

**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)**

**DECISION NOTICE**

**Dated 24 October 2005**

**Name of Public Authority: Department of Trade and Industry**

**Address of Public Authority: 10 Victoria Street  
London  
SW1H 0NN**

**Nature of Complaint**

The Information Commissioner (the "Commissioner") has received a complaint which states that on 1 January 2005 the following information was requested from the Department of Trade and Industry ("DTI") under section 1 of the Freedom of Information Act 2000 (the "Act"):

- '(a) the brief and evidence provided to Treasury Counsel
- (b) the opinion of Treasury Counsel, including any notes of meetings or telephone conversations, e-mails and letters both before and after the opinion was given.'

The information requested by [name redacted] comprises a submission by DTI's legal department to Treasury Counsel seeking advice on the position of a carpet cleaning franchise company ("the company") in relation to the Fair Trading Act 1973, and on what, if any, action should be taken as a result of complaints made against the company. The brief was accompanied by several internal minutes written by DTI legal advisers, and copies of various Acts, Regulations and guides.

It is alleged that:

DTI failed to provide [name redacted] with the requested information in accordance with their obligations under section 1(1) of the Act because they applied the following exemptions unreasonably: section 21 (information reasonably accessible otherwise than under section 1); section 42 (legal professional privilege); and section 43(1) (2) and (3) (trade secret, information prejudicial to commercial interests and no duty to confirm or deny that the information exists).

**The Commissioner's Decision**

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner's decision is as follows:

Section 21(1) exemption

Section 21 (1) states that 'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.' The Commissioner agrees that this exemption applies to the copies of Acts, Regulations and guides that accompanied the submission to Counsel as most of the material is available on the Her Majesty's Stationery Office website and the remainder can be purchased from HMSO.

Section 42(1) exemption

Section 42(1) states that 'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.' The Commissioner agrees that this exemption applies to the brief to Counsel, the accompanying internal minutes and Counsel's advice, including emails and letters before and after the opinion was given. He further agrees that the maintenance of this exemption overrides the public interest in disclosing the information.

Section 43 exemption

Section 43 states:

- '(1) Information is exempt if it constitutes a trade secret.
- (2) 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).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'

This exemption was cited in relation to a decision by DTI to neither confirm nor deny that it held information about an investigation into the company's activities. While the Commissioner does not consider that the section 43(1) exemption can be held to apply to this information, he is satisfied that DTI were justified in relying on 43(2) and (3) in refusing to confirm or deny that an investigation had taken place. The Commissioner has also decided that the public interest in maintaining this exemption overrides the public interest in disclosing the requested information.

A further explanation of the above decision is provided in the attached Statement of Reasons.

### Action Required

In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 50 of the Act, he does not require any remedial steps to be taken by the Department of Trade and Industry.

### Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: <a href="mailto:informationtribunal@dca.gsi.gov.uk">informationtribunal@dca.gsi.gov.uk</a>
Leicester	
LE1 6ZX	

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

Dated the 24th day of 2005

Signed: .....

Graham Smith  
Deputy Commissioner

Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## Statement of Reasons

### Section 21(1) exemption

In relation to copies of Acts, Regulations and guides, DTI asserted that the information was readily accessible to [name redacted] by other means. They explained to [name redacted] that the information was available from Her Majesty's Stationery Office and provided him with the relevant address and website. [name redacted] would have had to pay a small fee for copies of some of the material obtained in that way but section 21(2)(a) of the Act recognises that information may still be reasonably accessible even if payment is required; in any event most of the information is available free of charge on the HMSO website. The Commissioner therefore considers that the section 21(1) exemption was correctly applied in this case.

### Section 42(1) exemption

I turn now to the brief to Counsel and supporting minutes in respect of which DTI cited legal professional privilege. The material involved relates to internal minutes, e-mails and letters containing advice by DTI lawyers on whether the activities of the company came within the scope of the Fair Trading Act 1973, and what steps should be taken to investigate the complaints made against them; and to a submission to Counsel, and Counsel's opinion on the matter. This includes emails and letters before and after the opinion was given. The Commissioner reviewed the information in question and agreed that the Section 42(1) exemption applies. This is because it is clear that the principal purpose of the communication was for seeking and giving legal advice. Having agreed that the exemption applies, the Commissioner then considered the public interest arguments for and against maintaining that exemption.

### **The public interest test**

The principle of legal professional privilege is based upon the need to protect a client's confidence that any communication with his/her professional legal adviser will be treated in confidence and will not be revealed without consent. However, the exemption from the right to know under the Act is conditional and can only be relied upon where the public interest in maintaining the exemption outweighs the public interest in disclosing it. The Commissioner acknowledges the public interest in understanding the reasons for decisions made by public bodies when complaints have been made to them: where possible, public bodies should be open and transparent and accountable for decisions that they have taken. However, this needs to be balanced against the public interest in bodies being able to communicate fully and frankly with legal advisers and vice versa.

In this case the minutes involved contain a number of candid comments and a range of differing opinions were aired. The Commissioner considers that such debate could well be curtailed if the participants believed that their advice and deliberations were likely to be made public. In his view it is in the public interest for public bodies to be able to receive disinterested and frank legal advice in order to assist them in making appropriate decisions, and there is less likelihood that they would receive such advice if those giving it knew it

was to be made public. The Commissioner has also noted that this particular issue remains a 'live' one which means that, although the information sought may not be current, it nonetheless remains sensitive and the disclosure of information of continuing sensitivity affecting a relatively small number of individuals is, in the Commissioner's view, less likely in this case to serve the public interest than maintaining the exemption in order to allow legal advice to be provided unfettered by concerns about disclosure. Taking all of the above issues into account the Commissioner believes that the public interest in disclosing the information is outweighed by the public interest in the need for DTI to continue to receive legal advice on matters such as this in confidence.

#### Section 43 exemption

This relates to DTI's refusal to confirm or deny whether it holds information about an investigation into the company's operation as a result of the complaints made against it. DTI's argument is that to either confirm or deny would be likely to prejudice the commercial interests of the company concerned and those associated with it, or others. Confirming that an investigation had taken place (were that the case) could create a stigma against the company on the principle of 'no smoke without fire'; denying that an investigation had taken place would be likely to prejudice the commercial interests of other companies who had been investigated, and with respect to whom DTI had refused to either confirm or deny.

Carpet cleaning is a very competitive business which relies to a significant extent on reputation. The Commissioner accepts that, rightly or wrongly, the mere suggestion that such a company had been under investigation could have an adverse effect on its commercial interests and that of its franchisees. Therefore, while he is not of the view that information obtained in the course of an investigation into a complaint would necessarily contain trade secrets, the Commissioner agrees that section 43(2) and (3) exemptions apply in this case and that DTI were justified in citing those exemptions. That being the case section 1 of the Act does not apply.

#### **The public interest test**

Sections 43(2) and (3) are subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought. In this context it should be noted that section 2(1)(b) of the Act states that where, in all the circumstances of a case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosure, section 1(1) of the Act does not apply. The Commissioner recognises that there is a public interest in knowing how bodies with regulatory powers proceed and the outcome of their activities. In this case DTI took the view that the public interest was best served by maintaining the exemption for the reasons set out above. The Commissioner accepts that opinion. He recognises the wider need of the general public and the more specific interests of the complainant. But, in his view, because of the potential damage that might be caused to the company and its franchisees through the release of the information in terms of affecting their commercial interests and position,

**Reference: FS50066313**

the overall public interest in this instance is best served by maintaining the exemption.