

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 8 March 2007

**Public Authority:** Treasury Solicitor's Department  
**Address:** 1 Kemble Street  
London  
WC2B 4TS

### Summary

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The complainant submitted an FOI request to the Attorney General, asking for correspondence, papers and files which led to the Attorney General making an application to the Employment Appeals Tribunal to have him declared a vexatious litigant. The Treasury Solicitor's Department (TSol) (acting for the Attorney General) refused to supply this information on the basis that the information is exempt under section 30 (investigations and proceedings conducted by public authorities) and section 31 (law enforcement) of the Act.

The Commissioner decided that TSol should instead have applied section 40(1) (personal information) because the information requested constitutes personal data of which the applicant is the data subject. The Commissioner has nevertheless also addressed the exemptions used by TSol and has further decided that section 30 does not apply but section 31 is engaged with public interest in maintaining the exemption outweighing that in disclosure of the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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2. The complainant made the following request to the Attorney General on 21 January 2005: "I hereby request the following information be given to me: The correspondence, papers and files which lead to HM Attorney General making application to the Employment Appeals Tribunal to have me declared a vexatious litigant".

3. TSol (acting for the Attorney General) replied to the complainant on 23 February 2005, confirming that it held the requested information. The Commissioner understands that the information was obtained by TSol for the purposes of it carrying out its investigation function (on behalf of the Attorney General) in order to facilitate the application to declare the complainant a vexatious litigant. However, TSol stated that the information was exempt from disclosure under three exemptions of the Act:

**i. Section 21 – Information accessible to applicant by other means**

In respect of 'all the papers' in this matter, TSol confirmed that the complainant had previously been served with the originating application, affidavit and supporting evidence which TSol presented to the court for the purposes of its application to have the complainant declared a vexatious litigant.

**ii. Section 30 – Investigations and proceedings conducted by public authorities**

TSol stated that the correspondence in this matter is exempt under section 30(2)(a)(iii) and (iv) of the Act as the information:

- was obtained for the purposes of a public authority carrying out its investigations function pursuant to section 30(2)(a)(iii) and as such relates to investigations, which are conducted for the purpose of ascertaining whether there are circumstances which would justify regulatory action under section 31(2)(c) of the Act, and
- was obtained for the purposes of a civil proceedings brought by or on behalf of the authority pursuant to section 30(2)(a)(iv) and was obtained from confidential sources pursuant to section 30(2)(b).

**iii. Section 31 – Law Enforcement**

TSol stated that in so far as the exemption in section 30(2) does not apply, the exemption under section 31(1)(g) applies, as disclosure of the information would be likely to prejudice the exercise of functions of a public body in ascertaining whether there are circumstances which would justify regulatory action under section 31(2)(c) of the Act.

iv. TSol also stated that the public interest in maintaining sections 30 and 31 outweighs the public interest in disclosure as releasing the material would undermine the confidentiality given to individuals and would inhibit people from coming forward with relevant information, which enables the Attorney General to perform his public interest role with respect to vexatious litigants.

4. On 25 February 2005, the complainant wrote to TSol, requesting an internal review of its decision of 23 February 2005. In his request, the complainant clarified that he wanted to see the letter/letters or papers which activated the Attorney General's action against him in the Employment Appeals Tribunal.
5. TSol responded to the complainant's request for an internal review on 21 March 2005. TSol upheld its original decision of 23 February 2005. In this letter TSol also stated that it was on the basis of the Attorney General's investigations and not the information requested by the complainant (as clarified on 25 February

2005), that the application was made to the Employment Appeals Tribunal to have him declared a vexatious litigant.

## The Investigation

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### Scope of the case

6. On 18 April 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that the grounds for his complaint to the Commissioner are set out in his letter to TSol of 25 February 2005 and asked that the Commissioner have regard to those grounds. The Commissioner therefore decided (on the basis of the complainant's letter to TSol of 25 February 2005) to focus his investigation on whether TSol was correct to use sections 30 and 31 of the Act to withhold the requested information.

