Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0092
Information Commissioner's Ref: FS50126264

Determined on documents only

Decision Promulgated
17 July 2009

BEFORE

CHAIRMAN

ANDREW BARTLETT QC

and

LAY MEMBERS

PAUL TAYLOR
IVAN WILSON

Between

STUDENT LOANS COMPANY LIMITED

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:
Exemption under FOIA s36(2)(c) – prejudice to the effective conduct of public affairs – late claim – opinion of qualified person formed after time when request was dealt with – whether evidence of authorisation of qualified person pursuant to FOIA s36(5)(o)
Exemption under FOIA s43 – prejudice to commercial interests – meaning of 'commercial interests'
Public interests under FOIA s2(2)(b) - nature of balance which Tribunal is required to consider

Cases:
Guardian Newspapers Limited v Information Commissioner EA/2006/0011
Hogan v Information Commissioner EA/2005/0026
Home Office v Information Commissioner [2009] EWHC 1611 (Admin), on appeal from *Home Office v Information Commissioner* EA/2008/0062
Office of Government Commerce v Information Commissioner [2008] EWHC 737 (Admin)
Scotland Office v Information Commissioner EA/2007/0128

Representation:

For the Appellant: Shareen Auckbarallee, solicitor
For the Respondent: Mark Thorogood, solicitor

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 3 November 2008.

Information Tribunal **Appeal Number: EA/2008/0092**

SUBSTITUTED DECISION NOTICE

Dated 17 July 2009

Public authority: **Student Loans Company Limited**

Address of Public authority: **100 Bothwell Street, Glasgow, G2 7JD**

Name of Complainant: **Anthony I. Swain**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the Smith Lawson & Company Training Manual be disclosed under the Freedom of Information Act subject to the redactions set out in the confidential annex to this decision.

Action Required

Student Loans Company Limited is required to apply the redactions set out in the confidential annex to this decision and then disclose the Smith Lawson & Company Training Manual subject to those redactions to the complainant within 28 days from the date set out below.

Dated this 17 day of July 2009

Signed:

Andrew Bartlett QC
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. The appellant, Student Loans Company Limited ("SLC"), administers student loans. SLC challenges a decision of the Information Commissioner that it must disclose under the Freedom of Information Act ("FOIA") a training manual used for staff who deal with defaulting borrowers. It fears that disclosure will help borrowers to delay or avoid complying with their obligations.

The request for information

2. On 21 March 2006 Mr Swain requested "any documents, guides or customer service policies that apply generally to staff who have customer contact and who work for SLC's in house debt collection agency that is outwardly presented as 'Smith Lawson & Company'".

3. SLC initially denied that it held any such publication but after an internal review informed Mr Swain by letter of 22 May 2006 that it held a document entitled 'Smith Lawson & Company Training Manual'. It declined disclosure, relying on the exemption in FOIA s43(2) (prejudice to commercial interests).

The Commissioner's delay

4. Mr Swain complained to the Commissioner on 18 July 2006. Regrettably, there then followed a period of 22 months' delay during which, so far as we can tell, the Commissioner took no steps to fulfil his statutory duty under FOIA s50. His investigation only commenced on 16 May 2008. We are not in a position to say, and it is not for us to decide, to what extent

that inordinate delay was due to lack of resources, or to deficiencies in the Commissioner's systems of internal management, or to a mixture of those or indeed other causes. What is clear is that the volume of complaints to the Commissioner has been much higher than was predicted and, in cases where information ought to have been disclosed by the public authority, long delays in the commencement or conduct of the Commissioner's investigations tend to frustrate the purpose of the Act and deny to the public the rights which the Act has created.

5. The investigation was concluded on or about 17 July 2008, but the Commissioner's decision notice was not issued until 3 November 2008. Since the delays were not an issue in the case, we have no information on why such a long period elapsed from the conclusion of the investigation to the issue of the decision notice. The present case is not one of exceptional difficulty. We would have expected that in a properly resourced and properly managed office, following the conclusion of the investigation, three weeks would have been a sufficient period for the production of the Commissioner's reasoned decision.

