of that submitted both under the Open Government Code and through their MP (see Annex 1).
5. On 23 March 2005 DBERR responded to the complainants and refused to provide the information requested. In refusing the request DBERR relied upon section 43(3) of the Freedom of Information Act 2000 and neither confirmed nor denied that it held information about an investigation into the company's operation as a result of the complaints made against it.
6. DBERR in relying upon section 43 argued that if it were public knowledge that a company had been or was under investigation it would stigmatise the company and lead to an adverse impact on the company's reputation which would jeopardise its commercial interests.
7. Furthermore in considering the public interest, DBERR concluded that the balance came down in favour of maintaining the exclusion of the duty to confirm or deny.

The Investigation

Scope of the case

8. On 12 March 2006 the complainants contacted the Commissioner to complain about the way DBERR had handled their request for information. In particular the complainants argued that DBERR had wrongly refused to confirm or deny that the information was held given the significant public interest in the issues involved.

Chronology

9. As the result of initial correspondence with the Commissioner the complainants were advised to request an internal review of DBERR's decision.
10. In July 2006 the then Inspector General and Chief Executive of The Insolvency Service (incorporating Companies Investigation Branch) reviewed the decision and was satisfied that DBERR had been correct in applying section 43(3) and had correctly applied the public interest test. Furthermore it was stated that section 30(3) of the Act was also applicable, given that the information requested related to an investigation.
11. The complainants remained dissatisfied with this decision and following a further exchange of correspondence, the Commissioner began his investigation of the complaint against DBERR on 17 December 2007.
12. The complainants had indicated that they were concerned about the lack of action taken by DBERR in response to serious allegations that they had made regarding the practices of the named company. In particular they were concerned that given their considerable personal financial loss and distress and the financial loss incurred by other customers of the named company, that there was significant public interest in DBERR carrying out an investigation into their allegations.
13. On 18 February 2008 DBERR provided to the Commissioner, in confidence, information relevant to the complaint and confirmed that DBERR's view remained as set out in its internal review, the results of which had been conveyed to the complainant.
14. Following a review of the progress of the case in October 2008, the Commissioner sought further explanation of DBERR's rationale for its decision to neither confirm nor deny that it held the information. DBERR responded on 21 November 2008, providing further comments in relation to its application of the exemptions.

Findings of fact

15. DBERR is the statutory body responsible for the investigation and prosecution of complaints under s447 and s449 of the Companies Act 1985. (see Annex 2) DBERR's powers under statute are discretionary.
16. The complainant approached the Parliamentary Ombudsman (the Ombudsman) with a related complaint on 10 March 2005. The Ombudsman responded stating that it was evident from the content of the papers provided by the complainants that DBERR had given their allegations serious consideration. However the extent of this consideration was clearly a matter for DBERR's discretion and in the absence of some indication of administrative fault on the part of DBERR, the Ombudsman could see no basis on which she could intervene in their complaint.

Analysis

Exemptions

Section 43(2) Prejudice to commercial interests

17. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
18. Section 43(3) provides that the duty to confirm or deny does not arise if compliance with that duty would itself prejudice, or be likely to prejudice, commercial interests.
19. The full text of the exemption can be found in the Legal Annex at the end of this Notice.
20. Initially DBERR argued that knowledge of the existence of an investigation would be likely to prejudice the commercial interests of the company concerned and those associated with it. Confirming that an investigation had taken place (were that the case) could create a stigma against the company on the principle of 'no smoke without fire'; denying that an investigation had taken place would be likely to prejudice the commercial interests of other companies who had been investigated.
21. The company concerned is engaged in a competitive business which relies to a significant extent on reputation. The Commissioner accepts that, rightly or wrongly, the mere suggestion that such a company had been under investigation would be likely to have an adverse effect on its commercial interests. Therefore, he agrees that section 43(2) and (3) exemptions are engaged in this case.

Public Interest in relation to section 43 exemption

22. Sections 43(2) and (3) are qualified exemptions and are therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought. In this context it should be noted that section 2(1) (b) of the Act states that where, in all the circumstances of a case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosure, section 1(1) of the Act (the duty to confirm or deny) does not apply.
23. In this case DBERR accepted the need for transparency and accountability for decision making and the spending of public money. However this needs to be weighed against the harm to the commercial interests of companies if the existence of an investigation is confirmed or denied. DBERR took the view that the likelihood and degree of prejudice that might arise to a company if knowledge of a statutory investigation were to be made public meant that the balance of the

public interest comes down in favour of neither confirming or denying that any such investigation exists or existed.

