

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 5th January 2006

Name of Public Authority: Department of Trade and Industry

**Address of Public Authority: 1 Victoria Street
London
SW1H 0ET**

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint, which states that on the 12th 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"):

"I write, as we discussed, to determine the reason behind the decision to investigate Atlantic Property Limited"

The complainant alleges that the DTI has failed to provide him with this information in accordance with their obligations under Section 1 (1) of the Act because it has applied the Section 30 exemption inappropriately.

Section 30(1) (b) states:

"(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..."

Section 30 (2) (a) (i) states:

"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) and (b)

Section 30 (2) (b) states:

"Information held by a public authority is exempt information if-
(b) It relates to the obtaining of information from confidential sources.

The DTI has applied section 30(1) (b) and Section 30(2) (a) (i) and (b) to the requested information. Section 30 is a qualified exemption and subject to a public interest test.

The Commissioner's Decision

It is open to question whether the request made on the 12th January 2005 was a valid request under section 1 of the Act as it was not expressed as a request for specific information. However the DTI did not challenge its status, did not seek further information under section 1(3) (a) and treated it as a valid request. The Commissioner's decision therefore assumes this to have been a valid request.

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a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act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 is satisfied that the information requested does fall within the terms of the section 30 exemption, but the Commissioner has decided that the public interest in disclosing information which outlines the reasons for this investigation outweighs the public interest in maintaining the exemption.

A fuller 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 requires the DTI, within 35 days of the date on which this Decision Notice is served, to disclose to the complainant the reason for the investigation in outline terms. The Commissioner considers outline terms to mean at a minimum providing the complainant with the category or categories of complaint the investigation relates to in accordance with the flowchart on the DTI's website. This flowchart specifies fraud, public interest, shareholder interest, policyholder interest or other wrongdoing as the possible reasons for the investigation.

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
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Reference: FS50068235

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 5th day of January 2006

Signed:

Richard Thomas

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

STATEMENT OF REASONS

The Commissioner has considered the information in question and has decided that the information requested does fall within the terms of the exemption under section 30 of the Freedom of Information Act (“the Act”). Section 30 is a qualified exemption and subject to the public interest test.

Investigations and Proceedings conducted by public authorities (Section 30)

The Commissioner takes the view that this exemption applies to the investigation by the Department of Trade and Industry (DTI) of Atlantic Property Limited (the “Company”). The DTI has powers of investigation of companies under section 447 of the Companies Act 1985 (the “Companies Act”). Once the DTI has completed its investigations, follow up action may include proceedings to have the company wound up under the Companies Act or criminal proceedings taken against those investigated which can be carried out by the DTI’s in-house prosecutors. The Commissioner is also satisfied that information held by the DTI relates to the obtaining of information from confidential sources for the purpose of section 30(2) (b) of the Act. The Commissioner is therefore satisfied that the requested information does fall within the scope of the section 30 exemption but in determining whether the information should be released, the public interest test must be considered.

Public Interest Test

Having determined that the requested information does fall within the scope of the section 30 exemption, the Commissioner then considered whether the public interest in maintaining this exemption outweighed the public interest in disclosing the information. He has concluded that it does not and in reaching this decision, the Commissioner has considered the following arguments:

1. The Complainant’s view

The complainant has indicated in correspondence with the Commissioner’s Office that it cannot be right for an investigation to be initiated without being offered any form of reason, or justification whatsoever. The complainant has expressed a view that even the police when investigating serious crime are required to state the purpose of its investigation. The complainant has also pointed out that he is not seeking to know who has complained or the basis of their complaints but is merely seeking to know the purpose of the investigation in the broadest of terms. Finally he has pointed out that as he is already aware that the DTI want to investigate the company and indeed are doing so, he cannot see why giving the reason for the investigation is going to change the progress or outcome of the investigation.

2. The Public Authority's view

The Commissioner has taken into account the arguments expressed by the DTI. He has noted that:

- (a) Concerns were expressed by the DTI that if the subject of an investigation is told the reason for it, he is likely to resist requests for information which do not appear to him to be relevant to the reason for the investigation. Although s.447 of the Companies Act authorises the production of whatever information is required (regardless of why it is investigated), the DTI is concerned that dealing with debates over the remit of an investigation and the relevance of information it has requested from the company will lead to delays in information being provided to the DTI. This will slow the progress of the investigation and it considers delay in establishing the facts upon which a decision on further action can be taken is not in the public interest. Members of the public dealing with the company may be at risk if any improper activity is allowed to continue. It is also concerned that delay may lead to increased costs of the investigation, and again this is not in the public interest. It considers that providing the reason would allow complainants to tailor the answers they give to questions and possibly manufacture explanations in order to portray the company in a more favourable light.
- (b) The DTI is also concerned that disclosing the reason for the investigation may allow those complaining to the DTI to be identified. This could deter people from complaining to the DTI in future and will erode public confidence in the DTI. It has stressed that the provision of this information is vital to the Companies' Investigation Branch (CIB) of the DTI for the effective regulation of companies.
- (c) The DTI was asked by the Information Commissioner's Office whether the mere fact a company knows they are being investigated at an early stage without knowing the reason would in any event give the company sufficient opportunity to put their affairs in better order. The DTI has responded to this by stating the activities of the companies the CIB investigate can be very varied. At one level the company might be obviously fraudulent and the directors will know this but at another level the company may not be doing anything wrong at all. It is the purpose of CIB investigations to establish the facts and the CIB approach every investigation with an open mind. It accepts there have been cases where upon learning of a CIB investigation the company in question has sought to put its affairs in better order, but unless the company is clearly told why the investigation is being conducted it cannot know for sure what steps to take in this regard. Often it will only become apparent what concerns CIB may have when it has examined all the documents obtained and start to seek explanations of them.
- (d) In response to the complainant's argument that even the police have to state the purpose their investigation, the DTI has stated that

during a CIB investigation no statements made by a person pursuant to s.447 requirement can be used against them in any subsequent criminal proceedings and no caution is administered. It has pointed out that as part of any criminal investigation the suspect will be offered the opportunity to attend an interview under caution and the PACE regime to which the complainant refers would engage. He would then be told the nature of the offence he is suspected of committing. However it has explained that enquiries made under s.447 are simply designed to establish the facts.

