Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2006/0007

FREEDOM OF INFORMATION ACT 2000

Heard at: Finance & Tax Tribunal
On : 3 & 4 October 2006

Decision Promulgated

10 November 2006

Before

Mr. David Marks
INFORMATION TRIBUNAL DEPUTY CHAIRMAN

And

Mr Ivan Wilson and Mr David Wilkinson
LAY MEMBERS

Between

THE DEPARTMENT OF TRADE AND INDUSTRY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The Tribunal considers that the Respondent's Decision notice was not in accordance with the law and allows the appeal.

Reasons for Decision

Introduction

1. This is an Appeal by the Department of Trade and Industry (the "DTI") against a Decision Notice issued by the Information Commissioner (the "Commissioner") dated 5 January 2006 in relation to a complaint made in connection with a Companies Act investigation into the affairs of the complainant's company, Atlantic Property Limited ("Atlantic"). The complainant's name is Neil Morgan ("Mr Morgan").

2. In mid-January 2005, shortly after the full implementation of the Freedom of Information Act 2000 ("FOIA"), which came into force on 1 January and after the DTI had commenced a formal investigation under the Companies Act 1985 into the affairs of Atlantic, Mr Morgan sent a letter to the DTI asking in broad terms to be acquainted with the reasons for the decision behind the investigation. The DTI refused to provide such information. There then followed an internal review within the DTI which confirmed that refusal. After written exchanges between the DTI and the Commissioner's Office, a Decision Notice was issued by the Commissioner requiring the DTI within 35 days of the date of service, to disclose to Mr Morgan "the reason for the investigation" in outline terms. Subsequently, Atlantic was placed into compulsory liquidation on the basis of a petition presented by the DTI by order of the Chancery Division in the High Court following a hearing in which it was not represented and at which Mr Morgan did not attend and therefore in circumstances in which the winding up order was effectively unopposed.

3. Although, as will be seen below, the Tribunal feels some doubt as to whether, despite the potentially far-ranging issues in this Appeal, the facts of this particular complaint represented the ideal platform for the underlying debate which constituted the appeal and for the consideration of the issues involved, it recognises the importance of this appeal in the minds of both parties. It is also sensitive to and deeply appreciative of the extent and qualities of the written and oral submissions provided by the parties' respective Counsel, namely Mr Pitt-Payne, on behalf of the Commissioner and Messrs Jonathan Crow QC and Jason Coppel, on behalf of the DTI. The Tribunal is also indebted to Mr Robert Burns ("Mr Burns") the head of the DTI's Companies Investigation Branch ("CIB") who provided extensive

written and oral evidence to the Tribunal. Mr Morgan himself played no part in this Appeal and was not joined as a party.

4. In these circumstances, the Tribunal feels that it is, on balance, appropriate to deal with the facts and the submissions at some, but hopefully, not undue length. However, as will also be noted in further detail below, it feels a strong obligation to draw specific attention to the fact that it is primarily, if not exclusively, charged with adjudicating upon the merits or otherwise of the present appeal as distinct from any pending or possible future complaints touching and concerning similar subject matter.

The Facts

5. A great number of the background facts can be drawn from the judgment of Lawrence Collins J dated 13 March 2006, at the conclusion of which the learned judge ordered the winding up of Atlantic.

6. Atlantic was incorporated on 18 January 1999. Its registered and apparently only address was at 78 York Street, London, W1. In evidence, Mr Burns stated that this was an accommodation address and this seems eminently borne out by the comments made by the learned judge.

7. According to the court's findings, Atlantic "claimed" to have been a property rental agency collecting rents and deposits, but granting tenancies in its own name. The owners of the property included Mr and Mrs Morgan and three companies controlled by them, namely Sledgehammer Holdings Limited, Sledgehammer Properties Limited and Roadrunner Properties Limited. According to Mr Morgan, Atlantic ceased trading in December 2004 and its business was transferred to Homelet Estates Limited. The Secretary of State, as indicated above, presented a petition for the winding up of Atlantic in the public interest under the provisions of section 124A of the Insolvency Act 1986 alleging that having paid rent and deposits to the owners of the properties, Atlantic then failed to pay, or more probably refund, deposits to the tenants. There were 33 County Court judgments registered against Atlantic believed to be in respect of such deposits. The alleged failure to repay deposits in turn led to complaints being made both to a television programme called Watchdog on the BBC and to Westminster Council's Trading Standards Department who duly reported the matter to the DTI.

8. The learned judge noted that the "main basis" of the petition was Atlantic's "unsatisfactory response" to the DTI investigation conducted under section 447 of the Companies Act 1985. This section and its accompanying provisions will be set out below. On 5 January 2005, a Mr John Coker, an investigator at the CIB, then part of the Corporate Law Governance Directorate of the DTI, was authorised under section 447 to require Atlantic to produce such documents as he might specify.

9. The Tribunal was shown a copy of a three-page list of those books and records consisting of accounting and supporting documentation in respect of which production was required. The list was both lengthy and thorough. In the eyes of the DTI, the response was unsatisfactory and the lack of documentation meant that the DTI was unable properly to investigate Atlantic's affairs. There were in due course additional allegations of insolvency and an overall lack of transparency.