6. During the Commissioner's investigation, SLC contended that disclosure of the Manual would be likely to prejudice its commercial interests. In his decision notice the Commissioner determined that the Manual did not relate to SLC's commercial interests within the meaning of s43. The Commissioner therefore ordered that the Manual be disclosed.

7. The overall picture in this case is disturbing. As we have indicated, the request for information was originally made on 21 March 2006, and the matter was referred to the Commissioner on 18 July 2006. From that point it took in excess of 2¼ years for the requester to obtain a decision from the Commissioner that the information ought to have been released. For many requests which are made under the Act, the timeliness of the release of information is important. Where public interests are served by the disclosure of information, they are usually better served by prompt release than by a disclosure which is held up for months or years. The Act is written on this basis: subject to certain exceptions, information is required

to be disclosed by the public authority within 20 working days after the request. It seems to us that delays of the magnitude which occurred here seriously undermine the operation of the Act. The right to obtain information that ought to be made public loses much of its usefulness if it cannot be enforced within a reasonable timescale. While it may be that a requester could compel the Commissioner to act promptly by means of an application to the High Court for judicial review, most requesters are unlikely to possess the determination or the funds to make this a practical option. If public authorities come to expect that a reference to the Commissioner may take several years to be dealt with, they may be tempted to withhold information that ought to be disclosed, in the hope that the requester or the public will have lost interest in the topic by the time it is finally prised out of them, or that any embarrassment that might have been caused by prompt disclosure will be diminished because of the passage of time.[1] Such a situation would be wholly unacceptable.[2]

8. In the decision notice the Commissioner also found that SLC had failed to meet the requirements of FOIA s10 by failing to confirm that it held the information requested by the complainant within 20 days (see paragraphs 12 to 15 and 40 of the decision notice). The Commissioner further considered whether SLC held any additional information within the scope of the complainant's request and was satisfied that it did not (paragraphs 31 to 38 of the decision notice). Neither of those two matters is relevant to this appeal.

The appeal to the Tribunal

9. On 24 November 2008 SLC appealed to the Tribunal, contending that the Commissioner had taken too narrow a view of the meaning of "commercial interests" in s43(2), and that the balance of public interest was against disclosure.

[1] We are not suggesting that these remarks apply to SLC in the present case.
[2] The Commissioner has recently published his strategy for the discharge of his FOIA and EIR functions, available at http://www.icogov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_strategy_20090609.pdf

10. Mr Swain did not wish to be joined to the appeal but asked for permission to put in written submissions. We allowed him to do so.

11. On 13 March 2009 SLC applied to amend its grounds of appeal in order to rely additionally on FOIA s36(2)(c) (prejudice to effective conduct of public affairs). This application was opposed by the Commissioner. The application was granted by the Tribunal. The Tribunal's reasoning included the following:

> "... having regard to the possibilities that the result of the appeal might turn on this exemption and that disclosure might damage the interests of taxpayers, I adjudge that the Student Loans Company should be permitted to advance a section 36 case. In so deciding, I say nothing at all about the strength of the merits or demerits of that case."

The questions for the Tribunal

12. In broad terms, the questions for the Tribunal's decision are-

> (1) whether the s36 exemption applies (prejudice to effective conduct of public affairs),
>
> (2) whether the s43 exemption applies (prejudice to commercial interests),
>
> (3) under s2(2)(b), whether in all the circumstances of the case the public interesting in maintaining any applicable exemption outweighs the public interest in disclosing the information.

13. In considering those questions we must keep in mind the nature of the Tribunal's jurisdiction under FOIA s58. Our function in this case, after review of findings of fact on which the Commissioner's decision notice was based, is to consider whether the decision notice was in accordance with the law.

14. SLC's grounds of appeal mentioned in passing s29 (exemption where disclosure would or would be likely to prejudice the economic interests of

the United Kingdom), but this was not developed in SLC's written submissions and we did not understand SLC to be claiming an exemption under s29. There was no explicit reference to the aspect of the s29 exemption which concerns prejudice to the financial interests of the government.

