



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 26 July 2006

Public Authority: Department of Trade and Industry

**Address: Legal Services Group,
Bay 572
1 Victoria Street
London SW1H 0ET**

Summary Decision

The Commissioner's decision in this matter is that the Department of Trade and Industry (DTI) has not complied with Part I of the Freedom of Information Act 2000 to the extent set out in this Decision Notice and is required to provide the complainant with information to the extent specified.

1. Freedom of Information Act (the Act) – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The complainant advised that on 1 January 2005 the following information (the "requested information") was requested from the DTI in accordance with section 1 of the Act:

'I am requesting the information held by the DTI in relation to the decision, announced in a Written Statement to Parliament on March 26 2004, to take no further action following the investigation into allegations that British and American Tobacco has been involved in smuggling, including but not confined to: the full briefing notes used by Press Officers in response to journalists' queries on the decision; communications, both written and electronic, with other government departments relating to the decision; documents that give the full and detailed reasons for the decision.

I wish to be informed in writing whether you have such information and if so I seek the disclosure of that information. If the information is covered by any exemptions, please disclose such information as is not covered by the exemptions.

I appreciate that the investigation was ordered under section 447 of the Companies Act 1985 and information thus obtained may not normally be disclosed. The DTI may wish to claim that the information requested is therefore subject to a section 44 exemption under the FOIA. I submit, however, that the information requested is specifically not subject to a section 44 exemption and must therefore be made available as there is prima facie public interest in this information under the terms of section 2 of the Act.'

- 2.2 The DTI informed the complainant that the requested information was withheld under section 44 of the Act on the grounds that it was obtained pursuant to an investigation under section 447 of the Companies Act 1985. Section 44 of the Act exempts information if its disclosure is prohibited by or under any enactment. Section 449 of the Companies Act 1985 prohibits the disclosure of information relating to a company which has been obtained under section 447 of that Act.
- 2.3 In relation to the complainant's request for briefing notes used by press officers in response to journalists' queries on the decision to take no action, the DTI provided the press release which was made at the time.
- 2.4 In response to the complainant's request for copies of written and electronic communications between the DTI and other government departments relating to the decision to take no action, the DTI stated that it had no such information.
- 2.5 In response to the complainant's request for documents that detailed the reasons for taking no action, the DTI replied that it held information which consisted of a submission sent to Ministers after the investigation. This contained a summary of

the investigation and legal advice obtained by the DTI. The DTI withheld this information from the complainant under sections 42 and 44 of the Act.

- 2.6 The complainant requested an internal review in which the DTI confirmed its original decision to withhold the information.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides that –

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

4. Review of the case

- 4.1 The complaint to the Information Commissioner comprised four elements which are listed (a) to (d) in this Decision Notice. The Commissioner was asked to:

(a) ‘consider whether the submission to ministers is, in fact, new information and therefore not subject to section 44’ and ‘whether a summary or précis of the investigation, if it is, as the DTI claims, part of the submission to ministers, can retain the protection accorded by section 44 under section 447 and 449 of the Companies Act’

(b) ‘review and rule on the decision by the DTI to withhold information ... as the public interest in the disclosure of the information outweighs the public interest in maintaining secrecy’

(c) rule that ‘letters to the former Secretary of State, Stephen Byers and to the Chairman of the Health Select Committee informing them of the government’s decision and the Department’s communications with Number 10’ should be released

(d) ‘order a more thorough search and authorise the release of the information discovered’ as ‘I am not satisfied a complete and thorough search has been made for the information I requested, particularly the briefing notes for press officers or communications with other Departments seeking and receiving comment on the proposed decision to take no action against BAT’.

- 4.2 The Commissioner examined the DTI’s submission to ministers, the summary of the investigation and the legal advice received by the DTI in order to ascertain the appropriateness of the exemptions that were applied by the DTI to withhold the information.

5. The Commissioner’s Decision

5.1 (a) The section 44 exemption (statutory prohibition)

The DTI relied upon section 44 of the Act which states that:

44. – (1) 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,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

5.2 Section 44 is absolute and therefore not subject to the public interest test.

5.3 The relevant parts of sections 447 and 449 of the Companies Act 1985 (as amended) read as follows:

5.4 Section 447, Companies Act (Power to require documents and information)

(1) The Secretary of State may act under subsections (2) and (3) in relation to a company.