10. Such filed accounts as there were which related to Atlantic showed no details of turnover. Atlantic had in 2004 been served with two winding up petitions which had been dismissed. The learned judge found that in the light of the information given by the Westminster Trading Standards Department, and the complaints in the Watchdog programme, together with the fact that most of the judgments were between £1,000 and £2,000, it was "likely that many of these creditors were likely to be tenants seeking return of their deposits". In addition, in the view of the judge, the number of judgments strongly suggested that the complaints referred by the Westminster Council were not isolated cases. Atlantic had failed to produce any documentation relating to any of the various winding up petitions and judgements against it during the investigation. In the result, the court found that there was a failure to maintain or produce material which could be said to comply with a company's statutory obligations to maintain sufficient accounting records under the Companies Act 1985 and that it had traded in a manner which made it inevitable that it was just and equitable that it be wound up. This was despite an apparent last ditch attempt prior to the hearing by Mr Morgan to produce information which he claimed did constitute sufficient accounting records. The fact remained however, that most of the deposits formerly paid to Atlantic had not been repaid to the tenants and that there was an overall failure to explain in documentary form what had happened to the deposits.

11. In particular, virtually no tenancy agreements had been produced by Mr Morgan, a factor which contributed to the court's finding that the reasons given by Mr Morgan for non-production of the documents had "no basis" coupled with what he called "Mr Morgan's unsatisfactory answers to the section 447 investigation". It was this last particular feature which led the learned judge to express himself to be satisfied that there was "a dangerous lack of transparency" in relation to Atlantic's affairs, as he put it, "intermingled" as they were with the affairs of Mr Morgan himself and those of his other companies. There is no need to detail the latter matters any further since they post-date the written complaint which constituted the FOI request which Mr Morgan had made.

12. The Tribunal feels that this expanded history of the principal facts is not without significance. Mr Morgan's written request for information was dated 12 January 2005. By that time, quite apart from the paucity of publicly available accounting information relating to Atlantic, complaint had been made by a number of tenants to the Westminster Council and to the BBC. The registered office had an address which was a stationery shop with no apparent connection to Atlantic carrying on the business of acting as a mail forwarding service. Mr and Mrs Morgan's own address, according to the court, was that of an unincorporated accommodation agency called Cordon Bell which rented out properties and which also provided, it seems, a mail forwarding service. Sledgehammer Holdings Limited had the same address as Cordon Bell.

The Law: Companies Act

13. It is appropriate at this stage to set out the relevant Companies Act provisions. The principal section which deals with investigations is section 447. The present version of section 447 which originally derived from the Companies Act 1967 section 109 reads as follows, namely:

> "(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 (or 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 a description) as the investigator may specify.

(4) A person on whom a requirement under subsection (3) is imposed may require the investigator to produce evidence of his authority.

(5) A requirement of subsections (2) or (3) must be complied with at such time and place as may be specified in the directions or by the investigator (as the case may be)."

Section 447A of the 1985 Act was also referred to by Mr Crow. It provides that a statement made by a person in compliance with the requirement under section 447 may be used in evidence against him. However, according to subsection (2), in criminal proceedings in which the person is charged with a so-called "relevant offence", no evidence relating to the statement may be adduced by or on behalf of the prosecution and no question relating to it may be asked by or on behalf of the prosecution unless evidence relating to it is adduced or a question relating to it is asked in the proceedings by or on behalf of that person. This provision was described by Mr Crow as involving a false analogy with the criminal process, since as he pointed out, a "relevant offence" is defined as essentially any offence other than the offence of non-compliance with a section 447 investigator's questions.

14. Section 447 was described by Mr Crow as involving a "light touch" style of approach to company investigations by the DTI. It was and is to be compared with the far weightier provisions of sections 431 and 432 of the 1985 Act. Without reciting these latter provisions in full, the first entitles the

Secretary of State to appoint one or more "competent inspectors" to investigate the affairs of the company. Subsection (3) provides that should the application for an appointment be made by the company, such application "shall be supported by such evidence as the Secretary of State may require for the purpose of showing that the Applicant or Applicants have good reason for requiring the investigation", whilst the second section entitles the Secretary of State himself to make an appointment of inspectors "if it appears to him" that there are circumstances suggesting fraud or similar activity. It will become apparent below why reference can justifiably be made to these provisions, given their express reference to the need for the Secretary of State to be satisfied as to the existence of a sufficient "good reason".

15. Section 432 and in particular section 432(2) represents a power more widely used than those set out in section 431, namely the power of the Secretary of State to appoint one or more inspectors to investigate the affairs of a company, principally if it appears to him that fraud, misfeasance or some other misconduct with regard to a company's affairs has been involved.

16. Section 452(2) of the 1985 Act provides that nothing in either section 447, section 431, or section 432 compels the disclosure of matters which are the subject of legal professional privilege.

17. However, at the time of Mr Morgan's request, section 447 was somewhat differently framed, and for the sake of completeness, the relevant section then applicable should be set out in full as follows, namely:

> "(2) The Secretary of State may at any time, <u>if he thinks there is good reason to do so</u>, give directions to a company requiring it, at such time and place as may be specified in the direction, to produce such documents as may be so specified." (emphasis supplied).

18. The above underlined words were also to be found in section 447(3), now repeated in its amended form in section 447(3) as set out above.

19. Mr Burns in his witness statement at paragraph 10 explained the reference to "good reason" stating that it was thought to add nothing with regard to the restrictions imposed upon the exercise of the Secretary of State's powers. The Tribunal finds that whether or not it was felt that removal of any

reference to the existence of a good reason did not detract from the effectiveness of section 447 is perhaps not important. The purpose of such investigations was usefully expanded upon as follows in paragraph 7 of Mr Burns' witness statement in the following terms, namely:

> "The immediate purpose of most company investigations is to gather information where there are grounds to suggest some irregularity in the conduct of the company, business or individual in order to provide the Secretary of State with the information needed to decide whether any intervention in the affairs of the company or other legal action is necessary. Investigations do not themselves decide or resolve anything but rather form the basis for the decisions on further action. Such action could include, for example, criminal proceedings, the presentation of a petition to wind up a company on public interest grounds pursuant to section 124A of the Insolvency Act 1986, an application to disqualify someone from acting as a director pursuant to section 8 of the Company Director's Disqualification Act 1986 or a full scale investigation by company inspectors under section 432."

