



**Tribunals Service**  
Information Tribunal

Appeal Number: EA/2006/0057

**Freedom of Information Act 2000 (FOIA)**

Decision Promulgated: 16 April 2007

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Humphrey Forrest**

**and**

**LAY MEMBERS**

**Paul Taylor**

**Dave Sivers**

**Between**

**Malcolm James Dey**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**Office of Fair Trading**

**Additional Party**

**Determined without a hearing**

**Decision**

The Tribunal upholds the Decision Notice dated 25 July 2006 and dismisses the appeal.

**Reasons for Decision**

**Introduction**

1. Mr Dey had purchased goods from a company trading over the internet. The company was based in France but had an address in Hammersmith. He was dissatisfied with the service received. He complained to Hammersmith and Fulham

Trading Standards department about the company. They investigated his complaint, and provided him with information about the number of complaints they had received about the company. They indicated that because the company was based outside the United Kingdom, reference would have to be made to the Department for Trade and Industry.

2. Mr Dey contacted the DTI. At the time a branch of the DTI called Consumer Direct dealt with him. On 11 August 2005, Mr Dey requested the following information from Consumer Direct (the DTI) under section 1 of the Freedom of Information Act (FOIA):

The number of complaints they had received regarding the company

The number of complaints which they had passed on to Trading Standards

The number of complaints they had passed on to Hammersmith and Fulham's Trading Standards department.

3. The DTI initially responded by refusing the request on the ground that the information was exempt under section 43(2) FOIA, the protection of commercial interests.

Section 43 states

*(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).*

4. Under section 2 FOIA that is a qualified exemption and only applies to the extent that:

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

5. Mr Dey sought a review of that decision, arguing that there were strong public interests in revealing the information because it could help protect the public against unscrupulous traders. The DTI reviewed their decision and confirmed it.
6. On 29 September Mr Dey complained to the Information Commissioner about the DTI's refusal to provide the information. The Commissioner had some correspondence with the parties, in the course of which the DTI explained the reasons for their belief that the public interest in maintaining the exemption outweighed the public interest in disclosure. In April 06, the functions of Consumer Direct, which included dealing with Mr Dey's request or information, were transferred from the DTI to the Office of Fair Trading (OFT) (and it is therefore the OFT that have been joined as the Additional Party to this appeal). They reviewed the DTI's position on the request and confirmed it. The OFT informed the Commissioner that as well as

relying on the exemption in section 43, they also wished to rely on the exemption in section 44. Section 44 is an absolute exemption; it is not subject to the public interest test in section 2.

Section 44 FOIA states:

*Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

*(a) is prohibited by or under any enactment, ...*

7. The OFT relied on section 237 of the Enterprise Act 2002 as imposing such a prohibition on disclosure.

Section 237 Enterprise Act 2002 states:

*(1) This section applies to specified information which relates to –*

*(a) the affairs of an individual*

*(b) any business of an undertaking.*

*(2) Such information must not be disclosed –*

*(a) during the lifetime of the individual, or*

*(b) while the undertaking continues in existence,*

*unless the disclosure is permitted under this Part.*

*(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene –*

*(a) that subsection;*

*(b) any other rule of law or enactment prohibiting or restricting the disclosure of the information.*

*(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from the Part.*

Section 238: Information

*(1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of –*

*(c) Part 1, 3, 4, 6, 7 or 8.*

8. Sections 239 to 243 of the Enterprise Act set out various circumstances, or “gateways”, through which a public authority may, despite the general prohibition on the release of information under section 237, release the information. They include: consent (section 239), and “disclosure for the purpose of facilitating the exercise by the authority of any [statutory] function” (section 241). Where a public authority wishes to release information through one of these gateways, it must apply section 244, which requires it to consider various matters including the public interest.
9. The Commissioner issued his Decision Notice on 25 July 2006. He decided that the absolute prohibition in section 44 applied to the information sought and therefore upheld the OFT’s refusal to provide the information sought. Since section 44 was an absolute exemption, he did not consider the qualified exemption under section 43; nor whether the public interest was in favour of maintaining that exemption or outweighed it.
10. Mr Dey appealed to the Tribunal against the Decision Notice. Many of the arguments he sets out, both in the appeal notice and his submission to us, address the exemption under section 43 and the public interest test which applies to that section. They are substantial and forceful arguments. So are the arguments made in response by the OFT. We propose to say nothing more about them because the first point for us to decide is whether the Decision Notice is correct that the information requested falls within the absolute exemption from disclosure in section 44. If it does, the question of section 43 and the balance of public interest are academic: even if we were minded to order disclosure under section 43, we could not do so if section 44 applies.

Does section 237 Enterprise Act prohibit disclosure ?

11. The information requested is clearly “specified information” within the definition of specified information in section 238: the information came to the public authority (the DTI/OFT) in connection with the performance of at least some of its functions under Part 1 and Part 8 of the Act. Part 1, for example, includes section 5, the function of obtaining information, and section 8, the function of promoting good consumer practice; Part 8 deals with “The enforcement of certain consumer legislation”.

