

Information Tribunal

Appeal Number: EA/2005/0027
FS50072311

FREEDOM OF INFORMATION ACT 2000
(Determined on Papers on 26th May 2006)

Heard at
On Papers
Prepared 8th June 2006

Decision Promulgated
19th June 2006

Before

Mr. David Marks
INFORMATION TRIBUNAL DEPUTY CHAIRMAN

And

Mrs Jacqueline Blake and Mr John Randall
LAY MEMBERS

Between

PATRICK TOMS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The Tribunal upholds the Information Commissioner's Decision Notice dated 24 November 2005 and dismisses the Appeal.

Reasons for Decision

1. The Appellant appeals against the Decision Notice dated 24 November 2005 which, in effect, upheld a Decision by the Royal Mail not to disclose to the Appellant information related to the location of street storage post boxes in the Glasgow area, on the ground that the provisions of section 30(1) of the Freedom of Information Act 2000 (the 2000 Act), and the exemption set out in that sub-section applied, and that in the circumstances, which related to the Appellant's request, the public interest in maintaining the exemption outweighed the public interest in disclosing the information requested.

By an order dated 10 March 2006, the Tribunal directed that the appeal be dealt with without an oral hearing. The Appellant did not take issue with that direction and, in any event, the Tribunal is of the view that the determination of this appeal would not have benefited from an oral hearing, since all the materials on which the parties relied are recorded or set out in documentary form.

The Law

2. The 2000 Act contains a presumption in favour of disclosure. This is because section 1(1) of the 2000 Act, which is immediately prefaced by the heading "General right of access to information held by public authorities", 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 or her.
3. Part II of the 2000 Act deals with exempt information. An exemption may be absolute, or it may be qualified. This appeal does not involve an absolute exemption. The 2000 Act lists a substantial number of qualified exemptions. Section 30, which addresses a discrete species of qualified exemption, provides as follows:

"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.”

Section 30(2) of the 2000 Act is concerned with much the same sort of information, but which is obtained from confidential sources. Section 30 (2) is not applicable to the present appeal.

- 4. In a case in which information is subject to a qualified exemption, the duty to disclose will be disapplied where, in all the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: see section 2(2)(b) of the 2000 Act.
- 5. In an earlier decision of this Tribunal, namely *Bellamy v The Information Commissioner* (Appeal No. EA/2005/0023 [27th April 2006], the Tribunal said:
 - “5. As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter of the disclosure should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied on.”
- 6. It is clear from the wording of section 30(1) of the 2000 Act that for the exemption to apply, there is no requirement that there be any demonstration

that the disclosure sought would cause prejudice to any investigation or criminal proceedings. Equally, for the exemption to apply, the information in question must be held for the purpose of “any investigation which the public authority has a duty to conduct”, that is, a specific or particular investigation with which the public authority is concerned. The exemption would not appear to relate to, for example, the manner in which, or the procedure according to which, investigations in general are, or should be, conducted by a public authority (although, as will be seen for present purposes, the Tribunal does not need to determine this latter question). Finally, it appears from the wording of section 30(1) that if this information is subject to the exemption, it will remain so even if the particular purpose or purposes for which the information was retained for is or are no longer material, justified or required, such as would be the case, for example, with an investigation which had resulted either in a decision not to prosecute or in a prosecution which had been completed.

7. In considering whether the public interest in maintaining an exemption outweighs the public interest favouring disclosure the Tribunal had regard to the White Paper which preceded the introduction of the 2000 Act: “Your Right To Know: The Government’s Proposals for a FOI Act” (Cm.3818, 11 December 1997). Although the Act as enacted differs in some respects from the model propounded in the White Paper, the following extract is relevant:

“[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt. Because of this, the Act will exclude information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service. The Act will also exclude information relating to the commencement or conduct of civil proceedings.”

In striking the balance of interest, regard should be had, *inter alia*, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested.

The Facts

8. By letter dated 8 January 2005, the Appellant wrote to the Royal Mail's Glasgow Mail Centre, making the following specific request under the 2000 Act, namely:

“The number of street storage boxes used for the delivery of mail and their location that were broken into in Glasgow in the last year.”

The “last year” in question was 2004. The background to this request is reflected in a short series of written exchanges between the Appellant and the Royal Mail's Glasgow Mail Centre, in the course of which the Appellant explained his concerns regarding the security of mail in what he called “mail street storage boxes”, described by the Royal Mail as “pouch boxes”. The Appellant was concerned about the breaking into of such boxes in the Glasgow area in which he is a resident, and the resultant theft of mail. Prior to his formal freedom of information request, the Appellant had written to the Royal Mail asking for details of the number of break-ins into such storage boxes in the Glasgow area, and the Royal Mail had refused to provide such information.