20. In *Norwest Holst Limited v Department of Trade* [1978] Ch 201, the Court of Appeal examined the investigative powers relating to company inspections. The court found that the Secretary of State had to act fairly in deciding whether to authorise an investigation, but that this requirement stopped short of justifying any overriding requirement that the reasons for the investigation be disclosed. Mr Crow pointed out the judgments in the case constitute a reminder that there had been a practice in place up to 1962 pursuant to which the Secretary of State had entered into a dialogue with the company prior to the appointment of inspectors. The Court of Appeal, speaking principally through Lord Denning at page 224, characterised the investigatory process simply as "a matter of good administration". Later on the same page, Lord Denning went on as follows:

> "Equally, so far as section 109 is concerned, where the officers of the Department of Trade are appointed to examine the books, there is no need for the rules of natural justice to be applied. If the company was forewarned and told that the officers were coming, what is to happen to the books? In a wicked world it is not unknown for books or papers to be destroyed or lost."

See also Ormrod LJ at page 227, especially at E-G who reiterated that in considering whether to appoint inspectors "it is the minister who initiates an enquiry; and, in my judgment, all he is required to do at that stage is to act fairly in reaching that decision." This decision has not been overruled or dissented from, and is to all extent and purposes confirmed in the European context by the decision of the European Court of Human Rights in *Fayed v United Kingdom* (1994) 18 EHRR 393.

The Request

21. In his letter of 12 January 2005 which was treated by the parties as a FOIA request, addressed to Mr Coker, Mr Morgan, wrote as follows, namely:

"Dear Mr Coker,

Following our telephone conversation yesterday I write as we discussed to determine the reason behind the decision to investigate Atlantic Property Limited."

He then seeks to explain that Atlantic had recently suffered a "significant number" of bad debts which, along with other factors, had led to "severe cash flow problems". There then followed an express disavowal of having taken part in any form of fraud with Mr Morgan attributing the company's problems to its overall debt position. He expressed his intention to "provide you with documentation to evidence all of the foregoing" and then went on as follows, namely:

"I attach a page that I downloaded from your web site containing a flow chart concerning complaints. From carefully studying this flow chart, I cannot decipher any justification or any "good reason" whatsoever for the commencement of an investigation.

It cannot be right that you can simply initiate an investigation without offering any form of reason, or justification whatsoever. Even the police when investigating serious crime are required to state the purpose of their investigation. I cannot comprehend that the DTI has the right to be able to simply sidestep this basic and intrinsic right within the free society.

I please require to know what is the purpose of your investigation, in the broadest of terms. I do not wish to know who has complained, or the basis

for their complaints. You told me on the telephone that the investigation was not related to fraud which, in accordance with your flow chart leaves remaining "public interest", "shareholder interest", "policy-holder interest" and other "wrong doing".

I wish to make clear that I have every intention of cooperating with you in providing the documents to evidence what I have said is true. However, I please repeat, I must have a basic right to know the underlying reason for your investigation."

22. In his oral evidence, Mr Burns referred to the fact that the telephone exchange referred to by Mr Morgan had been taped and that he, Mr Burns, had studied the transcript. Mr Burns confirmed that Mr Coker did not say he was not conducting a fraud enquiry, but rather a confidential fact finding one, i.e. that he was not conducting the kind of fraud investigation that would have occurred had there been a criminal enquiry.

23. A copy of the flow chart is attached by way of schedule to this judgment. It can be seen that it refers to a typical yearly total of more than 4,000 complaints lodged with the CIB, resulting in "some 800 cases being formally considered for the use of statutory investigative powers" at which "around 250" are accepted for investigation, the "vast majority" being carried out under section 447 which were "confidential".

The DTI Response

24. The DTI's response was signed by Mr Christopher Mayhew as "Case Manager/investigator". It was dated 4 February 2005. Mr Mayhew began by formally treating Mr Morgan's request as a request under FOIA. He then referred to section 447 of the 1985 Act which as already stated at that time provided that an investigation could only be instituted if there were "good reason" for it. He then referred to and relied upon section 31 of FOIA as the apparent applicable exemption being one which provided that, if disclosure were made, it would or would be likely to lead to prejudice in the exercise by any public authority of its functions. He then stated that it was important that those being investigated should not have any preconceptions as to why information was being sought, adding:

"If we were to explain the reason behind our investigation it is possible either wittingly or unwittingly, that the subject in the investigation will tailor their response/actions accordingly."

The letter then went on to point to the risk of prejudicing the DTI's sources and the resultant prejudicial effect on the confidentiality with which the DTI treated its sources. As it was put by Mr Mayhew:

"Knowledge of this confidentiality encourages assistance."

The Subsequent Exchanges

25. Not surprisingly, Mr Mayhew's response was not acceptable to Mr Morgan. Read with the benefit of hindsight, particularly in the light of Lawrence Collins J's observations, Mr Morgan's protestations that Atlantic was "simply a company which has experienced trading difficulties because a significant number of its customers have not paid its substantial sums" now seem, to say the least, somewhat hollow. Reference has been made at the outset of this judgment to the DTI's subsequent internal review, and by letter dated 7 March 2005, Mr Anthony Inglese, solicitor and Director General of the DTI's Legal Services Group informed Mr Morgan that in the light of a considered review of section 31 of FOIA, it remained the DTI's view that "the public interest in maintaining the exception in the case outweighs the public interest in disclosing the information sought." No specific reference was made to the additional requirement embodied in section 31 that there needed to be evidence of a significant risk of prejudice.