The facts

15. There were no formal witness statements, but we received written material from both parties and from Mr Swain, all of which we have taken into account. We also saw the Manual itself. In the paragraphs that follow we summarise our findings of fact, material to the appeal.

16. SLC is owned by the Department for Innovation Universities and Skills ("DIUS") and the Scottish Executive and administers the policies set by them under the relevant legislation and associated regulations. The role of SLC as defined in the Student Support Regulations (as amended year on year) is to administer student finance on behalf of the Government and regional assemblies. SLC is also issued annually with an annual performance and resource agreement for the year, setting out priorities, objectives and performance measures for the company. SLC is a not for profit company and carries no reserves but is required to operate within its budget.

17. The entire system of student finance in the UK is built upon an assumption of repayment, so that the money repaid to the Government can be used to fund future student finance. There are two main types of statutory student loan. Loans made before academic year 1998-99 are known as "mortgage-style loans". These normally require borrowers to repay their loans over 5 years in monthly instalments once their income exceeds 85% of the national average income. These loans are regulated by the Consumer Credit Act. SLC has a consumer credit licence and is required to adhere to debt collection guidance in the same way as any other debt collecting body. Most loans made from 1998 onwards are known as

"income-contingent repayment loans". For most borrowers, repayment of these loans is made through the UK tax system.

18. The repayment department is split into repayment teams for income-contingent repayment loans and mortgage style loans. Mortgage style loans are given key performance indicators which are outlined in the annual performance agreement.

19. Where it appears the borrower should have commenced repayment or has fallen into arrears, accounts may be passed to an external debt collection agency, moved internally to Smith Lawson & Company for collection purposes, or litigated upon as appropriate.

20. The Government sold part of the portfolio of mortgage-style student loans under the Education (Student Loans) Act 1998. In two sales in 1998 and 1999, a total of around £2 billion worth of debts receivable from mortgage-style loans were sold to the private sector. At that time the combined value of the two sales represented around 40% of the total student loan book. Further sales may be made. The administration of the sold loans (including collection services) was subject to a further tendering process which SLC took part in, in direct competition with private companies. SLC was unsuccessful in that process.

21. If borrowers were to delay or evade payments to a greater degree than would otherwise occur, SLC would receive less money from borrowers and would incur greater costs of collection. Its effectiveness as a collection agent would be reduced.

22. Smith Lawson & Company has no separate existence from SLC. It is a unit run by SLC which is dedicated to collection of certain categories of outstanding debts under the brand name Smith Lawson & Company. Rather than raise immediate and expensive litigation actions for the recovery of debts owed, SLC attempts to contact borrowers on an escalated process to ensure speedy and cost efficient debt recovery. Mr Swain submitted, and on the evidence which we have seen we accept, that the aim of SLC, in operating Smith Lawson & Company as a separate

unit, is to induce defaulting borrowers to assume that their debts are no longer managed by SLC but by a third party debt collection agency. The rationale is that borrowers are more likely to comply with their obligations if they think they are being pursued by an independent debt-collecting agency.

23. SLC contended that it would be negligent for it to allow the public at large to have access to information which openly detailed how it dealt with borrowers who were unwilling or unable to repay their student loans and which detailed the escalation processes for tracing and recovery: the consequence would be that borrowers would be assisted in evading or delaying payment, with a consequent adverse effect on the resources available for student finance. We accept that in principle this is correct, but a judgment needs to be made about the practical value to defaulting borrowers of the information in the Manual.

24. The Manual runs to some 37 pages. It details the procedures used by Smith Lawson & Company in the collections process. The Commissioner pointed out that it includes, for example, procedures for dealing with the receipt, stamping and sorting of mail; procedures for dealing with cheques and postal orders; procedures for dealing with requests for deferments of payments; acceptable methods of payment; file management and procedures for printing letters. Disclosure of information of this nature could not reasonably be said to be likely to cause the prejudice suggested by SLC. He submitted that even those parts of the Manual that specifically relate to dealing with non-payment do not disclose any particular techniques of avoidance or other information that would materially assist a debtor in evading or delaying payment of a loan, and that SLC fell short of demonstrating a significant and weighty chance of prejudice.