9. By letter dated 1 February 2005, the Freedom of Information Unit within the Royal Mail responded to the Appellant's request stating that the information requested was considered to be exempt “under section 30”. The letter added:

“We have applied the public interest test and believe that, in this instance, the public interest in withholding the information outweighs the public interest in disclosing it. This is because disclosing the information can facilitate the commission of similar crimes.”

10. By letter dated 14 February 2005 to the same Unit, the Appellant relied on a number of public interest elements which he claimed militated in favour of

disclosure. They can be summarised as follows: first, the public had a legitimate interest in being acquainted with details of the arrangements regarding the security of mail, including the right to be informed as to the extent of any losses and of how, when and where such losses occurred; secondly, the public had a right to know what preventative measures were taken against such losses, given that public money was employed in that process; and thirdly, that there was no good commercial reason why, given the previous two arguments, the information sought should not be disclosed. It should be added that in tandem with the Appellant's formal information request of the Royal Mail, he had lodged a similar enquiry with PostComm, (the Postal Services Commission), but he claimed subsequently that PostComm had been unable to provide him with the information he sought.

11. In due course, by letter dated 10 May 2005, the Royal Mail altered its original stance and, following a decision of its own Appeals Panel, declared that it had come to the conclusion that it was in the public interest to disclose the information regarding the number of attacks on street storage boxes. It remained of the view, however, that details of those boxes' locations should not be disclosed, stating that the provision of such a list "could without doubt facilitate further attacks on those boxes", adding that:

"On the other hand, there is little public interest in this level of detail, given that members of the public posting mail do not use street storage boxes and information regarding box locations cannot be used by them in any way. Finally, some of this information is being used as evidence in current criminal proceedings, and the Appeals Panel therefore also considers it exempt under section 32 of the Freedom of Information Act."

This Appeal is only concerned with section 30, and not section 32 of the 2000 Act.

12. In mid-May 2005, the Appellant communicated with the Office of the Information Commissioner (the Commissioner). The Commissioner then made a further enquiry of the Royal Mail, asking in particular for clarification as to why section 30 was being relied upon. The Royal Mail responded by stating that:

- (i) at the time of the original request, a suspect had been charged with theft of the mail from pouch boxes in the Glasgow area and related offences; and
- (ii) the information sought as to the location of these street boxes was employed to build up and identify crime patterns to try to predict the areas in which the suspects might next operate, which in turn informed decisions as to where surveillance should be conducted, moreover, the information in question was being used to develop “intelligence” in support of the investigation and, finally, the information sought was being used to identify “vulnerable pouch boxes” to allow the Royal Mail to take preventative action, such as upgrading security.

The response formally confirmed that the information sought to be disclosed was exempt under section 30, there being further express agreement that the exemption under section 32 did not apply.

13. By his Decision Notice dated 24 November 2005, the Commissioner determined the applicability of section 30 of the 2000 Act as being “appropriate”, thereby upholding the decision of the Royal Mail. His statement of reasons found that:

- (i) both the Royal Mail and the police were involved in ongoing investigations into a “widespread and increasing number of attacks on street storage boxes” which had led to one prosecution and which might to lead to further criminal proceedings;
- (ii) the Royal Mail had demonstrated that criminals selected their targets when deciding which type of storage box to attack, the evidence pointing to specific targeting of boxes which had previously been the subject of break-ins, the Royal Mail further pointing out that the then current investigation by the Royal Mail showed that out of 1,074 street boxes in one Glasgow area, there were 90 attacks on 66 boxes of a particular type during a given period;
- (iii) even though there was a legitimate public interest in connection with knowledge as to the Royal Mail’s security arrangements, particularly in relation to where attacks had taken place, there remained the risk that

disclosure of the requested information would increase the risk of further break-ins, such as to diminish the benefits of such disclosure at the expense of a longer term strategy developed to eradicate further attacks;

- (iv) coupled with the factors referred to in (iii) above, there would in consequence be a knock-on effect on the prioritisation afforded to the updating of the 50,000-or so storage boxes in current use across the country, not least in terms of additional expense; and
- (v) overall, disclosure would therefore “seriously hamper” the Royal Mail’s efforts in protecting against criminal activity and in prosecuting those who committed offences in relation to post boxes.