26. The matter then passed to the Commissioner. Without in any way implying any discourtesy to the parties' representatives who conducted the subsequent exchanges leading up to the Commissioner's Decision Notice, the Tribunal feels that it is sufficient for present purposes to summarise the ensuing exchanges. This is in large part because by the time the Appeal came to be heard and during the Appeal itself, both parties had refined their respective positions in a way which the Tribunal found represented a proper basis to address the real issues. Overall, the Commissioner, it could be said, stressed six factors which he claimed were relevant. First, he emphasised the general desirability that public authorities explain their decisions to persons who might be affected by such decisions. Secondly, in so far as

different considerations or interests arose as those referred to with regard to the preceding factor, the promotion of transparency and accountability was important. Further, the DTI here had failed to justify the need to protect confidentiality and to specify the specific harm (mindful of the terms of the qualified exemption in section 31) which might be produced in the present case. Fourth, any risk of forewarning was counterbalanced by the statutory duty imposed on Mr Morgan to disclose the information and the documents sought from him. Fifth, all that Mr Morgan sought was a generalised explanation, and lastly, there was no risk in this case at least, of unwittingly revealing the identity of individual complainers.

27. In general terms, the DTI countered the Commissioner's contentions in the following manner. First, it claimed that a vetting procedure had been followed and conducted within the CIB culminating in the formulation of a vetting minute in mid-October 2004 which had found that the requisite "good reason" existed for the appointment of an investigator. This vetting process, in other words, was a considered prelude to the final confirmation of the appointment of Mr Coker as investigator on 5 January 2005. Secondly, by referring to what was called the risk of "forewarning", there was the risk that those being investigated might tailor their answers. Thirdly, unlike the consequences of questioning during a police investigation, the effect of section 447A of the 1985 Act meant that statements made in the course of section 447 investigation could not be used in any subsequent criminal proceedings, i.e. addressing in effect one of the points raised by Mr Morgan. Fourthly, disclosure of the reason for the investigation would entail the risk of compromising sources. There was in addition combined with this last point, the possible resultant adverse effect on the reliability of complaints with regard to future cases. It should perhaps be added that in a letter of 19 October 2005 sent to the Commissioner by Mr Inglese on behalf of the DTI, he produced evidence of a number of individual complainants whose letters were anonymised who expressed their anxiety that any information they imparted to the DTI should remain confidential.

28. In his letter dated 24 June 2005 to the Commissioner, Mr Inglese confirmed that, although complaint had been made by the Westminster City Council, disclosure of its identity might have engendered a paper trail which would have led to the uncovering of the identities of particular aggrieved tenants

and creditors, as well as other possible complainants. In addition Mr Inglese stressed that although transparency did constitute an important factor in weighing the respective public interests, it was to some extent taken into consideration with the content of the web site to which Mr Morgan had referred, together with the content of annual reports issued by the DTI and CIB as required by the Companies Act 1985. Finally, it should be said that Mr Inglese also stressed that there was little, if any, public as distinct from private interest in Mr Morgan being acquainted with the reasons for the investigation into his company.

Section 30 FOIA: The Relevant Exemptions

29. Although reliance was initially place on section 31 of the FOIA by the DTI, it is now accepted by both parties that the only applicable exemption lies in section 30. The relevant provisions of section 30 which are relied on by the DTI are the following, namely:

> "(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of – …
>
> (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,
>
> …
>
> (2) 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),
>
> …
>
> (b) it relates to the obtaining of information from confidential sources."

The parties are agreed that section 30 remains the only applicable possible exemption in this appeal.

The Decision Notice

30. The Decision Notice was dated 5 January 2006. In it, the Commissioner agreed with the DTI that the applicable exemptions were to be found in the provisions of section 30 set out above. In the circumstances, the Tribunal does not feel it appropriate to consider whether, and if so, to what extent any other exemption or exemptions might apply. Similarly, although a point has been made by the Commissioner to the effect that it was "open to question" whether Mr Morgan's letter of 12 January 2005 constituted a valid request under FOIA on the basis that it could arguably not be regarded as a request for specific information, the Tribunal is again not minded to differ from the considered views of both parties that it should be so treated. Indeed, the Tribunal has in the past confirmed it does not have the power to consider other exemptions save in special circumstances, see e.g. *Bowbrick and The Information Commissioner v Nottingham City Council* (EA/2005/0006) 28 September 2006.

31. The Notice required the DTI within 35 days to disclose to Mr Morgan "the reason for the investigation in outline terms" which according to the Commissioner meant "at a minimum providing the complainant with the category or categories of complaint the investigation relates to in accordance with the flow chart on the DTI's web site". The flow chart referred to is the flow chart referred to above and appended to this judgment.

32. Again, without in any way implying there has been no proper appreciation by the Tribunal of the extensive reasons set out in the Commissioner's Decision Letter, the Tribunal feels that it is sufficient merely to highlight the principal reasons which were put forward in support of the decision which in large part echo the considerations already aired in the previous exchanges.