25. We have reviewed the contents of the Manual in detail. By definition, because it is for Smith Lawson & Company, the Manual only deals with situations where borrowers are in default in one way or another, whether directly because they are in arrears, or have failed to commence repayments, or indirectly because they have changed their address

without notification. In our judgment SLC is right to contend that the Manual contains information which would be useful to defaulting borrowers to help them to delay or avoid payment. If the full Manual were disclosed, it would be likely to have the effect of delaying and reducing collections and of increasing the costs of collection, to the detriment of the public purse. While we are in no position to put figures on the likely effect in terms of pounds sterling, in our view there may very well be such an effect, of a substantial rather than a trivial nature, even if the risk falls short of being more probable than not.

26. However, there are only limited parts of the Manual which give rise to that risk because they would be of particular use to a borrower who wished to delay or evade payment. In our view there are only 14 pages of the Manual where there is information which needs to be withheld in order to avoid that risk, and the redactions required on those pages are mainly short, in some cases as little as one or two words. We shall refer to the information which requires to be redacted as "the sensitive information".

27. We have reached the factual conclusions stated above without reference to the certificate relied on by SLC, dated 13 March 2009, in which the SLC Chief Executive, Ralph Seymour Jackson, stated:

> "I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would have the effect set out in section 36(2)(c) of that Act."

28. The effect stated in s36(2)(c) is "would ... prejudice, or would ... be likely to prejudice, the effective conduct of public affairs".

29. We had some concerns about this certificate:

> (1) The covering letter mis-described the Manual in question as the "Smith Lawson Collections Manual". We nevertheless concluded that the information intended to be referred to in the certificate was indeed the Manual at issue in the present case, since it was described in the

covering letter as detailing the procedures followed by the collections department for mortgage style loans.

(2) It was not apparent from the covering letter alone that the Chief Executive had necessarily looked at the Manual before expressing his opinion, but we considered we ought to infer that he was sufficiently familiar with its contents to give the opinion which he did, since SLC's submissions referred to the Chief Executive having had regard to the Manual and the collection statistics, and having a knowledge of the tactics routinely employed by defaulting borrowers.

(3) His opinion as expressed did not say whether he considered that disclosure would (a) cause prejudice or (b) be likely to cause prejudice, and in that respect was equivocal. We considered it was appropriate to infer that his opinion was at least the latter. Having reviewed the Manual ourselves we came to the conclusion that his opinion was reasonable in either sense. We note, however, that the evidence provided to us only tells us what his opinion was in March 2009. There is nothing to show that he held that opinion at the time when the request was being dealt with under the Act by SLC (March-May 2006).

(4) We also had concerns over whether it was adequately demonstrated that the Chief Executive of SLC was the qualified person for the purpose of s36(2). The Commissioner pointed out in his written submissions on 1 May 2009 that there was no evidence of his authorisation. The date for the Tribunal to meet to make its determination was postponed in order to accommodate an additional submission from Mr Swain. When the Tribunal convened on 26 June 2009, it decided to postpone its determination further in order to give SLC the opportunity to provide the necessary evidence. We issued a direction that SLC supply evidence to show that Mr Ralph Seymour Jackson was authorised pursuant to FOIA s36(5)(o) by 5pm on Thursday 2 July 2009. SLC sought, and was granted, an extension of time to 8 July. SLC responded on that date with further material that

was not relevant. On 9 July the Tribunal office emailed to SLC in the following terms:

> "The Deputy Chairman asks me to point out that the evidence you have supplied has no bearing on the Tribunal's request. The evidence you have sent confirms that Mr Seymour Jackson is the chief executive of SLC, a fact of which the Tribunal was already well aware. The Tribunal's request was for evidence that he was authorised as a qualified person for the appellant pursuant to FOIA s36(5)(o). As you will have seen when you looked at FOIA s36(5)(o), the authorisation has to be by a Minister of the Crown for the purposes of the section. The Tribunal will extend time for the provision of this evidence to Monday 13th July at 5pm. If the Tribunal does not hear from you by then, the Tribunal will proceed to make its decision on the assumption that you are not able to provide evidence of such authorisation."