14. Reference to the police in the sub-paragraph numbered (i) above, reflected the fact that, in tandem with his original request to the Royal Mail, the Appellant had corresponded with Strathclyde Police in similar terms, following the Commissioner’s Decision Notice. By letter dated 30 November 2005, the Appellant had written to Strathclyde Police’s “C” Division asking for details of the locations of the break-ins. The Appellant had previously informed the Commissioner in a letter 18 May 2005 that he then believed the police were “quite willing to identify post boxes that had been broken into”, and indeed went on to assert that such information was “already in the public domain”. Further reference will be made to this belief in the context of the exchanges between the Appellant and the police described below.
15. The Appellant issued a Notice of Appeal dated 12 January 2006 against the Commissioner’s Decision Notice. The Appellant laid greater stress on his concerns as to the costs than he had in his previous exchanges, adding his assertion that the Royal Mail “does not want to spend increasing amounts of money that has not been budgeted on replacing boxes” and that “the situation results from poor risk assessment prior to introducing the new arrangements with this reliance on storage boxes, clearly something that is of embarrassment to the RM.”. He added that it was in the “public interest that poor risk assessment and slow replacement of insecure boxes in [sic] made widely known.”.

16. The Appellant, in effect, augmented his grounds of appeal in further written submissions which are, on their face, undated, but were received by the Tribunal's office on 6 February 2006. Without intending any discourtesy to the Appellant by not reciting his contentions in full, the Tribunal feels that they can be best summarised as follows, namely:
- (i) the evidence before the Commissioner showed that police were failing to prevent attacks on mail boxes on the basis that what he called the Royal Mail's "delivery system" had been insecure since inception;
 - (ii) if the public were informed of the locations of break-ins, this would assist in enabling the public to identify the weak boxes and press for replacements;
 - (iii) it followed from (ii) above that the money required, estimated by the Appellant to be in the sum of £1,000 per box based, in turn, on an estimate of 40% of the boxes used on a nationwide basis being "deficient" would amount to a total of £20 million by way of overall expenditure, which the Appellant considered should be spent quickly;
 - (iv) much of the information sought by the Appellant had been kept confidential by the Royal Mail "to ensure knowledge of poor security risk assessment management of the situation is hidden from the public";
 - (vi) the Royal Mail's concern that if locations were known, there would be an increased risk of further attacks "would be totally allayed" if quick replacement occurred, thus the failure to effect replacements constituted "a significant matter of public interest";
 - (vii) the Commissioner had taken a wrong view of the costs factor since in asserting that disclosure of the locations would be at the expense of a longer term strategy to eradicate attacks, the Commissioner had failed to take into account other increased costs, such as police and court related expenses "which could be offset by rapid replacement of boxes", apart from the costs attributable to repairing boxes and compensation costs arising in respect of lost or destroyed mail; and

(viii) overall, it was therefore “in the public interest that poor risk assessment and slow replacement of insecure boxes [was] made widely known”.

17. At this point it is appropriate to revisit a matter which has already been mentioned at paragraph 14. On 2 February 2006, after the first and formal Notice of Appeal of 12 January 2006 had been lodged by the Appellant, the Strathclyde Police, by letter dated 2 February 2006, informed the Appellant that, as in the case of the Royal Mail’s refusal to provide the information in question, it too formally refused to provide information relating to details of the locations of break-ins to storage boxes in the Glasgow area in the year 2004. The Strathclyde Police relied for this purpose on sections 34(1)(a)(i) and section 35(1)(a) of the Freedom of Information (Scotland) Act 2002, the former section corresponding to section 30 of the 2000 Act and the latter section to section 31 of the 2000 Act. Reliance had been placed by the Royal Mail on the former section. In their letter to the Appellant, the Strathclyde Police stated as follows:

“As you will be aware, the above exemptions are non-absolute and require the application of the Public Interest Test. I accept that accountability would favour disclosure in that the provision of the information you have requested may assist you in assessing what action, if any, to pursue with the Royal Mail, in relation to your concerns over security of storage boxes. That said, the applicability of the exemptions listed above favour non-disclosure, and it is my belief that supplying you with the requested information may lead to further criminal acts being carried out towards Royal Mail Storage Boxes. To provide you with the locations of those storage boxes within Glasgow, which have previously been the subject of theft, would be to provide you with information showing the possible vulnerability of certain boxes. If this information was placed into the public domain it is my opinion that this could lead to the targeting of boxes by those actively involved in crime. You may argue that once a storage box has been violated, the security would be upgraded by the Royal Mail, thus preventing the re-occurrence of crimes at those locations. If that was the case, to provide those locations could alert the criminal element to the location of the boxes where security has not yet been increased, therefore leaving those boxes at risk. There is therefore a

clear public interest in maintaining the confidentiality of the storage box locations in order to discourage such acts.”