    (1) There is a "strong public interest" in a company knowing why it is being investigated even in outline terms;

    (2) the DTI have not shown that were disclosure to be ordered in connection with Mr Morgan's complaint, any perceived resistance, e.g. in the form of so-called tailored answers would "significantly damage" the DTI's ability to carry out the Atlantic investigation;

(3) nor was the Commissioner satisfied in the context of the present complaint that if outline reasons were given, the identity of any confidential source or sources would be revealed; and

(4) as a result of the matters set out in (1) to (3) above, the Commissioner therefore concluded that there was no "overwhelming evidence" to substantiate the DTI's concerns and consequently balancing the relevant public interests, the interests in favour of disclosure outweighed the public interest in maintaining the exemption. It also followed that the DTI should have disclosed which category or categories of complaint formed the reason for the investigation. In particular, it was emphasised that the case was not to set a precedent and that in future cases, where there was "compelling evidence that a disclosure would lead to the harm identified by the DTI being caused", the Commissioner might not require disclosure.

33. The DTI's Grounds of Appeal took issue with a number of matters which can be summarised as follows, namely:

(1) Section 30 did not entail any requirement that there should be a showing of damage whether "significant" or otherwise;

(2) the DTI was entitled to take into consideration "the wider effect" in other cases of disclosure; the Tribunal however pauses here to note that this represented a call to what is sometimes called high level considerations, a reference to which can be found, for example, in the relevant published Guidances to FOIA, in particular Guidance No. 16 which specifically relates to section 30, e.g. the ensuring of good administration, support for increased participation in public debate as well as the promotion of transparency of decision making;

(3) Mr Morgan's request was made at a relatively early stage of the investigation; the DTI accepted that although subsequently it could be said that Mr Morgan did exhibit a degree of resistance in failing to disclose information of documents, the request had to be judged as at the time of its being made;

(4) similarly, assessment of the risk of delay could only properly be made as at the time of the request when there was no evidence to suggest that Mr Morgan or Atlantic would have been obstructive; and

(5) issue was also taken with the Commissioner's contention that (albeit in other cases which might arise in the future) disclosure would not be considered or sought by the Commissioner if there were "compelling evidence", that disclosure would lead to any risk of forewarning, delay and prejudice to confidentiality.

The Evidence Before the Tribunal

34. The Tribunal has benefited greatly from having received evidence which was not available to the Commissioner in the period leading up to the Decision Notice. In his witness statement at paragraph 8, Mr Burns provided not only confirmation that between 1967 and 1990, the vast majority of company investigations were conducted pursuant to section 447, or its predecessor, section 109 of the Companies Act 1967, but also more updated statistics setting out the extent of the CIB's work. As recently as 1 April 2006, the CIB became part of the Insolvency Service, itself, an executive agency of the DTI, but nothing material turns on that change.

35. In a table produced by Mr Burns at paragraph 13 of his statement, he revealed that in the periods 2003/4, 2004/5 and 2005/6, complaints were received numbering 4,734, 4,272 and 3,711 respectively. Out of those totals, 204, 171 and 148 investigations were commenced for each of the years in question. Much the same number of investigations were completed in those years whether as a direct result of such investigations or not. In each of the said years, 386, 110 and 125 winding up orders were obtained, coupled with 14, 28 and 26 disqualification orders for each of those years. In further information imparted during the Appeal, it transpired that in the year ending March 2006, follow up action was taken in 110 of the 160 enquiries completed, leading not only to 64 referrals to the Treasury Solicitor for the presentation of winding up petitions but to 5 referrals for prosecution, apart from additional though unspecified referrals to other prosecuting authorities.

36. Mr Burns' witness statement also clarified the internal vetting procedures within the CIB which in effect involved a two-tier screening process which

applied in the case of Atlantic. Indeed, he confirmed that, in effect, there was a Chinese wall between the vetting and the investigation units. Invariably it is the vetting minute, as the Atlantic case showed, which in effect acts as a trigger for the institution of a formal investigation. He also confirmed in his statement at paragraph 18 that it has always been CIB's practice not to provide those upon whom requirements pursuant to section 447 are imposed with any explanation or the reasons for the investigation. During the appeal it was confirmed that in only one investigation, namely one conducted in 2000 in relation to British American Tobacco Plc, was the existence of an enquiry formally confirmed.

37. Mr Burns' statement also drew attention to the present CIB web site which constitutes by any standards a very wide ranging and informative explanation of the CIB's role and practice. The Tribunal does not feel it necessary to recite the web site's contents in full as they are readily available as part of the overall Insolvency Service web site, but the Tribunal notes that on the introductory page headed "About Companies Investigation Branch", the following passage appears, namely:

> "Our investigations are confidential and that is why we do not tell complainants whether or not we are going to investigate, or, when we do decide to investigate, tell the company's directors the reasons why we are doing so or who has complained."

On a further web page headed "How We Do It", there appears a summing up of the vetting process. In yet a further section dealing with "Frequently Asked Questions", the following appears, namely:

> "8 If CIB investigates will they tell me what they find out? [Answer] No, investigations are confidential and we are not allowed to tell you what we have found out. This includes feedback on our original decision on whether to investigate a particular company or not."

Finally a web page dealing with "How To Complain" confirms that although there is "no real benefit" in making an anonymous complaint, any information provided is treated "in strictest confidence". It is also observed that if there is a decision to investigate, "we do not tell the company who has made the complaint or what we are looking at".

38. In his written statement at paragraph 46, Mr Burns referred to the fact that since the coming into force of FOIA, and the making of a complaint forming the basis of the present appeal, there have been seven cases where similar requests to that of Mr Morgan had been received. Each has been met with the same response as in the present case.