In response SLC sent a link to a webpage at <http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#pubown>. This appeared to be part of an out of date website of the Department of Constitutional Affairs, a Department which ceased to exist some time ago. It referred to the Chief Executive of SLC in a table described as listing "those wholly publicly-owned companies for which we have been notified of the nominated qualified person". The source of the notification was not stated. Whether it meant that SLC had nominated their Chief Executive to be their qualified person, or that the Minister had nominated the Chief Executive, we do not know. We feel bound to treat this information with some caution, not only because it is unsourced and out of date, but more particularly because there is no explicit mention of authorisation having been granted to the Chief Executive by a Minister of the Crown, as required by s36(5)(o). We would have expected to see a letter or other document issued by a Minister, granting the authorisation. For reasons which appear below,

it is not necessary for us to come to a final conclusion on the sufficiency of this evidence.

Application of the s36(2)(c) exemption (prejudice to the effective conduct of public affairs)

30. When the Tribunal permitted the amendment to SLC's grounds of appeal which introduced reliance on s36(2)(c), it did so without expressing any view on the merits of such reliance.

31. As noted above, our function in this case, after review of findings of fact on which the Commissioner's decision notice was based, is to consider whether the decision notice was in accordance with the law. By FOIA s50(1) the Commissioner was required to decide whether Mr Swain's information request had been dealt with by SLC in March-May 2006 in accordance with the requirements of Part I of the Act.

32. The Tribunal has had to consider in a number of previous cases whether on appeal a public authority is able to rely upon an exemption which was not relied on at the time when the request was originally dealt with. The Tribunal has previously held that there are some circumstances in which this will be permitted: see *Home Office v Information Commissioner* EA/2008/0062 at paragraphs 68-75.[3]

33. Where the Tribunal has given effect to an exemption belatedly claimed, there has been reasonable justification for permitting it to be raised late, and the facts which engage the exemption have been facts which were in existence at the time when the request was originally dealt with by the public authority.

34. Section 36(2) says-

[3] The proper approach to this question has not yet been the subject of an authoritative decision. On appeal, Keith J declined the parties' invitation to express a view on it: *Home Office v Information Commissioner* [2009] EWHC 1611 (Admin), paragraphs 39-46.

> "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act- ...
>
> (c) would ... prejudice, or would be likely ... to prejudice, the effective conduct of public affairs."

35. The correspondence in 2006 shows that Mr Swain's request was dealt with initially by SLC's "FOI office" and on internal review by SLC's Company Secretary. There is no evidence before us that Mr Seymour Jackson had any involvement in it, or formed any opinion at that time concerning the effect of disclosure of the Manual under the Act. Indeed, it may reasonably be inferred from the covering letter of 2 March 2009, which led to the certificate dated 13 March 2009, that it was in March 2009 that Mr Seymour Jackson was first asked to form an opinion on whether disclosure of the Manual would or would be likely to prejudice the effective conduct of public affairs.

36. Accordingly, in this case the facts required to engage the exemption were not in existence at the time when the request was originally dealt with. Thus, even with the benefit of hindsight and a review of the Commissioner's findings of fact, there is no possibility of our holding that the Commissioner's decision was not in accordance with the law on the ground that it did not give effect to the s36 exemption. We conclude that it is not open to us under the Act to take the s36 exemption into account on this appeal.

37. In the circumstances it is not necessary for us to consider whether s36(2)(c) would otherwise have been an applicable exemption.

Application of the s43(2) exemption (prejudice to commercial interests)

38. We have stated above that, if borrowers were to delay or evade payments to a greater degree than would otherwise occur, SLC would receive less money from borrowers and would incur greater costs of collection. Mr Swain pointed out that these losses would not ultimately be borne by SLC

itself, both because it is not the owner of the loans and because it is operated on a non-profit basis, resourced as necessary from public funds. While that is true, it would not make such losses any less real. In our view it would be wrong to say that the relevant effects (receiving less money from borrowers, incurring greater costs of collection) would not occur, simply because the losses would afterwards be made good from public funds.

