



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0113

Information Commissioner's Ref: FS50147333

**Determined at Procession House, London, EC4
19 February 2008**

**Decision Promulgated
19 May 2008**

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

**ROGER CREEDON
GARETH JONES**

BETWEEN:-

MR STANLEY DESMOND KEELY

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal upholds the decision notice dated 3 October 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. The Appellant was formerly an investor in a publicly listed company. He believed that he and other shareholders had been defrauded by its directors. He tried to have the matter investigated by the Company Investigation Department (“CIB”) of what was then the Department of Trade and Industry and is now called the Department for Business, Enterprise and Regulatory Reform, (“the Department”). When his attempts to persuade the Department to investigate failed he lodged a complaint with the Parliamentary Ombudsman on the basis that the refusal to investigate amounted to maladministration. In July 2005 the office of the Ombudsman wrote to the Appellant with its decision on the complaint. The letter concluded as follows:

“Ultimately, the question of whether there was any misconduct is a matter of DTI’s professional judgement. I am satisfied that their enquiries have been completed broadly within their own timescales, under appropriate supervision, and that their officers have demonstrated their willingness to examine your case in considerable detail, despite your disagreement with their findings. I am sorry but the Ombudsman can do nothing more for you on this occasion”

2. That decision has been the subject of an appeal within the Ombudsman’s office and a Freedom of Information request directed at the Ombudsman’s office. Those processes overlapped in time with the request for information from the Department which forms the basis of this Appeal.

The request for information

3. On 15th January 2006 the Appellant wrote to Gerry Sutcliffe MP, the then Minister for Employment, requesting the following information under the Freedom of Information Act 2000 ("FOIA"):
1. *When did the Ombudsman first advise [the Department] he was to investigate my complaint?*
 2. *When and where did the interview with the Ombudsman take place?*
 3. *Please advise the positions that the persons involved in vetting my request [four individuals identified by name] held within CIB.*
 4. *When did [three named individuals] (declared as having been transferred from CIB) actually leave CIB and to where were they transferred?*
 5. *Why was the 4th person [name] unavailable for this important interview?*
 6. *Were inquiries made by CIB to determine if other complaints had been made to SFA, DTI or London Stock Exchange regarding the acquisition of the Company concerned?*
 7. *Were any enquiries made to the Company directors regarding their activities leading up to the acquisition of the Company?*
 8. *Please provide all correspondence and internal memoranda of [the four individuals named under 3 above] relating to my request for a DTI investigation.*
 9. *Please provide all outgoing and incoming correspondence and memoranda of the head of Department [name] concerning any request for a DTI investigation."*

4. The request has been treated throughout as having been addressed to the Department and nothing turns on the identity of the public authority to which it was originally addressed.
5. In order to put this Appeal into context we have set out above all the requests in the form in which they were originally submitted. However, as the matter came before us the only requests that were in issue were numbers 6 and 8. The Department's response to those requests was set out in a letter to the Appellant dated 10 March 2006. The relevant parts of the letter read:

"6. You ask whether CIB made inquiries of the ...FSA, other parts of the DTI or the LSE ...the answer to your question is "yes". CIB's correspondence with these organisations falls within the request for documentation in your question number 8, and this is dealt with below.

...

8 ... I consider that by virtue of Section 30 of the FOIA this is exempt information and that, accordingly, there is no duty to communicate it to you."

Later in the letter the Department acknowledged that the section 30 exemption was a qualified one and that the information could only be withheld if the public interest in maintaining the exemption outweighed the public interest in disclosure. It also acknowledged that public confidence in investigations could be served by increasing their transparency but expressed the view that the public had an interest in CIB investigations being conducted in an effective manner. It argued that maintaining the confidentiality of its information gathering exercises was crucial to their effectiveness because without it the CIB would find it very much harder to secure the cooperation of those from whom it sought information, both complainants and third parties.

Statutory Provisions

6. The relevant part of FOIA section 30 reads as follows:

“(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-

(a) ...

(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;

(c) ...”

7. It is common ground that the exemption is a qualified exemption. This brings into play FOIA section 2(2)(b) which provides:

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

(a) ...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

The complaint to the Information Commissioner and the Appeal to the Information Tribunal

8. The Department’s decision was confirmed in a review decision dated 12 April 2006 and the Appellant made a complaint to the Information Commissioner on 20 April 2006.