39. Since the conclusion of the hearing of the Appeal and in answer to the Tribunal's request, the DTI has also provided a written explanation as to how the CIB investigators have been formally advised within the CIB to deal with requests similar to that of Mr Morgan and the ones referred to in the preceding paragraph. The Tribunal is grateful for this explanation. It confirms that the CIB standard response to requests of this type has continued to be that the reason for the investigation in question cannot be provided, and that prior to the coming into force of the FOIA, all investigators were provided with a formal training course as to the effect of the new Act. That presentation remains on the CIB internal web site and the Tribunal was provided with copies of the relevant slides together with other guidance and materials relating to the FOIA and associated subjects. These materials stress that all requests should be put in writing with a view to their being treated as a formal request under the FOIA, but this is coupled with a reminder (which reminder is reflected in terms in another internal CIB document being its Technical Manual) that the invariable practice of the CIB is for all of its investigators not to provide any details as to the reason and scope of the investigation.

40. Reference was also made after the Appeal to the more recent Annual Reports provided by the DTI as to company related matters pursuant to the Companies Act 1985, a matter already referred to earlier in this judgment, i.e. where there is a brief description of the vetting procedure and a table of relevant statistics similar to those supplied by Mr Burns.

FOIA: General Considerations

41. Section 1 of FOIA provides that any person making a request for information to a public authority is "entitled" to be informed by the public authority whether it holds information of the description specified in the request, and if so, to have that information communicated to him. Section 1 bears the heading "General right of access to information held by public authority".

Section 2(2) of FOIA deals with the effect of the statutory exemptions to the entitlement set out in section 1. As indicated above, section 30 constitutes the relevant qualified exemption applicable in this case. Section 2(2) of the FOIA 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 [with regard to the entitlement to have the information communicated to the person requesting it] if or to the extent that -
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

42. In argument during the appeal there was, for a while at least, a distinct difference in approach by opposing Counsel as to the way in which the balancing exercise regarding the competing public interests referred to in section 2(2)(b) should be approached. Mr Crow suggested that whilst section 2 requires "a balance of competing public interest to be shown" whenever a qualified exemption was engaged such as that set out in section 30, the balancing exercise must start "with the scales evenly balanced". With fairness to him, it may be that he somewhat resiled from that position during the course of the appeal. On the other hand, Mr Pitt-Payne for the Commissioner accepted that, unlike related legislation such as the Environmental Information Regulations 2004, there is in FOIA no explicit presumption in favour of disclosure. There was, as he put it, a "default setting" being a reference to the content of part of the Parliamentary debates leading to the introduction of the relevant Bill which stated that a default setting could really be described as invocation that "this information should be published unless…". Mr Pitt-Payne however stopped short, given the absence of any express reference to such a concept, of asserting that there existed a presumption in favour of disclosure, preferring to contend that there was an "assumption" in the Act that disclosure should be made, i.e. that there was a general or public interest to that effect. See generally *Hogan*

and Oxford City Council v The Information Commissioner (EA/2005/026; EA/2005/0030) 17 October 2006, especially at paragraphs 55-57.

43. Although the Tribunal is loathe to apply particular labels to the nature of the statutory entitlement, the Tribunal is happy to adopt Mr Pitt-Payne's approach for present purposes.

44. Both Counsel, however, were agreed that the relevant balancing test which had to be carried out by the public authority had to be done at the time the request was made. This is clear, if nothing else, from the words which open section 2(2)(b) to the effect that the balancing exercise must be carried out "in all the circumstances of the case". Although it might be thought that the phrase quoted in the preceding sentence would restrict the public authority to taking into account only those facts which bore upon the particular request, the Tribunal is equally loathe to limit the wording of the section in that way. Clearly, there may be cases where it would be wrong for the public authority simply to take comfort from and rely upon solely a generalised policy or policies about where the particular balance might lie, and equally it may be difficult for the public authority to point to any factor other than so-called high level considerations. Indeed, it might be justifiably thought that the DTI had adopted the latter course in the present case, i.e. before the time it was resolved to conduct the investigation into the affairs of Atlantic. It is perhaps inevitable that there will be a substantial overlap between the factors relevant in striking the appropriate balance decided upon by the public authorities as a matter of policy and those factors which enter into play in the light of the particular circumstances of the request.

45. The present case is, however, a good illustration of the overlap just referred to. It is simply a product of the fact that the public authority is charged with carrying out a distinct statutory, regulatory function and that the circumstances in which it carries out those tasks will tend to repeat themselves. However, section 2(2)(b) confirms that the onus of proof remains firmly on the public authority to demonstrate that specific consideration was given to the request when it was made.

46. The above considerations lead to another principle already referred to which should not be stated too narrowly. It might be suggested that the concentration upon "all the circumstances of the case" compels there to be a

focus purely on the circumstances as they existed at the time of the request. In general terms, the Tribunal would agree with Mr Pitt-Payne when he contended that there could properly be taken into account circumstances or matters which later came to light after the date of the request, but which might cast light on the balance of public interest at the time when the question fell to be decided. However, the Tribunal must stress that this principle should not be taken too far.

47. Mr Pitt-Payne gave an example. If there was a case where the balance of public interest required a public authority to consider whether a particular individual had been suffering from a particular medical condition at the time of the making of a FOIA request, it would not, he suggested be relevant whether the condition had developed subsequently: however it would be relevant whether there were subsequent medical reports or subsequently obtained medical evidence which cast light on whether the individual had had that condition at the time.

