

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 4th February 2008

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London
SW1A 2WH

Summary

The complainant asked the public authority for information about steel trade tariffs. The Cabinet Office withheld the information as exempt under section 44 of the Freedom of Information Act 2000 ('the Act'), citing a statutory bar created by Article 19(5) of the basic European Community Anti-Dumping Regulation (Regulation (EC) No 384/96). As a result of the Commissioner's investigation the public authority released some information, but added section 27(1)(a) and (c) as an exemption in relation to part of the remainder. The Commissioner decided that section 44 did not apply to the information which the public authority was continuing to withhold because the information did not fall within the cited Regulation. He also decided that section 27(1)(a) and (c) was not engaged because there was no reasonable likelihood of prejudice. He therefore required the public authority to release the remaining information. The Commissioner also decided that the public authority had breached section 17(1) of the Act because it took 69 working days to respond to the request.

The Commissioner's Role

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

2. On 20 August 2005 the complainant, the Leader of the UK Independence Party, made a request for information to the Cabinet Office. His request contained a number of elements.

(a) Details of instructions provided to the British negotiating team in respect of European Union anti-dumping tariffs imposed on steel products produced in Romania, South Africa, India and China at any time since 1997.

(b) Details of documentation relating to EU decisions which saw the tariff on steel produced by Ispat Sidex SA of Romania or its predecessor or successor company reduced to 5.7%, and any instructions to the British permanent delegation in Brussels relating to negotiations concerning Directive 963/2002 or 979/2002.

(c) Details of correspondence between the British and Luxembourg governments relating to any decision to extend the reduction in tariffs applied to imports from Ispat Sidex SA which would account for the appropriate directive (630/2005) being passed on the final day of the Luxembourg presidency of the European union rather than under the British presidency.

(d) Details of documentation relating to EU decisions which saw the tariff on steel produced by Ispat Iscor of South Africa reduced to 5.2% under Directive 963/2002, and any instructions to the British permanent delegation in Brussels relating to negotiations.

(e) Details of documentation relating to EU decision which saw the tariff paid by Ispat Industries Ltd of India reduced to 14% under Directive 1310/2002, and any instructions to the British permanent delegation in Brussels relating to negotiations.

(f) Details of the British position on the removal of anti-dumping tariff barriers to steel produced in Romania, China and India as per official notice 2005/C 192/5 on the 6th August 2005, and any instructions to the British permanent delegation in Brussels relating to negotiations.

(g) Details of any instructions or representations on behalf of the British government, formal or informal, which were passed to the EU Trade Commissioner, Mr Peter Mandelson, relating to these matters.

(h) Details of correspondence received from or sent to Mr Mittal or his agents in relation to these tariffs by the British government.

(i) Details of correspondence relating to the European Union punitive tariff on US steel, particularly in relation to Ispat Inland, Mr Mittal's US company, and on Mr Mittal's donation to the campaign in the United States to impose retaliative tariffs on EU steel imports contrary to the interests of the UK.

(j) Details of studies relating to the impact on Anglo-Dutch steel company Corus, including the effects on UK employment in the steel industry, of the reduction and/or removal of tariffs imposed on non-EU produced steel.'

3. The complainant did not receive a response and therefore complained to the Commissioner on 19 October 2005, asking for an investigation. After some communication between the Commissioner and the Cabinet Office, the latter wrote to the complainant.

4. This response, dated 25 November 2005, stated that the information consisted of records of the European Union Anti-Dumping Committee. The Cabinet Office claimed that *'disclosure of information of this kind is incompatible with Article 19(5) of the basic European Community Anti-Dumping Regulation (Regulation (EC) No 384/96)'* which *'prohibits disclosure of any internal documents on anti-dumping prepared by the authorities of the Community or its Member States.'* As a consequence, it decided that section 44 of the Freedom of Information Act applied to the requested information. The Cabinet Office advised the complainant of its internal review procedure.
5. On 28 April 2006, the complainant requested a review.
6. The Cabinet Office replied on 10 July 2006 upholding the original decision. It advised the complainant of his right to approach the Commissioner's Office.