12. The restriction on disclosure in section 237 therefore applies “unless the disclosure is permitted under this Part.” That prohibition on disclosure is reinforced by section 245 of the Act which makes it a criminal offence to disclose information to which section 237 applies, save in the permitted circumstances. Mr Dey argues that disclosure is permitted in two ways.
13. Firstly, he says 237(3) permits disclosure because the information has on an earlier occasion been disclosed to the public”, when Hammersmith and Fulham Trading Standards department disclosed the number of complaints made against the company to them. However, the information held and disclosed by Hammersmith and Fulham is not the same information (though it may be similar and may overlap) as the information held by the OFT: they hold information nationally, from other Trading Standards departments and other sources, and information about complaints against the company made to them directly. Section 237(3) does not therefore permit the disclosure.
14. Secondly, he argues that disclosure is permitted under 237(6), since “This Part [which includes section 237] does not affect any power or duty to disclose information which exists apart from this Part.” The Freedom of Information Act imposes a duty to disclose information independently of (“apart from”) the Enterprise Act, and therefore the prohibition in section 237 does not apply.
15. To this, the Information Commissioner, and the OFT make two replies. Firstly, the duty to disclose information in section 1(1)(b) of FOIA is expressly made subject to the provisions of section 2, and section 2 provides:
  2. *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*
    - (a) *the information is exempt information by virtue of any provision conferring absolute exemption ...*
16. Therefore, they say, since section 44 is a provision in Part II which confers absolute exemption, the duty in section 1(1)(b) of FOIA to disclose information does not apply. Therefore there is no duty under the Freedom of Information Act to disclose information which exists “apart from this Part” for the purposes of section 237(6) of the Enterprise Act. We agree.
17. Secondly, they argue that section 44 of FOIA itself stipulates that information is exempt from disclosure if its disclosure “(otherwise than under this Act) ...” is prohibited by or under any enactment. Disclosure, otherwise than under the Freedom

of Information Act, is prohibited under section 237 Enterprise Act. You cannot rely on disclosure under the Freedom of Information Act to get round that prohibition. Otherwise the argument would be circular: any prohibition on disclosure could be circumvented by relying on the duty to disclose in section 1 of FOIA.

18. In considering this issue, we have considered the decision of the Scottish Information Commissioner in Dr Donald Reid and Dumfries and Galloway Council, decision 210/2006. Mr Dey relies heavily on this: it is a decision on a similar point in his favour; he invites us to follow it. The decision is not of course binding on us; and we bear in mind that it is a Scottish decision taken under the provisions of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). The exemption in section 26(a) of FOI(S)A is identical in its material terms to section 44 of FOIA. Dumfries and Galloway Council relied on this exemption in refusing Dr Reid's request for information about requests to their Trading Standards department, because disclosure of the information was prohibited by section 237 of the Enterprise Act 2002. The Scottish Information Commissioner concluded that section 237(6) did allow disclosure of the information because the FOI(S)A provided a duty to disclose the information "apart from" the Enterprise Act. However, in reaching that conclusion, no account appears to be taken of the provisions of section 2 of FOI(S)A, which makes the duty to disclose information in section 1 subject to those sections of FOI(S)A containing exemptions; section 2 of FOI(S)A is similar in content and structure to section 2 of FOIA. It is not for us to interpret or apply the Scottish legislation but we are persuaded, on the legislation before us (FOIA), that the effect of section 2 FOIA is that where an absolute exemption applies, then the duty to disclose in section 1 does not apply. The exception in section 237(6) cannot therefore assist Mr Dey.
19. Nor are we persuaded by the Scottish Information Commissioner's argument, in paragraphs 47 to 49, that section 241(1) of the Enterprise Act also allows disclosure under the freedom of information legislation. Section 241 is one of the gateways under which a public authority may disclose information under the Enterprise Act for the purpose of facilitating its functions. It gives the public authority a power to disclose, not a duty. The exercise of that power is a matter for the public authority to consider; it must first decide that it would facilitate the exercise of its functions to disclose the information, and then it must apply the various tests set out in section 244. That process, with its own version of a public interest test, set out in an Act passed two years after the Freedom of Information Act, cannot be short circuited by invoking the Freedom of Information Act provisions.
20. A similar point arose for decision by a differently constituted Information Tribunal in the case of Slann and the Information Commissioner and the Financial Services

Authority, EA/2005/0019. The Financial Services and Markets Act 2000 (FSMA) contains restrictions on disclosure of information and also gateway provisions where disclosure may be made, including one where disclosure will assist the authority in discharging a "public function". In paragraph 38 of their decision, the Information Tribunal state :

The Tribunal respectfully agrees with FSA when it contends that section 349(5)(a) with its reference to public function is referring to and is directed to functions and powers conferred on the FSA by statute or by statutory instrument other than the FSMA and not legislation such as the 2000 Act [FOIA] to which other persons including the FSA are or might be subject. Even if that view were wrong, section 44 [FOIA] on its face makes it clear beyond doubt that disclosure under the 2000 Act is to be ignored for this purpose by virtue of the dispensing words "otherwise than under this Act".

21. We take the same view. We are not persuaded by any of the reasoning in Reid, or by Mr Dey's other arguments, that section 44 does not apply to make the information requested by Mr Dey exempt. Disclosure is prohibited under section 237 Enterprise Act and therefore the information requested is exempt, under section 44 FOIA; and therefore there is no obligation to disclose it under FOIA. The Decision Notice must be upheld.
  
22. If we have a criticism of the Decision Notice, it is in the Commissioner's Analysis, in paragraph 5.4, that "much of the information falling within the complainant's request is subject to the statutory bar on disclosure at part 9 section 237 of the Enterprise Act". As Mr Dey put it, even if much of the information is exempt under section 44, the rest of it should at least be disclosed. In our view, all the information requested is subject to the statutory bar and therefore exempt under section 44.

Signed

Humphrey Forrest  
Deputy Chairman

Dated 16 April 2007