48. Without expressing any opinion upon the appropriateness of Mr Pitt-Payne's example, in this regard the Tribunal would prefer to point to the present case as a reminder not to place too great a reliance on hind sight. As the facts of this case have shown, only a limited number of matters were known to the DTI at the time of the request. The true scale of Mr Morgan's activities only came to light long after his request, but there were a number of matters which have already been alluded to and which led to the institution of the investigation into Atlantic's affairs. The proper approach in a case such as the present was to see whether the mischief aimed at by the legislation, i.e. at the risk of corporate impropriety of the type aimed at by section 447 was a factor properly taken into account by the public authority in deciding not to accede to the request. It is fair to say that at a later stage of his argument, Mr Pitt-Payne expressly recognised that whenever a public authority was seeking to justify the public interest in maintaining the exemption, it could also take into account in assessing the competing public interests two further elements: first, the harm that the public authority was concerned about, and in particular, the gravity of that harm, and secondly, the degree of likelihood with which it could be said that the identified harm would or might follow.

49. The Tribunal respectfully agrees with that general approach. It, again, however is wary of suggesting that what Mr Pitt-Payne called his two

variables should always come into play, even in the context of a section 30 claimed exemption. If nothing else, reference to harm as distinct from the principal characteristics of the appropriate public interest, risks reintroducing by the back door so-called prejudiced-based elements which find expression in other distinct exemptions such as section 31, reliance on which it will have been noted was abandoned by the DTI during the course of its exchanges with Mr Morgan and the Commissioner. In this regard, the Tribunal accepts Mr Crow's submission that there was no necessity in this case (and impliedly in future cases) on the part of the public authority to demonstrate that there was something tantamount to "overwhelming or compelling" evidence to substantiate the DTI's concerns although it is fair to say that Mr Pitt-Payne, in his submissions, distanced himself from that formulation as the appeal unfolded.

50. By way of a further general observation and at the risk of alluding to issues which are perhaps largely self-evident, the Tribunal feels that it is vital to distinguish if at all possible between public and private interests. Moreover, it seemed to be agreed by both opposing Counsel that reference to the public interest involves a reference to something which is for the common good or welfare, i.e. the relevant reference is to matters which are in the public's interest as distinct from matters which are of interest to the public. From this it follows that although the particular matter of public interest may be of interest to the public, it will not necessarily be in the public interest for the public to be acquainted with its existence and content. Equally there may well be many cases where matters of public interest involve private matters such as engaging in unlawful or improper activities. This somewhat elusive distinction should not detract however from a proper engagement of the fundamental overall balancing exercise which is required by section 2(2)(b).

51. The facts of this case again provide perhaps a good illustration of the overlap referred to in the preceding paragraph. Mr Morgan could be said to have held a predominantly private interest in seeking disclosure of the information he required, but in essence, he could also be said albeit perhaps unwittingly to have erected a wider public interest, namely that it is generally in the public interest that all persons or parties subject to the Companies Act Investigations be acquainted with the reasons for the investigation. Having said that, however, the Tribunal wishes to stress that even the notion of a

private interest needs to be examined with some care. The Tribunal would reject any suggestion that the fact that the request here was not made by a member of the public, but by the director of the company under investigation, of itself removes any public interest element. A useful reminder of the need to embark on a careful analysis was provided in an argument: Mr Crow posed the opposing cases of an innocent director whose company was subject to investigation, making the relevant request, to that of a person in the position similar to that of Mr Morgan, who it might be said, is largely motivated by the type of considerations underpinning the DTI's policy in this case, i.e. a desire to cause delay and obfuscation. Indeed, there may well be cases in which far from there being any overlap between a private and public interest, the presence of the former type of interest may well be possibly inimical to the existence of the latter, a matter also raised in argument. The fact that the CIB embarked upon an investigation prior to any considered decision to take the matter further, could as Mr Burns put it, be in fact "positively dangerous" particularly to the company concerned with the resultant effect on its business interests should, as might well happen, the disclosure be acquainted to third parties.

52. Some discussion also occurred during the appeal about the extent, if any, to which it is was permissible or relevant to take into account the characteristics and motives of the complainant. The Tribunal finds this issue, if not again elusive, no more than a particular facet of the overall balance which needs to be struck in all the circumstances of the case. In this respect, Mr Crow contended that the only persons who might have an interest in finding out about the reasons for the investigation would be the parties directly affected, i.e. the company and its controlling directors. He contended what he called "the section 2 balancing exercise", could not be exercised as he put it "with disregard to the identity of the particular request".

53. Whether or not the identity and motives of the party making the request are material to the balancing act would depend again on all the facts and surrounding circumstances. Thus, if as here, the public authority felt in all the circumstances that the bases of the complaints made to the Westminster City Council were grave enough to warrant an investigation and in particular reflected adversely on Mr Morgan's conduct as director, then considerations pertaining to the motives exhibited by Mr Morgan himself might be

outweighed by the former material. If on the other hand there were few, if any, serious allegations made against him or his company in the period leading up to the vetting procedure and, subject to that procedure, then it may be more relevant to take into account the stated motives and general characteristics of the complainant. See and compare *Hogan and Oxford City Council v The Information Commissioner* at paragraph 32.

54. Finally, reference has been made above to the undoubted fact that it is the public authority which bears the onus of showing that the exemption should be maintained. Section 2(2)(b) refers to no specific threshold which has to be attained in this respect. Yet again, the Tribunal is loathe to generalise about the degree or strength of evidence required. Its function is reflected in the wide ranging terms of section 58 of the FOIA. It was accepted by both parties that the task of the Tribunal in this respect is to address a mixed question of law and fact. Invariably, as in this case, there will be material put before the Tribunal which was not before the Commissioner. The Tribunal is charged with determining whether the Commissioner gave all the material before him due consideration and then must be mindful of its own power to revisit findings of fact to see whether he acted in accordance with the law and whether in the light of the further evidence before it, it should uphold the decision Notice and allow the appeal or substitute a different Notice.