39. The Commissioner argued that, if any such losses occurred, while they might affect SLC's or some other public body's financial interests, they would not prejudice SLC's "commercial interests" within the meaning of s43(2). The Commissioner referred to his Freedom of Information Act Awareness Guidance No 5 on Commercial Interests, V3.0, 6 March 2008. This stated:

> "A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.
>
> The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.
>
> While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. ...
>
> There is a distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a public authority may affect its commercial interests, this is not necessarily the case."

40. The Guidance also identified some suggested questions to be considered in order to determine the impact of releasing the information. These were:

a. Does the information relate to, or could it impact on a commercial activity?

b. Is that commercial activity conducted in a competitive environment?

c. Would there be damage to reputation or business confidence?

d. Whose commercial interests are affected?

e. Is the information commercially sensitive?

f. What is the likelihood of prejudice being caused?

41. While the Commissioner disclaimed any absolute contention that the purchase and sale of goods or services was a prerequisite of commercial activity, he contended that SLC was not participating competitively in the purchase and sale of goods or services, and that a detrimental financial effect of the kind feared by SLC would not constitute prejudice to "commercial interests" of SLC.

42. In our view the Commissioner's approach was too restrictive. "Commercial" is an ordinary English word. While its meaning is well known, the boundaries of its meaning are not precise. It takes colour from the context in which it is used. In s43 it is used in a context where the commercial interests which are in view expressly include the commercial interests of public authorities. In this context we do not consider it appropriate to tie its meaning directly or indirectly to competitive participation in buying and selling goods or services and to exclude all other possibilities.

43. It does not seem to us to be a misuse of ordinary English to describe debt collection as a commercial activity, even when carried on by a company supported by public funds. We note that Mr Swain in his submissions expressly described it in that way.[4]

[4] "B3. Debt collection and recovery is a commercial activity that is particularly susceptible to malpractice, either by those offering financial services or by those that undertake collection and recovery on behalf of those offering services."

44. Rather than applying the Commissioner's Guidance, we think it preferable to take the unvarnished words of the Act and ask ourselves whether a detriment to SLC, from the delay and reduction of debt collections and increasing the costs of collections, can fairly be described as prejudicing SLC's commercial interests. While the case is perhaps near the borderline, taking account of the facts that we have found in paragraphs 16-26 and the considerations in paragraphs 38, 42 and 43, in our judgment the answer is yes.

45. In our view the likelihood of prejudice satisfies the statutory wording in the sense explained in *Guardian Newspapers Limited v Information Commissioner* EA/2006/0011, paragraph 53. In reaching this conclusion we have taken into account the approach set out in *Hogan v Information Commissioner* 2005/0026 at paragraphs 27-36.

46. We therefore hold that the exemption in s43(2) applies to the sensitive information which is contained in the Manual, because its disclosure under the Act would be likely to prejudice SLC's commercial interests.

47. We do not consider that there is any proper basis for the contention that the s43(2) exemption applies to the remainder of the Manual. Disclosure of the Manual in redacted form, with the sensitive information obscured, would not in our view be of material assistance to debtors and would not be likely to cause any significant prejudice to SLC's commercial interests.

<u>The public interest</u>

48. The Commissioner contended that, even if we found prejudice to be likely, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He identified as public interest factors in favour of disclosure:

    (1) furthering the understanding of how SLC conducted its debt collection activities,

(2) promoting transparency and accountability by SLC for decisions taken by it in relation to its debt collection activities,

(3) allowing individuals to understand decisions made by SLC that may affect their lives and, in some cases, assisting individuals in challenging those decisions.

49. He further submitted – and we agree – that "the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process." (*Guardian*, at paragraph 87(5). There is an assumption built in to FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities: *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) at paragraphs 68-71. The fact that considerations such as openness, transparency, etc., are regularly relied on in support of a public interest in disclosure does not in any way diminish their importance (*Scotland Office v Information Commissioner* EA/2007/0128 at paragraphs 58-59).

