

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 November 2007

Public Authority: Department for Business, Enterprise & Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant was refused information about the application of the Department's Coal Investment Aid scheme to the Aberpergwyn Colliery. The Commissioner decided that information contained within reports to the department from its consultants had been correctly withheld using the section 41 exemption but that the Department had been in breach of section 17 of the Act in not including section 41 in its refusal notice. He also decided that other information, about the offer of aid and employment at the mine, had been wrongly withheld as the section 43 exemption was not engaged.

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.

The Request

2. In June 2007, the Prime Minister announced that much of the then Department of Trade and Industry (DTI) would become the Department for Business, Enterprise & Regulatory Reform (DBERR). For clarity, the public authority is referred to as DBERR throughout this Notice.
3. On 21 January 2005 the complainant asked DBERR for:
 - 1) a copy of the application by Energybuild Mining Limited (the company) for Aid for periods 1 and 2 of the Coal Investment Aid (CIA) scheme at the Aberpergwyn Colliery, West Glamorgan
 - 2) copies of the awards for both periods with details of any conditions attached (the offer letters)

- 3) copies of reports provided by those charged with 'auditing' the actual spend by the company against which Aid is paid (the consultants' reports)
 - 4) if not included with the above, a profile of actual employment against the 178 jobs that should have been in place at the end of period 1 (the employment profile); and
 - 5) correspondence (including emails) between the company and the department and internal communication within the department relating to the investigation concerning the behaviour of the directors of a second named company.
4. The complainant later accepted that any entitlement was to information not documents. He also withdrew his request for the first part of his request. DBERR subsequently asked him to clarify the fifth part of his request which he did not do with the result that neither party has pursued that part of the request. Accordingly, this Decision Notice sets out the Commissioner's decisions in respect of parts 2 - 4 of the original request.
5. DBERR said that the CIA scheme had been launched in June 2003. The scheme aimed to create or safeguard jobs in the UK coal industry within socially and economically disadvantaged areas. The first awards had been made in December 2003 and were followed by a further application period leading to the offer of period 2 awards in September 2004 for acceptance by mid-December 2004. By then, all successful applicants had begun to draw down the monies linked to their period 1 awards, but the projects selected to receive support were expected to continue to at least March 2006 with the funding continuing to be available until December 2008 if necessary.
6. On 17 February 2005 DBERR issued a refusal notice, which refused parts 2, 3 and 4 of the request, citing the exemption contained in section 43 (Commercial interests) of the Act. DBERR said that the balance of the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
7. There were further exchanges of correspondence between DBERR and the complainant, much of it relating to earlier correspondence that had predated the coming into force of the Act on 1 January 2005 and, on 16 June 2005, the complainant requested a review of DBERR's decision to withhold the information sought, i.e. for parts 2 – 4 of the original request. On 10 October 2005 DBERR replied maintaining its decision to withhold the information requested.

The Investigation

Scope of the case

8. On 3 November 2005 the complainant contacted the Commissioner to complain about the refusal of his request for information. The complainant provided the Commissioner with a rebuttal of many of the arguments that DBERR had used.

Chronology

9. There was some further correspondence between the Commissioner's staff and the complainant before the Commissioner began his investigation on 26 March 2007. In a letter dated 16 May 2007, sent on 22 May, DBERR confirmed to the Commissioner that it had decided to maintain its decision to withhold the information requested.
10. The Commissioner's staff reviewed the information being withheld and, on 29 May 2007, met with DBERR officers to review their reasons for continuing to withhold the information. DBERR offered to disclose some of the information sought but, despite further exchanges of correspondence, was unable to agree with the Commissioner what information could properly be withheld.