### Chronology

7. The Commissioner contacted TSol on 22 March 2006, in order to request a copy of all the information caught by the scope of the complainant's request and to request further clarification as to the application of sections 30 and 31. To this end, the Commissioner requested:
  - Details of the legal framework for the Attorney General's investigations.
  - Any proceedings that he may bring arising from those investigations.
  - An outline of the Attorney General's regulatory functions in relation to section 31(1)(g) and section 31(2)(c) where this is not covered in response to section 30(2).
  - An expansion upon its arguments relating to the public interest test.
  - Details of the process by which a person may be deemed to be a vexatious litigant.
8. TSol replied to the Commissioner on 28 April 2006, responding to each of his requests for further information and enclosing a copy of all the information caught by the scope of the complainant's information request, but excluding the papers exempt under section 21. The Commissioner was satisfied that this submission provided sufficient detail to enable him to make a decision on the matter. In the submission, TSol also stated that it also considers sections 40 (Personal information) – in respect of the personal information of third parties, 41 (Information provided in confidence) and 42 (Legal professional privilege) to apply to the requested information. However, it stated that it was not considered necessary to cite these exemptions in its response to the complainant as it believed that sections 30 and 31 applied to all aspects of the information. The Commissioner therefore decided not to consider these additional exemptions as they did not form the reasons for TSol's refusal to supply the information to the complainant or the complainant's grounds for appeal.

## Findings of fact

9. The Commissioner established the basis of TSol's assertion that sections 30 and 31 of the Act apply to the requested information and familiarised himself with the process by which a person can be deemed to be a vexatious litigant.
10. The Commissioner established that the role of TSol in determining whether a person should be deemed to be a vexatious litigant commences once a complaint is made. It is then investigated by TSol, who act for the Attorney General in these actions. Information in respect of the individual whom is the subject of the complaint is gathered with the assistance of the complainants and/or their solicitors. Once a reasonable body of evidence is available, TSol will advise the Attorney General on the merits of making an application to the Divisional Court under section 33 of the Employment Tribunals Act 1996. (This provision allows proceedings to be brought against individuals who have habitually and persistently without reasonable ground(s) issued vexatious claims and/or applications in the Employment Tribunal and Employment Appeals Tribunal.) The Attorney General or Solicitor General will then personally consider the case and decide whether an application is appropriate.
11. The Commissioner also established that after the section 33 application is submitted, the Employment Appeal Tribunal arranges service of the sealed copies of allegations made on the individual. It is at that point that the Respondent (the person to whom the application relates) is given the opportunity to rebut the claim.

## Analysis

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12. On the basis of a review of the withheld information, the Commissioner is satisfied that the information requested constitutes personal data of which the complainant is the data subject. He therefore concluded that the information is exempt from disclosure by virtue of section 40(1) of the Act. Section 40(1) is an absolute exemption, and therefore the Commissioner has not undertaken an assessment of the public interest test.
13. As the information is exempt from disclosure under section 40(1), consideration of whether the information may be withheld from the complainant under other exemptions is not strictly necessary. Nevertheless, as the complainant appealed against TSol's application of sections 30 and 31, the Commissioner undertook a review of whether or not this information could also be withheld under one or both of these exemptions.
14. Please consult the legal annex for the provisions of sections 30, 31, 40 of the FOI Act and section 33 of the Employment Tribunals Act 1996.