24. The Commissioner accepts that opinion. He recognises the wider interest of the general public and the more specific interests of the complainants in having access to information about a possible investigation. The Commissioner recognises that there is a public interest in knowing how bodies with regulatory powers operate and the outcome of their activities. However, in his view, because of the potential damage that might be caused to the company in terms of their commercial interests by disclosing whether an investigation took place, the greater public interest in this instance is served by maintaining the exclusion of the duty to confirm or deny whether the information is held.

Section 30(1) (b) (Investigations and proceedings conducted by public authorities)

25. Information is exempt under s30 (1)(b) if at any time it has been held by a public authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has the power to conduct.
26. Section 30(3) provides that the duty to confirm or deny does not arise if the information is (or if it were held would be) exempt by virtue of s30(1).
27. As explained at paragraph 15 above, DBERR has statutory powers conferred upon it by the Companies Act 1985. There are two types of investigation regime under the Companies Act 1985, one involving the appointment of Inspectors who produce a report that is normally published. The other type of investigation is the s447 regime, where the appointment of investigators is not announced and the final report is not published. One of the possible outcomes of the s447 regime is that where criminal conduct is uncovered there may be criminal proceedings instigated. DBERR's powers to investigate under statute are discretionary, so it is not obliged to undertake an investigation in any case.
28. DBERR confirmed that a decision to take no further action in relation to the complainants' allegations had been made on 6 February 2004 and that this had been relayed to the complainants on 23 March 2005.
29. At internal review stage the complainants were given some further information about that decision, but it was said that this should not be taken as an indication as to whether a statutory investigation had been undertaken.
30. Because any information within the scope of the request which may have been held would have been held for the purpose of considering whether proceedings were justified, the Commissioner is satisfied that in this instance the exemption is engaged. In view of this s30 (3) also applies.

Public interest test in relation to section 30 exemption

31. Although there is no requirement for DBERR to demonstrate that disclosure would result in prejudice to its operations, section 30 is a qualified exemption and

- therefore the Commissioner needs to consider the balance of the public interest test.
32. The complainants emphasised that their independent research had highlighted the real possibility of malpractice and fraud. Matters such as these were widely acknowledged to be of great public interest and consequently they were concerned at DBERR's failure to confirm or deny.
 33. Conversely the public interest inherent in maintaining the s30 exemption is that disclosure of information would prejudice both any actual investigation to which the information relates and also any future investigations in so far as there would be a negative impact on the investigative process.
 34. In this instance it is the latter public interest argument that is relevant. Whilst the Companies Act does make provision for the Secretary of State to compel a company to provide information as part of the process of conducting confidential investigations under s447, DBERR argued that the process of gathering such information was greatly facilitated by the cooperation of those involved, both complainants and third parties.
 35. Such cooperation is voluntary and provision of information is achieved through the knowledge that all aspects of the process are confidential. Were companies to become reluctant about providing information due to the possibility of its disclosure, either at all or to the full and frank extent required for proper reliance to be placed upon it, this would significantly hamper DBERR in its role in investigating companies and preventing wrongdoing.
 36. The Commissioner believes that there is a public interest in encouraging the voluntary cooperation of companies in order to facilitate an efficient investigative process. Thus in this instance confirming or denying that the specific pieces of requested information were held would be against the public interest.
 37. The Commissioner's decision in this matter has been informed by earlier decisions of the Information Tribunal in the *Toms*¹ case and in another DBERR case (*Department of Trade and Industry v Information Commissioner – "the DTI case"*²). In *Toms*, the Tribunal acknowledged that, in principle, the public interest in protecting information acquired in confidence during investigations could override the public interest in disclosure. In the DTI case, the Tribunal said that there were strong policy grounds to maintain the confidentiality of the then DTI's sources of evidence.
 38. The Commissioner believes that the public must be satisfied that DBERR takes seriously information it receives from members of the public that may point to the existence of criminal or fraudulent activity, and that it investigates such matters thoroughly using sound and effective methods. Sufficient information should therefore be made available to give the public reassurance that its work is done expeditiously both in general and in a specific case.