Findings of fact

11. The DBERR refusal notice of 17 February 2005, and the 10 October 2005 letter confirming the outcome of the internal review of that decision, were both signed by the same DBERR officer.
12. The Commissioner has seen that the information withheld comprises: DBERR's offer letters to the company of 1 December 2003 and 16 September 2004; and, the commercially confidential reports by DBERR's consultants (which the complainant accepts were correctly withheld under section 41 (Information provided in confidence) of the Act).
13. The Commissioner has also seen proforma invoices from the company for their CIA claims which were submitted in support of its claims for CIA payments, but which did not form part of the complainant's request. These contain information about numbers employed at the mine which was part of the request.
14. The Commissioner has seen correspondence between DBERR and the company in which the company set out their objections to DBERR disclosing certain information they had provided to it.
15. One of the objectives of the award of CIA to the company was to secure 78 jobs at the mine and to create 100 more jobs there, i.e. to support 178 jobs in total.

Analysis

Procedural matters

16. The Commissioner has seen that DBERR acted correctly in issuing a refusal notice to the complainant and in providing for an internal review of its initial decision to withhold the information requested. However, as DBERR later relied upon the section 41 exemption as well as the section 43 exemption, the refusal notice was defective and in breach of section 17 of the Act in not referring to section 41.
17. [The Commissioner also saw that DBERR's procedure was deficient in that the review of the original decision was carried out by the same DBERR officer who had refused the initial request and so was not independent of the initial refusal.]

Exemption

Section 41

18. On 16 May 2007 DBERR told the Commissioner that, while it still relied upon the section 43 exemption in refusing to provide the information sought in part 3 of the request (the consultants' reports), it intended additionally to rely upon the section 41 exemption in withholding the information in the consultants' reports.
19. The Commissioner has reviewed the reports by DBERR's consultants. He has been guided by the decision of the Information Tribunal in the *Derry* case (*Derry City Council v Information Commissioner EA/2006/0014*). In the particular circumstances of this case, the Commissioner has seen that information was obtained by DBERR from its consultants and that it was the intention of both the consultants and DBERR that these reports would be accorded strict confidence and that the company were aware of that. He is therefore satisfied that disclosure by DBERR of this information, against the expressed wishes of the consultants, could be damaging to them and to DBERR, that an obligation of confidence exists and that it would be actionable. He has seen nothing in the reports to suggest that the balance of the public interest, which he believes should not lightly be overridden on public interest grounds, should be overridden in this case in view of the importance of preserving confidences. Accordingly he has decided that the section 41 exemption has been correctly applied. Because he accepts that the section 41 exemption applies, the Commissioner did not consider the application of the section 43 exemption to the information in the consultants' reports.

Section 43

20. The complainant told the Commissioner that DBERR's action in consulting third parties who might be adversely affected did not appear to him to be a suitable basis for DBERR to conduct an internal review of its decision to withhold the information. He noted too that DBERR was concerned about how disclosure would impact on it; he found this surprising as it implied that disclosure would

have a deleterious impact. He said that DBERR was acting with the best of intent on spending public money which amounted to a compelling argument in favour of disclosure.

21. The complainant said that disclosure by DBERR of detail of the company's pricing would not assist anyone else. The vast majority of coal sales were not subject to formal contracts; there would be successive contracts for the company to supply the Aberthaw power station, the only variables would be the quality and price contracted. Quality reflected the coal available and prices were known to DBERR and its consultants. The price of coal was volatile and was affected by a lot of issues, many of them outwith the control of the industry, so that pricing information provided to DBERR in 2003 would be worthless in 2005. The prospect that anyone would invest in a new anthracite colliery basing their decision on historic figures from a potential competitor was ludicrous. He said that all coal is different. Coal from the Aberpergwn Colliery was unique. No one else in the world could produce that coal and disclosing its price was no help to competitors, actual or potential. Withholding the information did not, and could not, protect the company's commercial interests.
22. The complainant also said that every mine was unique; all mines were significantly different by virtue of their geology, hydrology, coal quality and a host of other factors. No mining operation could be mirrored and few detailed lessons could be applied to one mine based upon the experiences of another. The information sought was, he argued, of negligible commercial value.
23. As to the balance of the public interest, the complainant said that he applauded the CIA scheme but added that those receiving public money should be held accountable for their actions. There was a strong public interest in accountability and transparency; nothing in the public interest could be served by refusing disclosure.
24. DBERR told the Commissioner that it relied upon the section 43 exemption in refusing to provide the information sought in parts 2, 3 and 4 of the request. As the Commissioner has decided that section 41 had been correctly applied to the information in the consultants' reports, part 3 of the request, he only considered the application of section 43 in respect of parts 2 and 4 of the request (the offer letters and the employment profile).
25. DBERR said that the text of the offer letters was standard across all of the awards made under the CIA scheme, except for the exact value of the award and project information in schedule 2 to the letters specific to each project.
26. As regards the offer letters and the employment profile, DBERR told the Commissioner that, at the time of the request, CIA was a relatively new business support product. DBERR and the successful applicants were still satisfying themselves that the CIA system was effective. It had been particularly important for DBERR to maintain stability and the trust of applicants throughout that period. Disclosing the information sought could undermine the confidence of potential applicants for other regional or sectoral assistance schemes that DBERR would protect their sensitive information, thereby