(2) The Secretary of State may give directions to the company requiring it-

- (a) to produce such documents (or documents of such description) as may be specified in the directions;*
- (b) to provide such information (or information of such description) as may be so specified.*

(3) The Secretary of State may authorise a person (an investigator) to require the company or any other person-

- (a) to produce such documents (or documents of such description) as the investigator may specify;*
- (b) to provide such information (or information of such description) as the investigator may specify.*

(7) The Secretary of State or the investigator (as the case may be) may take copies of or extracts from a document produced in pursuance of this section.

(8) A "document" includes information recorded in any form.

5.5 Section 449, Companies Act (Provision for security of information obtained)

(1) This section applies to information (in whatever form) obtained-

- (a) in pursuance of a requirement imposed under section 447;*
- (b) by means of a relevant disclosure within the meaning of section 448A(2);*
- (c) by an investigator in consequence of the exercise of his powers under section 453A.*

(2) Such information must not be disclosed unless the disclosure-

- (a) is made to a person specified in Schedule 15C, or*
- (b) is of a description specified in Schedule 15D.*

(6) A person who discloses any information in contravention of this section-

- (a) is guilty of an offence, and*
- (b) is liable on conviction to imprisonment or a fine or to both.*

(9) This section does not prohibit the disclosure of information if the information is or has been available to the public from any other source.

5.6 The Commissioner considered whether documents created subsequent to the investigation (the submission to ministers, the summary and the legal advice) should retain the protection afforded by sections 447 and 449 of the Companies Act.

5.7 As section 449 creates a criminal offence, it must be construed strictly. Accordingly, the Commissioner has concluded that its scope must be limited to information obtained directly in pursuance of a requirement imposed under section

447. This must be limited to documents or information obtained from the company under a direction from the Secretary of State (sub-section (2)) or as specified by a duly authorised investigator (sub-section (3)).

5.8 As the complainant has recognised, a substantial part of the requested information must fall within the scope of these prohibitions. In particular, this applies to the report of the investigators itself which the complainant does not appear to be seeking. However - except to the extent that disclosure must necessarily reveal protected information - the prohibition would not apply (inter alia) to:

information available to the public which influenced or informed the decision to take no further action following the investigation;
information obtained from the company or any other person otherwise than under a section 447 requirement;
analysis and recommendations of the investigators; or
analysis and recommendations of those advising the Secretary of State.

5.9 In principle the Commissioner has concluded that the section 44 exemption cannot apply to all the requested information. But this must be read subject to what is said

below about legal professional privilege and in the knowledge that the exception – where disclosure must necessarily reveal protected information – will exempt a very substantial part of the requested information. This is addressed further below in the section headed Summary and Specified Steps.

5.10 (b) Section 42 (Legal professional privilege)

Section 42 of the Act was applied by the DTI in order to withhold the legal advice and sections of the submission to ministers. Section 42 states that:

42. - (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

- 5.11 The Commissioner is satisfied that substantial parts of the requested information are subject to legal professional privilege and therefore fall within the section 42 exemption. This is a qualified exemption - so the Commissioner is also required to consider whether the public interest in maintaining the exemption is outweighed by the public interest in disclosure.
- 5.12 The Commissioner recognises that there are competing public interest arguments in this case.
- 5.13 There is clearly public interest in the subject-matter of the legal advice. It deals with the result of an investigation into allegations which had been made against a high-profile company. The investigation followed hearings before the Health Select Committee. The allegations had been widely reported. They involved perennially controversial topics – tobacco, third world countries, taxation and smuggling. Prominent politicians and business-people were involved.
- 5.14 Public interest in the subject-matter is not, however, the same as the public interest in the disclosure of legal advice which is covered by professional legal privilege. Public interest in the subject matter is a factor, but it is not a dominant one.
- 5.15 There are some more specific arguments for the public interest in disclosing the legal advice, but they are not strong in this case. They include, for example enabling the public to get a fuller insight into the legal issues arising out of DTI investigations and increasing public confidence in the investigation process in general. There is also some public interest in disclosure which would enable objective judgements to be made about the conduct and aftermath of this investigation in particular.
- 5.16 The substance of the legal advice in this case was however thorough, objective and professional and the Commissioner has not seen anything in it to suggest a compelling argument for its disclosure on public interest grounds.