¹ FS50072311 and EA/2005/0027

² Appeal No EA/2006/0007

39. However the Commissioner has noted too that the Tribunal's decision in the DTI case supports the view that DBERR's investigations should be afforded some measure of confidentiality although the facts of this case differ in several important respects from those in the DTI case.
40. In this case, the Commissioner has seen that DBERR wrote to the complainants on more than one occasion explaining, in some detail, why it considered that it was not appropriate for DBERR to confirm or deny that the requested information was held. The Commissioner accepts that, in spite of the passage of time in this case, it is appropriate for DBERR to maintain this stance. He also notes that the Ombudsman did not investigate the complainants' concerns about how their allegations had been dealt with because there was no basis on which she could intervene.
41. The Commissioner believes that it is appropriate and proper for the complainant to seek assurance that DBERR investigated properly the information laid before it. However, the complainants had already been given much of the relevant information about DBERR's reasoning, which led it to refuse their request. Accordingly the Commissioner's decision is that the public interest in maintaining the exclusion of the duty to confirm or deny in this case outweighs the public interest in disclosing whether it holds the requested information.

The Decision

42. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 1st day of April 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Annex 1

Chronology of Complaint prior to FOIA 2005

1. In June 2003 the complainants contacted DBERR expressing concerns regarding the activities of a named company. Specifically it was alleged that overpayments had been taken by this company from its customers and the complainants provided copies of information that had been gathered to support this allegation.
2. In August 2004 the complainants were informed by DBERR that the information provided had been carefully considered and that no further action would be taken.
3. In September 2004 in order to ascertain why DBERR had decided not to investigate their allegations the complainants requested information under the non-statutory Open Government Code (the Code).
4. The Code was a commitment to provide access to information based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II. Part II of the Code lists categories of information that are exempt from disclosure on the grounds that to do so would cause harm or prejudice. Where one of these exemptions applied, there would be an overriding 'public interest' test.
5. Specifically, the complainants asked:
 - e) Did the public authority discuss the matter with the named company?
 - f) Were the three individuals whose names were provided spoken to?
 - g) Was a request made to obtain records/documents?
 - h) Details of any contact between the public authority and the named company.
6. Applying exemptions in Part II of the Code³, DBERR responded stating that it could neither confirm nor deny whether such an investigation had taken place. This stance was also upheld by DBERR at internal review under the Code and the complainants were informed that they would have further recourse through the Ombudsman and the Freedom of Information Act 2000 when it replaced the Code on 1 January 2005.

³ Code exemptions 4 (c) 'information relating to ...the proceedings of any tribunal, public inquiry or other formal investigation.....or relating to investigations which have or might have resulted in proceedings'.

4 (d) 'information covered by legal privilege'

13 'commercially confidential information'

15 (a) 'information whose disclosure is prohibited by or under any enactment'

Annex 2

Legal Annex

Companies Act 1985 c.6

Part XIV Investigation of Companies and their Affairs; Requisition of Documents

Section 447 (2) provides that:

“The Secretary of State may at any time, if he thinks there is good reason to do so, give directions to a company requiring it, at such a time and place as may be specified in the directions, to produce such documents as may be so specified”.

Section 449 (1) provides that:

“No information or document relating to a company which has been obtained under s447.....shall,be published or disclosed, except to a competent authority, unless.....”

Freedom of Information Act 2000

Section 1(1) (a) – Duty to confirm or deny

Section 1(1) (a) provides that:

“Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.”

Section 2(2) - Public Interest Test

Section 2(2) provides that:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1) (b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring an absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing the information.”

Section 43 – Trade Secrets and Commercial Interests

Section 43 (1) provides that:

“Information is exempt if it constitutes a trade secret”.

Section 43 (2) provides that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43 (3) provides that:

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”

Section 30 - Investigations and proceedings conducted by public authorities

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,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if -

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

- (i) investigations falling within subsection (1)(a) or (b),
- (ii) criminal proceedings which the authority has power to conduct,

... and

(b) it relates to the obtaining of information from confidential sources.”

Section 30(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).”