The Investigation

Scope of the case

7. In a letter (incorrectly dated 2 May 2006) which was received on 19 July 2006, the complainant asked the Commissioner to consider whether section 44 applied to all of the requested information.

Chronology

8. The Commissioner wrote to the complainant and the Cabinet Office on 31 October 2006. The Cabinet Office was asked to comment on a number of issues.
9. The complainant replied on 1 November 2006, and the Cabinet Office provided comments on 22 November.
10. On 29 November 2006 the Commissioner asked the Cabinet Office to provide him with the withheld information, which it did on 29 January 2007.
11. The Commissioner wrote to the Cabinet Office on 2 March 2007 for further clarification of why the Anti-Dumping Regulation applied to the information.
12. The Cabinet Office replied with its comments on 15 March 2007. It stated that some of the information was *'only indirectly covered'* by the Regulation and that it therefore considered that *'release of this information may be appropriate'*.
13. The Commissioner asked the Cabinet Office on 4 July 2007 to confirm that the information had in fact been released to the complainant. He sent a chasing letter on 8 August, which also raised some further queries.
14. The Cabinet Office had in fact written to the Commissioner on 8 August 2007. It confirmed that it had released to the complainant the information which it had

identified in its letter of 15 March 2007. It also stated that it would be responding to the Commissioner's other queries within twenty working days.

15. The Commissioner sent a chasing letter on 14 September 2007.
16. On 1 October 2007 the Commissioner informed the Cabinet Office that he would be issuing an Information Notice to require production of the information which he had previously requested from them.
17. The Cabinet Office provided its response on 5 October 2007. It confirmed that it had released the information which it had previously identified as disclosable. It also identified another document from which it was now prepared to release some information in summary form; it claimed that the remainder of the document was exempt under section 27(1)(a) and (c).

Findings of fact

18. The website of the Department for Business, Enterprise and Regulatory Reform (BERR) makes clear that 'dumping' is distinguishable from other unfair trade practices such as 'subsidies', and from legitimate measures called 'safeguards'.

'Anti-Dumping Anti Subsidies and Countervailing Measures and Safeguards

The World Trade Organisation (WTO) agreement contains 3 principal trade defence instruments. These are the anti-dumping, anti-subsidy and safeguard instruments.

Anti-dumping is designed to allow countries to take action against dumped imports that cause or threaten to cause material injury to the domestic industry. Goods are said to be dumped when they are sold for export at less than their normal value...

Anti-subsidy measures allow importing countries to take action against certain kinds of subsidised imports. Broadly speaking, "subsidies" are defined as financial assistance from a government to a company or group of companies...

Safeguards...are designed to protect countries from unforeseen surges in imports that cause or threaten to cause serious injury to the domestic industry.'

19. The BERR website further suggests that it is only 'anti-dumping', in the narrowest definition, that falls within Regulation (EC) 384/96.

'Trade Defence in the EU

The WTO trade defence agreements are incorporated into European law and are applied at a European level. The European Commission are the investigating authority on behalf of member states. Anti-dumping, anti-subsidy or safeguard investigations are carried out by Directorate General Trade of the European Commission in response to complaints lodged by EU industry. Measures are adopted by the Council of Ministers.

*The relevant EC legislation is as follows. **Anti-dumping is covered by Council Regulation (EC) 384/96 as amended...Anti-subsidy measures are covered by Council Regulation (EC) 2026/97 as amended ...**' (emphasis added).*

20. The information withheld in this case (rather than that which the Cabinet Office has now released) relates to a dispute between the United States and the European Union. The website of the European Union explains the background to this dispute.

'The US safeguard measures case

In 2002, the USA took discriminatory safeguard measures by imposing high additional duties on imports of main steel products, hitting principally the EU exports. The EU, together with other WTO members (Japan, Brazil, Norway, Switzerland) in turn attacked the US measures as not justified under the WTO rules. The EU took also safeguard measures, fearing to be flooded with products that could no more be exported to the USA; however, the measures taken by the EU were in the form of generous tariff quotas, and had very limited effects on traditional trade flows.