As a result the DTI has concluded that the arguments for withholding the information are justified.

The Commissioner's Analysis

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 therefore be open, transparent and accountable for the decisions they have taken. The Commissioner considers there is a strong public interest in a company knowing why it is being investigated, even if in very outline terms. However the Commissioner accepts the arguments favouring disclosure need to be balanced against the public interest in bodies such as the DTI being able to carry out their functions effectively.

The Commissioner considered the DTI's argument that if the subject of the investigation was provided with the reason for the investigation, requests for information would be resisted, the relevance of the information requested would be debated and answers may be tailored to provide a more positive impression of the company under investigation. It has indicated that this would result in unnecessary delays in the investigation and may cause an unacceptable risk to the public if a company is allowed to continue to trade. The Commissioner is willing to accept that a resistant attitude by those being investigated could occur in some cases. He is not however convinced that in this case the DTI has been able to show that if such resistance occurred to the providing of information to the DTI it would significantly damage its ability to carry out this investigation. The Commissioner is aware that in this particular case the DTI has commented that it has already had difficulty in obtaining the information it was seeking during the course of its investigations even without the reason being disclosed. He is therefore not persuaded, taking into account the circumstances of this case, that disclosing the reason for the investigation, in broad terms, would have significantly altered the DTI's ability to investigate the company or created further delays than it has already experienced. The Commissioner has taken into account that the Companies Act can require those subject to investigation to provide information to the DTI. Whilst using the Companies Act to require persons to provide information may delay the investigation process, the Commissioner is satisfied that in this case there is no convincing evidence that a delay would put the public at risk.

The DTI has argued that disclosure of the reason even in outline terms could allow the complainant to be identified and this may have an adverse effect on the willingness of future complainants to approach the DTI with their concerns for fear of being intimidated or inconvenienced by those being investigated. The DTI has explained that it is only in very few cases that the identity of a complainant will need to be disclosed even if the case results in legal action being taken against the company.

The Commissioner accepts that the public should be able to complain to authorities like the DTI without their identities being disclosed to the subject of their complaint. This is necessary to ensure the public maintain its willingness to come forward with complaints, thus allowing the DTI to operate effectively as an investigatory body. The Commissioner accepts that there may be a reluctance to make complaints to the DTI if the identity of those complaining is revealed. However, the Commissioner is not requiring disclosure of the identity of any complainant. In this case, the DTI has not convinced the Commissioner that, providing an outline reason, for investigating the Company would reveal the identity of any confidential source. The Commissioner has therefore concluded that an outline reason could safely be provided without this revealing the identity of those making the complaint to the DTI or damaging its powers of investigation in the manner it has highlighted.

In this case the Commissioner has concluded that there is no overwhelming evidence to substantiate the DTI's concerns. Having considered the competing public interest arguments the Commissioner has decided that in this particular case the public interest arguments in favour of disclosure outweigh the public interest in maintaining the exemption and the reason for the investigation should therefore be provided in outline terms.

In considering what would constitute outline terms the Commissioner has taken into account the information provided by the DTI on its website. The DTI website provides a flow chart which can be used as a guide to explain how complaints to it are handled. There must always be a sound and defensible basis to investigate a company under section 447 of the Companies Act. The flow chart categorises the types of complaints it receives which would be acceptable for inquiry. These categories are fraud, public interest, shareholder interest, policyholder interest or other wrong doing. The complainant has also picked up on these categories of complaints in an endeavour to ascertain the reason for the investigation. The Commissioner considers it is possible to answer the complainant's request by disclosing which category or categories of complaint formed the reason for the investigation. The Commissioner also notes that as a result of the DTI gathering information from the Company, the initial reason for the investigation by the DTI may no longer be appropriate or the investigation may have to be widened but disclosure of the reason in outline terms does not prevent the DTI from widening its investigations under the Companies Act.

The Commissioner wishes to stress however that his decision in this case is not to be seen as setting a precedent for future cases. He accepts that there may be situations where disclosure of the reason, even if provided in very outline general terms may, depending on the circumstances of the case, damage the ability of the DTI to carry out its functions effectively. Where there is compelling evidence that disclosure would lead to the harm identified by the DTI being caused the Commissioner would not require disclosure.

Summary

The Commissioner has decided that in this particular case the public interest is best served by the DTI disclosing the reason for the investigation in outline terms. His decision has been made having taken into account the specific circumstances of the case and an assessment of the impact disclosure may have in this case.

The Commissioner has concluded that the public interest lies in being able to understand why an investigation is taking place and the need for public authorities to be accountable as far as possible for the decisions it takes. This outweighs, in this specific case, the DTI's concerns about the harm that may ensue in its ability to carry out its functions under the Companies Act. The Commissioner considers that it is important for public authorities such as the DTI to be able to demonstrate good administrative practices. Publishing its reasons for investigation in certain cases may therefore strengthen the public's confidence in the DTI's ability, powers and willingness to investigate companies.