impairing the effectiveness of future programmes. DBERR said it had sought the views of third parties whose interests might be affected by disclosure in order to consider the impact of disclosure on them. The company should be able to rely on information it supplied being treated as commercially sensitive, or being kept confidential. Failure to do so might affect the company's fundraising programme and so jeopardise the success of the project.

However, DBERR agreed with the complainant that there was a public interest in access to information about the spending of public money but said that this interest was met by the information it had put on the CIA website.

27. As regards the complainant's argument that every mine and its coal are unique, DBERR said that information could be commercially sensitive for many reasons and could influence a company's prospects of securing additional finance or sales contracts. DBERR considered that disclosing the information requested could give competitors an advantage, even if it might not assist them directly in developing their own mining activities. DBERR agreed that every mining operation was different; each mine operator had to develop their own plan to work any potentially profitable reserves. For this reason, information about the seams to be targeted, access arrangements, infrastructure, etc was integral to the business plan for the mine. Disclosing details of the work programme, such as employment levels, could help a third party to estimate what coal the company might be able to supply, when, and at what price. Information about the work programme and employment was therefore commercially sensitive although the total figure of 178 jobs to be safeguarded or created at the mine had been published.
28. The Commissioner noted that the company told DBERR that their commercial interests would be prejudiced by disclosure of the requested information. They instanced key business plans, price lists and customer lists. They regarded their business plan, and the customer lists, which they had given to DBERR in pursuit of their application and verifying claims for CIA, as trade secrets which should be withheld.
29. The Commissioner has seen that section 43 exempts from disclosure, information that is a trade secret, or is likely to prejudice the commercial interests of any person. Trade secrets can extend to a company's goods or pricing structure, or other information that is the source of a company's competitive advantage. However the Commissioner does not accept that the information in the offer letters nor the employment profile possesses the quality of being a trade secret. One of the main issues to consider when determining whether something is a trade secret is the ease or difficulty with which it can be acquired or duplicated, and then used, by others and he does not see those conditions applying to the information in the offer letters or the employment profile.
30. So far as a commercial interest is concerned, it is normally something that is germane to generating profits and some prejudice to the relevant body must be established for the exemption to apply. If prejudice is established, then the balance of the public interest must be considered. The public interest will normally be served where access to information would: facilitate the

accountability and transparency of public authorities for decisions taken by them; facilitate accountability and transparency in the spending of public money; and, allow individuals to understand decisions made by public authorities affecting their lives or, in some cases, assist individuals in challenging those decisions.