End 2003, the US dropped its safeguard measures (following condemnation by the WTO) and the EU dropped theirs on a voluntary basis thereafter.'

21. In light of this information, the Commissioner has determined that the information withheld in this case relates to measures applied by the United States against European Union steel imports under the World Trade Organisation Agreement on Safeguards, and not to 'anti-dumping' (or 'anti-subsidy') measures applied by the European Union.

Analysis

Procedural matters – delay

22. The complainant made his initial request on 20 August 2005. He did not receive a response and therefore complained to the Commissioner on 19 October 2005. After some communication with the Commissioner's Office, the Cabinet Office sent a refusal notice to the complainant on 25 November 2005. The Commissioner subsequently asked the Cabinet Office to explain this delay. The Cabinet Office's reply of 22 November 2006 was that:

'the letter passed through a number of areas within government departments before being answered. It is with regret that I note the inefficiency in this matter and I would like to add my apologies to those already given...in November 2005 for the unacceptable delay...'

23. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following

the date of receipt.'

A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

24. In this case the Cabinet Office took 69 working days to respond to the information request. Section 10(1) of the Act requires that *'a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt'*. The Commissioner therefore finds that, in exceeding this statutory time limit for responding to the request, the Cabinet Office breached section 17(1) of the Act.

Exemption – section 44

25. The Cabinet Office's response to the request was that the information consisted of records of the European Union Anti-Dumping Committee and that Article 19(5) of the basic European Community Anti-Dumping Regulation (Regulation (EC) No 384/96) *'prohibits disclosure of any internal documents on anti-dumping prepared by the authorities of the Community or its Member States'*. Article 19(5) of the European Community Anti-Dumping Regulation (Regulation (EC) No 384/96) states:

'The Council, the Commission and Member States, or the officials of any of these, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier. Exchanges of information between the Commission and Member States, or any information relating to consultations made pursuant to Article 15, or any internal documents prepared by the authorities of the Community or its Member States, shall not be divulged except as specifically provided for in this Regulation' (emphasis added).

26. Consequently, the Cabinet Office claimed that section 44 of the Freedom of Information Act 2000 applied. Section 44(1) states:

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

...(b) is incompatible with any Community obligation'.

27. In its comments to the Commissioner on 22 November 2006 the Cabinet Office expressed its view that all elements of the request *'related to the negotiations on steel tariffs...'*. However, in its letter of 15 March 2007 it accepted that some of the information was *'only indirectly covered'* by the Regulation; after further queries from the Commissioner, it released some of the requested information on 5 October 2007.

28. The Commissioner had asked the Cabinet Office to explain why the information related to 'anti-dumping' so as to fall within the Anti-Dumping Regulation. The Cabinet Office's response on 15 March 2007 was to explain that *'tariffs [sic] are a means by which dumping can be prevented'* and the withheld information *'discussed*

the European [sic] Union's tariffs [sic] on US steel'. However, the Commissioner notes (as recorded in the 'Findings of fact' section above) that the threatened tariffs in this case were not a response to dumping actions by the United States but rather to the safeguard measures which it had introduced against European Union steel imports.

29. According to the BERR website, the European Community Anti-Dumping Regulation (Regulation (EC) No 384/96) only covers 'anti-dumping' issues. The Cabinet Office appears to accept this interpretation, since its refusal notice stated that the Anti-Dumping Regulation '*prohibits disclosure of any internal documents on anti-dumping*'. Having considered the relevant information, and in light of the facts which he has established in relation to 'anti-dumping' which are recorded in the section '*Findings of fact*' above, the Commissioner has concluded that the information withheld in this case relates to 'safeguard' measures taken by the United States, and not to 'anti-dumping' measures taken by the European Union. Since the withheld information does not in fact relate to 'anti-dumping' the Commissioner has decided that it does not fall within the terms of the Regulation.
30. In its refusal notice the Cabinet Office claimed that all of the withheld information '*consists of records of the Anti-Dumping Committee*'. It is not clear to the Commissioner why that should be the case, since the information does not appear to fall within the purview of the Committee. However, he has not pursued the point further because he is satisfied that the withheld information does not fall within Regulation (EC) No 384/96 and so cannot be exempt under section 44. (He also considers it relevant that the Cabinet Office itself has implicitly accepted that information does not necessarily fall within the Regulation simply because it is part of the records of the Committee, since it has now released some of the information which previously it had claimed was part of the records of the Committee.)