50. Mr Swain argued that it is in the public interest to disclose the Manual in order to ensure that SLC is operating in accordance with consumer legislation, to ensure that SLC is not engaged in systematic malpractice and in order to re-assure the public of the feasibility of SLC "in-sourcing of its debt recovery function". Mr Swain provided evidence that in the 2005/06 financial year SLC received an average of 51 complaints per month concerning customer service, arrears, or debt collection. As Mr Swain submitted, it would be in the public interest to ascertain whether any transgressions of good practice that might have occurred were isolated incidents due to employee autonomy or whether they occurred

systematically as a result of company policy or procedure. Disclosure of the Manual would be of some assistance in such an inquiry. We also agree with Mr Swain that any initiative taken by a public body that is effectively designed to mislead those with whom it deals, albeit in pursuance of the laudable aim of containing costs and improving the recovery of public funds, should be exposed to a high degree of scrutiny.

51. SLC sought to answer this by observing that, in order to carry out debt collection functions for mortgage style loans, SLC requires a consumer credit licence. Under the consumer credit regime the Office of Fair Trading, which has both civil and criminal enforcement powers, must be satisfied that SLC is fit to engage in credit collection activity, and the standard of fitness is monitored on a continuing basis. In addition, SLC is subject to the jurisdiction of the Financial Ombudsman Service. Accountability and public reassurance is provided by these regulatory controls.

52. If we had been required to assess the balance of public interest in relation to the Manual as a whole, these would all have been important points for consideration, since the Manual provides substantial information about SLC's processes under the Smith Lawson & Company banner. However, in view of our conclusions in relation to the limited applicability of the s43(2) exemption, our assessment of the public interest factors must relate not to the Manual as a whole, but only to the sensitive information.

53. We draw attention here to the nature of the public interest balance which section 2(2)(b) requires the Tribunal to consider in all the circumstances of the case. The public interest in disclosure has by its nature a wide ambit, since it includes the high level reasons why Parliament passed the Act and why disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods. The other side of the balance is more narrowly defined. The statute directs us to consider whether the public interest in disclosing the information is outweighed not by *the public interests in withholding the information*, but

by *the public interest in maintaining the exemption*. The latter is focused not on generalised reasons why it would be good to keep the information private but on the aspects of public interest which relate to the particular exemption or exemptions defined by the Act and relied upon in the particular case. (We think this is what a differently constituted Tribunal may have intended to convey in paragraphs 63-64 of its decision in *Home Office v Information Commissioner* EA/2008/0062, which, on appeal, Keith J found to have been expressed with insufficient clarity: [2009] EWHC 1611 (Admin) at paragraphs 33-35.)

54. In our judgment the public interest factors in favour of disclosure of the sensitive information are not weighty. Most of the Manual will be disclosed. The additional contribution made, to the interests of transparency, accountability, public understanding and the like, by disclosing the sensitive information would in our view be small.

55. In favour of maintaining the exemption, the Commissioner accepted that there is a public interest in ensuring that debtors are not provided with tools and techniques that would enable them to defer or avoid their legal liabilities in respect of repayment of loans. In our view this is particularly the case where public money is involved. We consider that taxpayers would rightly be concerned, perhaps even outraged, if FOIA were used in a way that created a substantial risk of helping borrowers to avoid or delay repaying their student loans, unless there were very strong public interest reasons requiring the disclosure. In relation to the sensitive information, and having read the Manual in detail, our judgment in all the circumstances of the case is that the public interest in maintaining the commercial interests exemption under s43(2) outweighs the public interest in disclosing the information.

Conclusion and remedy

56. The Manual must be redacted to obscure the sensitive information. In addition, there are some very minor redactions required in order to protect

personal data of individuals. Subject to those redactions, the Manual must be disclosed.

57. We have defined the details of the redactions in a confidential annex to this decision. The confidential annex is available only to SLC and the Commissioner. It may not be disclosed to the public.

58. Accordingly SLC's appeal against the Commissioner's decision is allowed, but only in regard to the redactions. The remainder of the Manual must be disclosed in accordance with the substituted decision notice.

59. We wish to express our thanks to the parties and to Mr Swain for the clarity of the submissions which we received.

60. Our decision is unanimous.

Signed:

Andrew Bartlett QC

Deputy Chairman

Date 17 July 2009