18. It is now appropriate to turn to the Commissioner’s formal Reply to the Notice of Appeal which, being dated 14 February 2006, post-dated both the Appellant’s additional grounds summarised above in paragraph 16, and Strathclyde Police’s letter of 2 February 2006, quoted above. As is indicated earlier in this judgment, the only relevant section of the 2000 Act which is in issue is section 30(1). In considering whether the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information, the Commissioner noted, at paragraphs 21 and 22 of his Reply, that there was a recognisable public interest which he called “legitimate”, in ensuring the security of the postal system. He accepted that the extent of any losses incurred by attacks on street storage boxes would “inform the public of the level of risk in using the postal system.”. He also noted that if it were known which boxes had been broken into, users of the system could check whether expected mail had been received. However, in paragraph 22, the Commissioner also recognised what he called “the strong public interest in the protection of mail from theft.”. He referred to the evidence, already referred to above, to suggest that criminals would target street storage boxes that had already been attacked, or that were of a similar type. If disclosure occurred in the way requested, this would “therefore increase the risks of further attacks on those and similar boxes.”. He reiterated the fact that there were “approximately 50,000 street storage boxes throughout the country” which were subject to an ongoing programme of updating. Updating, he observed, had to be “prioritised”. Replacement of all storage boxes would incur significant costs, he added, and it followed that the Royal Mail should be “afforded the opportunity to pursue effective strategies to prevent attacks on street storage boxes” in consequence of which disclosure of the locations of boxes that had been attacked “would seriously hamper its efforts in that respect”.
19. Later, at paragraph 29, the Commissioner observed that the Appellant’s arguments, which have been summarised above, stressed the need to replace boxes with more secure boxes, together with a greater degree of accountability. Whilst this constituted a “public policy aim”, it did not resolve

the issue of whether the disclosure of the location of the street storage boxes which had been attacked was in the public interest.

Conclusion

20. An appeal under the 2000 Act is dealt with by the provisions of section 58 of the Act. If the Tribunal considers that a Decision Notice in relation to which the appeal is brought is not in accordance with the law, or to the extent that the Notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, then the Tribunal shall allow the appeal or shall substitute such other order as should have been issued by the Commissioner: in any other case, a Tribunal shall dismiss the appeal.
21. In relation to the applicability of the Public Interest Test, the decision as to how the competing public interests should be balanced does not constitute an exercise of discretion. Rather, the relevant question in such a case is whether the 2000 Act has been properly applied to the facts as found by the Commissioner; in other words, it is a mixed issue of fact and law. A question of law would arise if the Tribunal considered that the Commissioner was wrong in his judgment of the public interest balance (see section 2(2)(b) of the 2000 Act); in such a case, the Tribunal could overrule the Commissioner under section 58(1)(a). Admittedly, in such a case, the Tribunal would merely need to conclude that it took a different view. There is, therefore, in relation to the present case, no question of discretion.
22. In the present case, the Tribunal does not consider that a different view to that taken by the Commissioner is justified. Although there may be differing views as to the particular emphasis which might be placed on the extent to which costs otherwise borne by the public enter into the equation, the Tribunal is firmly in agreement with the Commissioner's overall approach in supporting the decision of the Royal Mail not to disclose the information. Indeed, in paragraph 34 of his Reply, the Commissioner is conscious of the element of costs, but concludes that any factors which might pertain to costs "are not directly relevant in considering the public interest in disclosing information revealing the location of street storage boxes.". The Tribunal also agrees with the Commissioner that, in any event, the cost to the public purse in terms of policing and court proceedings would increase, or at least

would be likely to increase, if the location of street storage boxes were disclosed.

23. The Tribunal is satisfied that, in this case, the exemption set out in section 30(1) is properly applied, having regard to the balance of interests. The Royal Mail is charged with ensuring the security of its boxes. Attacks on the boxes will continue to represent a real risk. Consequently, the revelation of the whereabouts of sensitive post boxes is likely to entail even greater risk. Moreover and perhaps conclusively, the point is firmly reinforced by the formal reaction of the Strathclyde Police as set out in its letter of 2 February 2006 as set out above.
24. For all the above reasons the Tribunal dismisses this Appeal.

Signed

A handwritten signature in black ink, appearing to read "David M. Marks".

David Marks

Deputy Chairman

EA/2005/0027