Exemption – section 27(1)(a) and (c)

31. On 5 October 2007 the Cabinet Office informed the Commissioner that it was releasing a summary of part of the information in one of the documents which it had been withholding, which was a letter from Tony Blair. It claimed that the rest of the information in this document was exempt by virtue of section 27(1)(a) and (c).
32. Section 27(1) of the Act provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,...

(c) the interests of the United Kingdom abroad...'

33. Section 27(1)(a) will only be engaged if disclosure of the requested information would, or would be likely to, cause some prejudice; in this case, that prejudice would be, respectively, to United Kingdom relations with another state, and to the interests of the United Kingdom abroad. The Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of prejudice to the

subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests.

34. In this case, the Cabinet Office did not explicitly address the issue of prejudice. However, it identified some public interest factors in favour of maintaining the exemption which might bear on the matter:

- harm to the United Kingdom's relationship with the parties involved in this case;
- damage to the United Kingdom's ability to protect its interests abroad when dealing with similar issues in the future.

35. Having considered the original document, the Commissioner does not accept that disclosure of the remaining information 'may very well' prejudice United Kingdom interests. Although the Cabinet Office referred to the information which it was prepared to release as constituting a 'summary', it was in fact the original information with one sentence and the 'furniture' of the letter redacted. The Commissioner does not consider that the redacted sentence was sensitive or contentious, particularly in the context of the other information in the letter which the Cabinet Office was prepared to release. He has therefore decided that it was not reasonable for the Cabinet Office to have reached the conclusion that disclosure of these redacted elements of the information would be likely to prejudice United Kingdom relations with another state or the interests of the United Kingdom abroad. Accordingly, the section 27(1) exemption does not apply to the information redacted from the letter and the whole document should be disclosed.

The Decision

36. The Commissioner's decision is that the Cabinet Office did not deal with the request in accordance with the requirements of the Act. First, the Commissioner finds that, in exceeding the statutory time limit for responding to the request, the Cabinet Office failed to comply with the requirements of section 10(1) of the Act, which constitutes a breach of section 17(1). Secondly, the Cabinet Office inappropriately withheld the requested information on the basis that it was exempt under section 44 and section 27(1)(a) and (c).

Steps Required

37. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.

- The Cabinet Office should provide the complainant with all of the information which it is currently withholding.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.
40. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.
41. The complainant's internal review request was made on 28 April 2006, and the Cabinet Office sent its internal review decision to him on 10 July 2006. The Cabinet Office therefore took 49 working days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case that to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

42. 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

43. 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 4th day of February 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 1(1) provides that –

‘Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.’

Section 1(2) provides that –

‘Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.’

Section 1(3) provides that –

‘Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.’

Section 1(4) provides that –

‘The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.’

Section 1(5) provides that –

‘A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).’

Section 1(6) provides that –

'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'

Section 10(1) provides that –

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

Section 10(2) provides that –

'Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.'

Section 10(3) provides that –

'If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.'

Section 10(4) provides that –

'The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.'

Section 10(5) provides that –

'Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.'

Section 10(6) provides that –

'In this section –
'the date of receipt' means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

'working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.'

Section 17(1) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.'

Section 17(2) states –

'Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.'

Section 17(3) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

Section 17(4) provides that -

'A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.'

Section 17(5) provides that -

'A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.'

Section 27(1) provides that -

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.'

Section 27(2) provides that -

'Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'

Section 27(3) provides that -

'For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was

obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.'

Section 27(4) provides that –

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'

Section 27(5) provides that –

'In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'

Section 44(1) provides that –

'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,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.'

Section 44(2) provides that –

'The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).'