31. The Commissioner noted, but did not share, the complainant's concern that DBERR had consulted the company about disclosure of some of the information they had provided to DBERR. Such consultation is recommended in the Code of Practice issued by the Secretary of State under section 45 of the Act. The Commissioner therefore commends DBERR for seeking the company's views, recognising that the Department was not bound to accept or adopt the views expressed.
32. The complainant argued that price related information was worthless in view of the volatility of the price of coal, much of which was due to exogenous variables. He pointed also to the limited competition that existed in the market for the company's product; DBERR did not dispute this but pointed to possible prejudice to the company's relationships with its bankers, shareholders, etc. That the CIA scheme was initiated to attract new entrants into the coal market, or retain existing players within it points, in the Commissioner's view, to an inherent lack of attraction of the market and competition within it.
33. The complainant argued persuasively, and DBERR largely accepted, that each mine, and the coal it produces, is unique, limiting severely the transferability of information about operating conditions, employment levels and procedures from one mine to another. DBERR suggested that disclosing information about the progress of operations could lead third parties to deduce information about output that might be of commercial value to them. The Commissioner accepts that the uniqueness of the geological and other conditions of each mine severely limits the usefulness to third parties of information about a mine's physical operations. The Commissioner is not persuaded by the arguments alleging commercial prejudice and has decided that the section 43 exemption is not engaged. Accordingly, he did not proceed to consider the balance of the public interest.
34. The Commissioner noted that one of the aims of the CIA award to the company had been to create and preserve jobs within the local coal industry. He did not accept that the employment profile at the mine was a trade secret or that its disclosure would prejudice the company's commercial prospects so the exemption was again not engaged.
35. The Commissioner gave specific consideration to the forecasts of future project costs included in the offer letters. He has seen that these take the form of high level annual summary forecasts and do not include any information which he considers to represent the company's key business plans, price lists or customer lists. He has seen that the future project cost forecasts had been made for periods stretching some years into the future from the dates of the offer letters. He considered that both DBERR and the company will have recognised the considerable uncertainty inherent in the forecasts as the

physical progress of operations at the mine and future income and expenditure would depend on the impact on the company of both the natural elements and market forces. Accordingly he is not persuaded that disclosure will prejudice the commercial interests of the company and therefore he decided that the exemption is not engaged as regards the forecasts of future project costs.

36. The foregoing analysis has led the Commissioner to the following conclusions. In the case of the offer letters from DBERR to the company of 1 December 2003 and 16 September 2004, the Commissioner has seen that, for the most part, they comprise standard text together with outline information about the works for which the CIA funds will be used. The Commissioner does not accept that release of the information in those letters would prejudice the commercial interests of the company. He has noted the arguments by DBERR and the complainant concerning the strength of the market, the need for the company to attract investors and maintain their confidence, and the ways in which it was said that disclosure might prejudice the company. He has seen that that no two mines are the same, that the market is not strongly competitive and that DBERR has seen the need to commit substantial sums of public funds to support mining operations. Accordingly he does not see that prejudice to the company would result from disclosure of the text of the offer letters or of the employment profile for the period requested.

The Decision

37. The Commissioner's decision is that DBERR dealt with part 3 of the request in accordance with the requirements of the Act. However, the Commissioner has also decided that the parts 2 and 4 of the request were not dealt with in accordance with the Act.

Steps Required

38. The Commissioner requires DBERR to take the following steps to ensure compliance with the Act:
- disclose the full text of the offer letters from DBERR dated 1 December 2003 and 16 September 2004.
 - disclose the employment data (only) from the proforma invoices for CIA claims, invoices 1 – 4.
 - disclose the employment data (only) from the reports by DBERR's consultants.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

40. Although not a breach of the Act, the Commissioner is concerned that the refusal notice and the internal review of that refusal were signed by the same DBERR officer. This meant that the review of the decision to refuse the information may not have been conducted independently of the original refusal which it should have been to accord with the Code of Practice issued by the Secretary of State under section 45 of the Act.. Certainly that is the appearance given.

Failure to comply

41. 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.

Right of Appeal

42. 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@dca.gsi.gov.uk

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 12th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal annex

Refusal of Request

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

...

- on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(7) provides that –

“A notice under subsection (1), (3) or (5) must-

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information 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).”