Conclusions

55. Although the scope of both parties' submissions were wide ranging, the Tribunal feels that the real issues raised in the Appeal are relatively narrow. The conclusions of the Tribunal can perhaps be most usefully summarised under three heads which for the sake of convenience can briefly be referred to as relating to issues of forewarning, confidentiality and the internal vetting procedures.

56. At the risk of over-repetition, the Tribunal wishes to stress that its decision in this case is limited to the facts and materials presented to it in relation to the case of Atlantic.

57. Before turning to the three matters which are characterised in the last but one paragraph, it is important to consider the matters which are themselves mirrored, directly or indirectly in the exemptions which are in fact in play,

namely the provisions of section 30(1)(b), section 30(2)(a)(i) and finally section 30 (2)(b). it is clear that in relation to these provisions, the Act has recognised that there is a public interest in recognising the importance of the proper conduct of investigative processes and procedures carried out by public authorities, particularly those which might lead to criminal proceedings, and moreover that in relation to such procedures and possible proceedings, the maintaining of confidential sources must be respected. The Tribunal would however accept that the above factors do not represent a complete check list of the public interest elements to be taken into account by a public authority in considering whether to maintain an exemption under section 30.

58. The Tribunal also wishes to comment upon the concerns expressed by the Commissioner as to an apparent lack of transparency and accountability. The Tribunal finds that the contents of the web site which Mr Morgan himself referred to which is exhibited to this judgment are themselves a sufficient illustration of a suitable degree of transparency and accountability. The Tribunal has been informed as mentioned above about the more recent web site developed by the CIB under the auspices of the Insolvency Service. It could with perhaps equal justification be stated that the present website satisfies even further any proper requirement of accountability in the context of this particular legislation.

59. Overall the Tribunal is satisfied that having heard and considered all the evidence, the basic philosophy behind the relevant legislation is to ensure that there is an effective system of statutory investigation into the manner in which companies carry on business under the appropriate legislation. For this purpose, Parliament has clearly entrusted a specific responsibility to the DTI and in particular the CIB.

60. With regard to the element of forewarning, the Tribunal is satisfied that this was a sufficient public interest properly made out on the facts of this case. It relies on the following features, in particular, namely:

(1) the fact that Mr Morgan's request was made at an early stage of the investigation when, by definition, the CIB and its investigator could not be expected to know what the information and documents yet to be delivered up might reveal;

(2) although the request was framed in terms of seeking to elicit a response that represented an explanation of which category or categories of complaint were being pursued, e.g. public interest or shareholder interest, etc, which responses themselves could perhaps be said not to be particularly illuminating, it could equally be said that at the time of the request, any such answer or answers might well have prompted Mr Morgan to ask for further details of the category or categories relied upon;

(3) the existence and exercise of the vetting process in this case provided a strong but by no means conclusive safeguard that the appointment of Mr Coker as an investigator was warranted; and

(4) the Tribunal was also impressed by the fact that the entire tone of Mr Morgan's letter recited at length above, if anything, suggested more of a attempt to stall matters, even at this early stage of the investigation, particularly in the light of his apparent failure to express an unqualified willingness to comply with his statutory obligations to deliver up papers and information to the investigator.

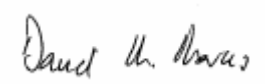
61. As for the second head referred to above, namely that relating to confidentiality, the Tribunal feels that there are strong policy grounds for maintaining confidence with regard to complaints made and such grounds were properly in play at the time of Mr Morgan's request, but was nonetheless inclined to think that in this case at least, there was no real risk of confidentiality being broken even indirectly. It recognises however that there is an argument for maintaining confidentiality that even the revelation of the identity of Westminster Council's Trading Standard's Department might have alerted Mr Morgan to the identity of individual complainants who might have come forward to complain. But the evidence in relation to this is scant. In any event, as is clear from his letter, he expressed to be unconcerned about the identity of complainants. However, the Tribunal was fully conscious of the need to ensure that complainants might never otherwise come forward were the disclosure of identities at risk, and was impressed by the reference made in other cases to the desire by Complainants not to have their identities unwittingly revealed.

62. As for the third matter referred to above, namely the vetting procedure then and now in place, the Tribunal is entirely satisfied that any concerns about accountability at least are properly taken into account by dint of this procedure. It is understandable why the expression "for good reason" might have been removed from the then existing version of section 447 given the applicability of the process. Although the *Norwest Holst* decision was a decision which occupies a different judicial context, as Mr Pitt-Payne perhaps rightly pointed out, nonetheless its value is to demonstrate that the decision to appoint inspectors which might perhaps follow upon an investigation is part of an overall administrative process reflected in the legislation and that no accountability at law at least is required in the absence of a showing of bad faith or abuse of power.

63. For present purposes, the position may well have been different had no vigorous vetting procedure been in place. The Tribunal hopes that it is not unfair to Mr Pitt-Payne when faced with that reality in this case to reject his attempt to argue in the appeal that no system of internal controls could be infallible. It is enough to repeat a point already made in this judgment namely that were a disclosure ordered in the case of an innocent director, the results could be potentially disastrous or at least highly prejudicial to the company.

64. The Tribunal feels that in the light of the additional evidence it has received, it could fairly be said that the CIB has developed for a considerable period of time a well-tried and tested system where the percentage exceeding some 90% of complaints are in effect "vetted out" with no evidence that the system has in any way been shown to be prone to error or complaint.

65. For all the above reasons, the Tribunal will allow this appeal.

Signed 

David Marks
Deputy Chairman

Date: 15 November 2006

EA/2005/0027