- 5.17 In the Commissioner's view, moreover, there are strong public interest arguments for maintaining legal professional privilege. The Commissioner believes that this privilege can and should only be outweighed in exceptional cases where there are compelling contrary arguments. The public interest in legal professional privilege is rooted in the proper administration of justice and is quite separate from the subject matter of any legal advice. A client needs to be confident that information shared with a lawyer, and advice received from that lawyer, will remain confidential. Without such confidence there are risks of lack of openness between client and lawyer and threats to the administration of justice. The detailed policy arguments supporting the doctrine were most recently considered and fully set out in the judgment of the House of Lords in *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48. More directly, the Commissioner has also taken into account the Information Tribunal's decision of 27 April 2006 in *Bellamy v DTI* which referred to a very strong inherent public interest in maintaining legal professional privilege.
- 5.18 **The Commissioner has weighed the competing public interest considerations as outlined above and has concluded that, in all the circumstances of this case, the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure of the privileged material. He has therefore concluded that the DTI was correct to apply the section 42 exemption to such of the requested information as is protected by legal professional privilege.**
- 5.19 (c) The Commissioner asked the DTI to clarify whether, as understood by the complainant, letters were sent in 2004 to the Chair of the Health Committee and to the former Secretary of State, Stephen Byers separately informing them of the government's decision to take no action following the investigation. The Commissioner also asked the DTI whether it held a record of its communication with No. 10 Downing Street regarding its decision to take no action.
- 5.20 **The DTI informed the Commissioner that the Chair of the Health Committee and the former Secretary of State, Stephen Byers, were informed by telephone of the decision to take no action. The DTI informed the Commissioner that there is no record of the content of those telephone conversations. The DTI also informed the Commissioner that the communication with No. 10 Downing Street took place by telephone and that it holds no record of this conversation. The Act deals only with 'recorded' information and the Commissioner has no reason to question what he has been told on this aspect by the DTI.**
- 5.21 (d) With regard to the complainant's request that the Commissioner order a more thorough search for the requested information, the Commissioner asked the DTI to confirm and clarify:
- (i) whether briefing notes, other than the press release that was issued at the time, were provided to government departmental press officers

(ii) whether any written memos, letters or emails, relating to the decision to take no further action were sent from the DTI to other government departments

(iii) whether any other government departments were asked for their comments on the proposed decision to take no action.

5.22 The DTI confirmed to the Commissioner that to the best of its knowledge no recorded information such as outlined in (i) and (ii) above was issued. The DTI also confirmed to the Commissioner that no other government departments were asked for their comments on the decision to take no action following the investigation into BAT. The Commissioner has no reason to question what he has been told on these aspects by the DTI.

6. Summary and Specified Steps

6.1 The overall conclusions reached by the Commissioner in this case can be summarised as follows:

1. The DTI is not obliged to disclose such parts of the requested information which are protected by legal professional privilege.
2. The DTI is required to disclose the remainder of the requested information, except to the extent that:
 - a. it is information which was obtained directly in pursuance of a requirement imposed under section 447; or
 - b. disclosure must necessarily reveal information which was obtained directly in pursuance of a requirement imposed under section 447.
3. Subject to the above exceptions, disclosure should include:
 - a. information available to the public which influenced or informed the decision to take no further action following the investigation.
 - b. information obtained from the company or any other person otherwise than under a section 447 requirement;
 - c. analysis and recommendations of the investigators; or
 - d. analysis and recommendations of those advising the Secretary of State.

6.2 The Commissioner believes that it is a relatively simple matter in this case to identify material protected by legal professional privilege. Far greater practical difficulties will be presented by the Commissioner's other conclusions as the remainder of the requested information closely inter-twines disclosable and non-disclosable material. It should be made quite clear that a very substantial part is non-disclosable.

6.3 The Commissioner recognises that it would be extremely difficult or impossible to prepare or understand any document within the requested information, which has been redacted in accordance with the conclusions summarised above

6.4 In the circumstances, the Commissioner therefore requires the DTI within 60 days from the date of this Notice to provide the complainant with a Disclosure Statement, in a form agreed with the Commissioner, setting out the substance of the requested information in fulfillment of the conclusions summarised above.

7. Failure to comply

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

8. Right of Appeal

8.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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@dca.gsi.gov.uk

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

Dated the 26th day of July 2006

Signed

**Richard Thomas
Information Commissioner**

**Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**