## Application of sections 30 and 31

15. The functions of the Attorney General in investigating the conduct of a person and applying to the Employment Appeals Tribunal to have them deemed a vexatious litigant falls within the scope of section 31(2)(c). This is because such an investigation is undertaken for the purposes of ascertaining whether circumstances would justify regulatory action in pursuance with Section 33 of the Employment Tribunals Act 1996. The Attorney General's investigation and subsequent decision to make an application to the court is undertaken on the basis of his powers established under section 33 of the Employment Tribunals Act 1996, which establishes the Attorney General's ability to take action by way of an application to the tribunal to have a person declared a vexatious litigant.
16. Section 31(2) of the Act relates back to Section 30(2). Section 30(2) exempts information if it was obtained for the purposes of a public authority's functions relating to investigations conducted by the authority for any of the purposes specified in section 31(2)...by virtue of powers conferred by or under any enactment.
17. The Commissioner further notes that the Attorney General has vested in his office exclusively the statutory power to make an application to declare an individual a vexatious litigant. This statutory power is fundamental to the Attorney General's remit to ensure proper and effective access to the courts by members of the public who have a legitimate claim upon the courts' time and resources. The Commissioner is therefore satisfied with TSOL's explanations relating to the regulatory powers of the Attorney General and considers the requested information to fall within the scope of section 30(2)(a)(iii).
18. However, for information to be exempt under section 30(2)(a) it must also be information which was obtained from confidential sources under section 30(2)(b). In this case the sources of the withheld information are likely known to the complainant and in any case would have been disclosed to the Employment Appeal Tribunal had the application to deem the complainant a vexatious litigant been heard. The Commissioner does not therefore consider the information to have been obtained from confidential sources and therefore does not consider the information to be exempt under this subsection. For this reason, the Commissioner does not consider TSol to have legitimately withheld the information by virtue of section 30(2). As such, the Commissioner concludes that no part of section 30(2) could be engaged in order to withhold the information.
19. The Commissioner notes TSol's view that in so far as the exemption in section 30(2) does not apply, the exemption under section 31(1)(g) applies, which allows for the information to be withheld if its disclosure would be likely to prejudice the exercise of functions of a public body in ascertaining whether there are circumstances which would justify regulatory action under section 31(2)(c) of the Act. Given the Commissioner's analysis above in relation to section 30(2), he proceeded to analyse the application of section 31(1)(g) and he is satisfied that this is engaged in relation to the withheld information in its entirety.

20. Whereas section 30 provides an exemption in relation to particular proceedings brought by public authorities, section 31 provides an exemption for general steps taken in relation to law enforcement. The engagement of section 31 is subject to a test of prejudice in that the exemption is not engaged unless prejudice would or would be likely to occur. The Commissioner believes that TSol has sufficiently demonstrated that prejudice to the exercise of its functions in relation to section 33 of the EAT Act 1996 would be likely to occur if the withheld information was released. This is because the Commissioner accepts TSol's arguments that disclosure of this information is likely to result in:

- Reluctance by either the courts or tribunals themselves to be as forthcoming with the supply of background information in such investigations. This in turn would be likely to prejudice his functions in relation to the section 33 ETA or section 42 of the Supreme Court Act 1981 (which relates to applications from courts) regimes through a lack of the ability to obtain all relevant information pertinent to the investigation.
- Opening the tribunals to unfounded allegations of bias from the person being investigated, particularly if any of the proceedings they have commenced are still on-going at the time.
- Harm to the person being investigated as not all section 33 investigations lead to proceedings being taken and there may be reputational consequences for the individual concerned if the very fact of an investigation was in the public domain.

The Commissioner is therefore satisfied that a sufficient likelihood of prejudice has been demonstrated in order for section 31 to be engaged in this case.

### **Public Interest Test**

21. Section 31 is a qualified exemption and subject to the public interest test. In this respect section 2(2)(b) of the Act states that the duty to disclose under section 1(1)(b) of the Act does not apply if or to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
22. The Act is purpose and applicant blind and therefore the public interest in disclosure of this information should focus on whether there is a public interest in allowing the public, including the individual concerned, access to such information for the purposes of making the Attorney General accountable (such as by ascertaining whether he has exercised his powers to apply to have an individual declared a vexatious litigant responsibly) and to encourage transparency (by increasing public understanding of the process under which he conducts his functions). In doing so the assessment of the public interest test must focus on whether it is in the public interest for the information in question to be placed into the public domain.
23. The Commissioner believes that disclosure of this kind of information (namely, complaints made about a litigant) via the Act, which in legal terms constitutes disclosure to the public at large, would not only prejudice the Attorney General's

functions in regulating the conduct of vexatious litigants but would not be in the public interest. This is on the basis that it is in the public interest that the Attorney General is able to carry out his functions in relation to section 33 of the ETA 1996 but that it is likely that the public would not provide such information if it was likely to be disclosed in this manner.