9. In his Decision Notice dated 3 October 2007 the Information Commissioner decided that, apart from a point on procedure which is not relevant to this Appeal, the Department had complied with the FOIA. He considered that the section 30(1)(b) exemption applied, and that, applying the public interest test under s 2(2)(b), the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

10. The Appellant launched an appeal against the Decision Notice on 27 October 2007. He asked for the matter to be decided at an oral hearing but the Tribunal issued a direction on 23 November 2007 that it be determined on the papers without an oral hearing. The parties subsequently agreed a bundle of relevant documents and lodged written submissions. We have determined the Appeal on the basis of those documents, the Appellant's Grounds of Appeal, the Information Commissioner's Reply of 21 November 2007, a document lodged by the Appellant on 17 December 2007 headed "Response to Reply" and final written submissions provided by both parties on 8 February 2008. We also inspected the materials which had been withheld and, as mentioned in paragraph 17 below, we also sought further information from the Information Commissioner on one element of the Appeal
11. Before considering the merits of the Appeal we should deal with a preliminary point as to its scope. The Appellant's Grounds of Appeal included this statement:

"Implicit in Q6 is the request to reveal the number of complaints made to these regulators"

It is clear that this is not just a passing comment but forms part of the appeal because in his final written submissions the Appellant clearly argued that he should be informed about the number of complaints made on the grounds that it was in his view nothing more than a crime statistic and not therefore sensitive. It seems clear to us, however, that if we were to accept what the Appellant says on this issue we would be considering a request that is quite different from the original one (as set out in paragraph 3 above), which was considered by the Department and adjudicated upon by the Information Commissioner. Clearly any request must be approached in a common sense manner; and not construed as a formal legal document. It should be approached with a bona fide intention to assess what it is that the person making the request wishes to know. If that is not clear then the public authority receiving the request may have an obligation (under FOIA section 16) to advise and assist the person making the request, a process which may lead to the scope of the request being clarified. However, where, as in this case, the request is clear on its face the public authority does not have an obligation to try to imagine what other information the person making the request might have considered asking for if he or she had thought of it. It is entitled to take the request

on its face value, as the Department did in this case. The Department's original refusal and the Information Commissioner's subsequent Decision Notice have proceeded on the basis of the request as originally made and it is not open to the Appellant to expand or vary it in the way he proposes at this stage.

Is the exemption engaged?

12. We therefore have to consider, first, whether both request 6, (interpreted in the way we have stated), and request 8 fell within the section 30 exemption. The basis of the Appellant's argument is that the exemption does not come into play at all because the work performed by the CIB is not an investigation of the kind contemplated by the section. He says that it simply carries out a preliminary vetting of complaints raised by the public to ascertain if they justify further investigation and it is only if, having been accepted on that basis a formal investigation is instigated, that it may be said that the exemption is triggered. However, one has only to consider the words in section 30(1)(b) "may lead to a decision by the authority to institute criminal proceedings" (emphasis added) to conclude that the vetting process falls squarely within the exemption.
13. The Information Commissioner has argued that the exemption is a "class based" one with the result that it is not necessary to establish that any investigations would be prejudiced if the information were disclosed for the exemption to apply. He also argues that it is not necessary for the authority to show that the information is still, at the time of the request, held for the purposes of an investigation. We agree: section 30(1)(b) expressly states that the exemption applies if the information was held "at any time" for the purposes of a relevant investigation. The Appellant has also argued that the exemption should not apply because this would remove any possibility of the Department's actions being reviewed. However, that is not an argument that the exemption should not be engaged but that, if engaged, it should be outweighed by the public interest in disclosure. We will therefore consider the point at that stage of our decision.

14. We conclude that the exemption is therefore engaged and turn to consider the public interest test.

The public interest balance.

15. Each side has presented a number of arguments which are said to support its case as to where the public interest balance should lie. In the case of the Appellant the arguments tended to stray beyond the quite narrow question of the public interest for and against the disclosure of the particular information, which we say falls within questions 6 and 8, and we have had to remember to distinguish our role from that of the Ombudsman.
16. As already mentioned the Appellant has stressed the importance of the Department's activities being open to review, particularly as he considered that its work had displayed incompetence or worse. The Information Commissioner conceded that sufficient information should be made available to the public to provide assurance as to the rigour of the CIB's investigation of matters brought to its attention by the public. The Appellant's argument is weakened by the fact that he has concentrated on the importance in this context of having the number of complaints disclosed (a statistic which we have said falls outside the scope of his request). The question we have to consider is whether the disclosure of information (including correspondence) regarding whether the Department made enquiries of the other bodies in question would have an impact on this aspect of public interest. We conclude that publication of information on the individual steps taken in the course of the CIB's investigation would serve to inform public debate into the quality and effectiveness of its work. However, the significance of the particular information in question in this case is slight and is reduced by the fact that the standard of the Department's work has already been considered by the Ombudsman. It is, in our view, substantially outweighed by the desirability of maintaining the secrecy of the CIB's operating methodologies in this field of its work and the confidence of those who may be asked to provide information in the course of its investigations. There may be cases where the public interest in maintaining

that secrecy will not outweigh the public interest in disclosing particular information about its processes. But this is not such a case; neither the circumstances surrounding the Appellant's original request nor the nature of the information he seeks give rise to a public interest in disclosure that carries sufficient weight to tip the balance in his favour.

17. We have concluded, therefore, that the public interest in maintaining the exemption in respect of materials in the Department's files outweighs the public interest in its disclosure. We asked the Information Commissioner to make further enquiries into the evidence supporting the response given to question 6 and have been satisfied, on balance, that this brought nothing to light to alter our view of the balance of the public interest. It follows that the Appeal fails and the Decision Notice stands.

Signed

Chris Ryan

Deputy Chairman

Date: 19 May 2008