24. The Commissioner considered public interest arguments favouring disclosure of this information, namely whether it would aid the public's understanding of the process, and evidence used in which an application can be made to have an individual, and in this case the complainant, deemed a vexatious litigant. The Commissioner did not consider the information in this case to provide such assistance and further concluded that disclosure of such information into the public domain via the Act would not be in the public interest.
25. The Commissioner consequently decided that the public interest in maintaining the exemption under section 31 outweighs that in disclosure.

## The Decision

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26. The Commissioner's decision is that the information requested by the complainant is exempt under section 40(1) of the Act. This is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.
27. The Commissioner has also decided that the public authority incorrectly applied sections 30 of the Act, but correctly applied section 31 as a basis for withholding the requested information. He also agrees that in this case the public interest in maintaining the exemption under section 31 outweighs the public interest in disclosure.

## Steps Required

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28. The Commissioner requires no steps to be taken.

## Other matters

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29. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
30. The Commissioner decided that section 40(1) applies to the information as the requested information is the personal data of which the complainant is the data subject. This means that the complainant has a right to request it under the DPA and TSol has a duty to deal with the request in accordance with the provisions of the DPA. The Commissioner therefore expects TSol to now deal with the

complainant's request as a Subject Access Request as a matter of urgency given the time that has elapsed since it originally responded to the complainant.

31. The Commissioner further expects that in future TSol considers whether requests for information made to it relate to personal data of the requestor and if so to deal with the request under the Subject Access Rights under section 7 of the DPA instead of the FOI Act. The Commissioner believes that TSol should have handled the complainant's request in this manner.

## Right of Appeal

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32. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 8<sup>th</sup> day of March 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

### Section 30 of the Act provides that:

(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) any investigation which the public authority has a duty to conduct with a view to it being ascertained: -

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it,

(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, or

(c) any 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),
- (ii) criminal proceedings which the authority has power to conduct,
- (iii) investigations (other than investigations falling within subsection (1)(a)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
- (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and,

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references -

(a) to any officer of the authority;

(b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and

(c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5) In this section -  
"criminal proceedings" includes -

(a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957;

(b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957;

(c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act or section 52FF of the Naval Discipline Act 1957 (summary appeal courts);

(d) proceedings before the Court-Martial Appeal Court, and proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(6) In the application of this section to Scotland -

(a) in subsection (1)(b), for the words from a "decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted";

(b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and

(c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

**Section 31 of the Act provides that:**

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(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 any of the matters mentioned in subsection(1).

**Section 40(1) of the Act provides that:**

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 33 of the Employment Tribunals Act 1996 provides that:**

- (1) If, on an application made by the Attorney General or the Lord Advocate under this section, the Appeal Tribunal is satisfied that a person has habitually and persistently and without any reasonable ground-
  - (a) instituted vexatious proceedings, whether in an industrial tribunal or before the Appeal Tribunal, and whether against the same person or against different persons, or
  - (b) made vexatious applications in any proceedings, whether in an industrial tribunal or before the Appeal Tribunal. The Appeal Tribunal may, after hearing the person or giving him an opportunity of being heard, make a restriction of proceedings order.
- (2) A "restriction of proceedings order" is an order that-
  - (a) no proceedings shall without the leave of the Appeal Tribunal be instituted in any industrial tribunal or before the Appeal Tribunal by the person against whom the order is made,
  - (b) any proceedings instituted by him in any industrial tribunal or before the Appeal Tribunal before the making of the order shall not be continued by him without the leave of the Appeal Tribunal, and
  - (c) no application (other than one for leave under this section) is to be made by him in any proceedings in any industrial tribunal or before the Appeal Tribunal without the leave of the Appeal Tribunal.
- (3) A restriction of proceedings order may provide that it is to cease to have effect at the end of a specified period, but otherwise it remains in force indefinitely.
- (4) Leave for the institution or continuance of, or for the making of an application in, any proceedings in an industrial tribunal or before the Appeal Tribunal by a person who is the subject of a restriction of proceedings order shall not be given unless the Appeal Tribunal is satisfied-
  - (a) that the proceedings or application are not an abuse of the process of the tribunal in question, and

- (b) that there are reasonable grounds for the proceedings or application.
- (5) A copy of a restriction of proceedings order shall be published in the London Gazette and the Edinburgh Gazette.